

No. 11-824

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**In the Supreme Court of the United States**

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JANICE SCHAFER, GUARDIAN AD LITEM FOR  
WMS, INFANT, PETITIONER

*v.*

MICHAEL J. ASTRUE,  
COMMISSIONER OF SOCIAL SECURITY

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT**

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### QUESTION PRESENTED

Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 641 F.3d 49. The opinion of the district court (Pet. App. 44a-49a) is unreported. The recommendation of the magistrate judge (Pet. App. 50a-61a) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on April 12, 2011. A petition for rehearing was denied on August 1, 2011 (Pet. App. 62a). On October 20, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 29, 2011, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides retirement and disability benefits to insured wage earners. In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner before his or her death. Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1362.

As relevant here, three statutory provisions now govern the availability of child survivor benefits. First, under 42 U.S.C. 402(d)(1), benefits are available to “[e]very child (as defined in section 416(e) of this title) \* \* \* of an individual who dies a fully or currently insured individual,” provided that the individual has made an application for benefits, is a minor or is disabled, and was dependent on the deceased wage earner at the time of death. 42 U.S.C. 402(d)(1). Second, Section 416(e) provides that “[t]he term ‘child’ means \* \* \* the child or legally adopted child of an individual,” and also provides that “child” means a “stepchild,” “grandchild,” or “step-grandchild,” so long as certain conditions are met. 42 U.S.C. 416(e)(1)-(3). Third, Section 416(h)(2)(A) directs that “[i]n determining whether an applicant is the child” of a deceased wage earner, “the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which” the wage earner “was domiciled at the time of his death.” 42 U.S.C. 416(h)(2)(A).

2. In 1992, Don Schafer, Jr., deposited sperm at a fertility clinic. He died in 1993, and petitioner, his widow, subsequently underwent in vitro fertilization. In January 2000, she gave birth to a son, W.M.S. Pet. App. 3a.

Petitioner applied for Social Security benefits on behalf of W.M.S. as the survivor of Mr. Schafer, a deceased wage earner. Although an administrative law judge initially awarded benefits, the Social Security Administration's Appeals Council reversed, explaining that W.M.S. could not demonstrate a child-parent relationship with Mr. Schafer under Section 416(h)(2)(A) of the Act because W.M.S. did not have inheritance rights in Mr. Schafer's estate under the intestacy law of Virginia, the State in which Mr. Schafer had been domiciled. Pet. App. 4a, 51a.

3. Petitioner sought judicial review in the United States District Court for the Western District of North Carolina. The district court affirmed the agency's determination. Pet. App. 44a-49a.

4. The court of appeals affirmed. Pet. App. 1a-42a.

a. The court of appeals held that the agency had correctly interpreted Section 416(h) to apply to all applicants seeking survivor benefits as the "child" of a deceased wage earner, not just those whose biological parentage is disputed. Pet. App. 2a-28a. The court explained that the agency's interpretation of the Act "best reflects the statute's text, structure, and aim of providing benefits primarily to those who unexpectedly lose a wage earner's support." *Id.* at 3a.

b. Judge Davis dissented, concluding that the biological child of a deceased wage earner need not demonstrate a child-parent relationship under state intestacy law in order to obtain benefits. Pet. App. 28a-42a.

**DISCUSSION**

This case presents the question whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act. Petitioner correctly observes (Pet. 4) that the Court is considering the same question in *Astrue v. Capato*, cert. granted, No. 11-159 (oral argument scheduled for Mar. 19, 2012). The petition for a writ of certiorari in this case should therefore be held pending the resolution of *Capato* and then disposed of accordingly.

**CONCLUSION**

The petition for a writ of certiorari should be held pending the Court's decision in *Astrue v. Capato*, cert. granted, No. 11-159 (oral argument scheduled for Mar. 19, 2012), and then disposed of accordingly.

Respectfully submitted.

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