No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
MICHAEL S. RAAB
KELSI BROWN CORKRAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID F. BLACK
General Counsel
Social Security Administration
Baltimore, MD 21235

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-12a) is reported at 631 F.3d 626. The opinion of the district court (Pet. App. 15a-32a) is unreported. The decision of the administrative law judge (Pet. App. 33a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2011. A petition for rehearing was denied on March 9, 2011 (Pet. App. 13a-14a). On May 27, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 7, 2011. On June 30, 2011, Justice Alito further extended the time to August 8, 2011, and the petition was filed on

that date. The petition for a writ of certiorari was granted on November 14, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

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 child has made an application for benefits, is a minor or is disabled, and was dependent on the deceased wage earner at the time of his or her 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 further provides that "child" means a "stepchild," "grandchild," or "stepgrandchild," 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 prop-

erty 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).[1]

2. In 1999, Robert Capato deposited sperm at a fertility clinic. He died in March 2002, and respondent, his widow, subsequently underwent in vitro fertilization using the frozen sperm. In September 2003, she gave birth to twins. Pet. App. 2a-3a.

Respondent applied for Social Security benefits on behalf of her children as survivors of a deceased wage earner. The Social Security Administration (SSA) denied the claim, and respondent requested a hearing before an Administrative Law Judge (ALJ). Pet. App. 3a.

The ALJ affirmed the denial of benefits. Pet. App. 33a-47a. Relying on Section 416(h)(2)(A), the ALJ reasoned that a child conceived after the death of his or her biological father can establish eligibility for benefits only by "showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died." *Id.* at 39a. In this case, the ALJ found, Mr. Capato had been domiciled in Florida at the time of his death, and Florida's law of intestate succession permits children born after the death of a parent to inherit only if they were "conceived before his or her death, but born thereafter." *Id.* at 40a (quoting Fla. Stat. Ann. § 732.106 (West 2005)); see Fla. Stat. Ann. § 742.17(4) (West 2010).

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[1] Title II of the Act also provides for benefits to the children "of an individual entitled to old-age or disability insurance benefits." 42 U.S.C. 402(d)(1). For that reason, Section 416(h)(2)(A) provides for the determination of child status by reference to the laws of "the State in which such insured individual *is* domiciled" at the time of the application, if the insured wage earner is still alive. 42 U.S.C. 416(h)(2)(A) (emphasis added). This case involves only survivor benefits.

"Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law," the ALJ concluded that "they do not qualify as the wage earner's 'children' under the Social Security Act." Pet. App. 41a.

The Social Security Appeals Council denied review, making the ALJ's decision the final agency decision. Pet. App. 16a; see 20 C.F.R. 404.955.

3. Respondent sought judicial review in the United States District Court for the District of New Jersey, and the district court affirmed the denial of benefits. Pet. App. 15a-32a. The court determined that "[s]ubstantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death," and it agreed with the ALJ that, because posthumously conceived children are excluded from intestate succession under Florida law, respondent's children are ineligible for benefits under Section 416(h)(2)(A). *Id.* at 24a.

4. The court of appeals reversed. Pet. App. 1a-12a. Rejecting the agency's interpretation of the Act, the court held that Section 416(h)(2)(A)'s instruction to apply state intestacy law is applicable only in cases in which biological parentage is disputed. *Id.* at 10a. The court saw no reason "why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to [Section] 416(h)." *Id.* at 7a. The court concluded that, under Section 416(e), "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," without regard to state intestacy law. *Id.* at 12a. The court therefore remanded "for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the

final requisite of the Act remaining to be satisfied." *Ibid.*

SUMMARY OF ARGUMENT

The Social Security Administration has correctly interpreted the Social Security Act to provide that, in determining whether an applicant in the position of respondent's children is the "child" of an insured wage earner for the purpose of obtaining survivor benefits, the agency must apply state intestacy law. This case involves children conceived after the death of their biological father. Because the applicable state law would not confer intestacy rights in that context, the SSA correctly determined that the children are not entitled to survivor benefits under the Act. The contrary decision of the court of appeals is inconsistent with the text, history, and purposes of the Act, and it fails to give appropriate deference to the agency's interpretation of the statute.

Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible for survivor benefits, provided that certain requirements are met. Section 416(e) defines "child" to include "the child or legally adopted child of an individual." Although that provision does not further define "child," Section 416(h) identifies who qualifies: "In determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, 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 insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Thus, under Section 416(h)(2)(A), a posthumously conceived

child who is ineligible to inherit personal property under state intestacy law is also ineligible for survivor benefits.

The agency's interpretation of the Act is supported by legislative history demonstrating that when Congress amended Section 416(h) in 1965, it understood that provision to require all children to demonstrate intestacy rights under state law in order to be eligible for benefits. In amending Section 416(h) to extend eligibility to certain children who were born out of wedlock and for that reason lacked intestacy rights under some States' laws, Congress did not alter the role of Section 416(h) as the provision that governs the determination of child-parent relationships for the purposes of the Act.

Principles of federalism also support the agency's interpretation. Even in the context of federal programs, child-parent relationships are generally determined by state law, and nothing in the Act suggests that Congress intended to depart from that approach. By contrast, the court of appeals' approach not only requires the creation of a single federal rule that overrides state law, but also poorly serves the Act's basic purpose of replacing the unexpected loss of wages for a child's support. Posthumously conceived children fall outside the Act's core beneficiary class because they are brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for their support.

Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in failing to defer to SSA's wholly reasonable interpretation, which is reflected in published regulations first issued more than seventy years ago. That interpretation is entitled to deference under *Chevron U.S.A. Inc.* v.

NRDC, 467 U.S. 837 (1984), and the court identified no basis for disregarding it.

ARGUMENT

TO OBTAIN SOCIAL SECURITY BENEFITS AS THE CHILD OF A DECEASED WAGE EARNER, AN APPLICANT MUST DEMONSTRATE A CHILD-PARENT RELATIONSHIP WITH THE WAGE EARNER UNDER 42 U.S.C. 416(h)

A. The Text Of The Act Makes Clear That Section 416(h) Provides The Test For Determining An Applicant's Eligibility For Benefits As The "Child" Of A Deceased Wage Earner

1. In order to obtain child survivor benefits under the Social Security Act, an applicant must establish, among other things, that he or she is the child of a deceased wage earner. Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible for survivor benefits, provided that the child "was dependent upon such individual * * * at the time" of the individual's death, and provided that certain other requirements not at issue here are met. 42 U.S.C. 402(d)(1). The definitions applicable to determining whether an applicant for survivor benefits qualifies as a "child" are set forth in 42 U.S.C. 416, entitled "Additional definitions." Subsection (e) of Section 416, referred to in Section 402(d)(1), states: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [under specified circumstances], and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only [under specified circumstances]." 42 U.S.C. 416(e). Section 416(e) goes on to provide a detailed definition of "legally adopted

child," but it does not further define the word "child" as used in Subsection (e)(1).

That further definition is supplied by Subsection (h) of Section 416, entitled "Determination of family status. As relevant here, Subsection (h)(2)(A) provides that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, 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 insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Subsections (h)(2)(B) and (3)(C) of Section 416 then describe three alternative ways in which an applicant who is the son or daughter of the insured wage earner, but who is not determined to be a "child" under Section 416(h)(2)(A), may nevertheless be "deemed" a child for purposes of Section 416(e)(1). See 42 U.S.C. 416(h)(2)(B) (applicant who is the son or daughter of the insured wage earner is deemed to be a "child" if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments); 42 U.S.C. 416(h)(3)(C)(i) (applicant is deemed to be a "child" if, before death, the insured had acknowledged in writing that the applicant is his or her son or daughter, had been decreed by a court to be the father or mother of the applicant, or had been ordered to pay support because the applicant is his or her son or daughter); 42 U.S.C. 416(h)(3)(C)(ii) (applicant is deemed to be a "child" if the insured is shown by evidence satisfactory to the Commissioner to be the applicant's father or mother, and the insured was living with or supporting the applicant at the time of the insured's death).

The court of appeals did not dispute that the applicants here—who were conceived after the death of their biological father—do not qualify as his "children" under any of the four categories specified in Section 416(h)(2) and (3). In particular, the court acknowledged that they do not qualify under Section 416(h)(2)(A) because the law of Florida—the State in which Mr. Capato was domiciled at the time of his death—would not recognize them as his children for purposes of intestate succession. Pet. App. 7a; see Fla. Stat. Ann. § 742.17(4) (West 2010) ("A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."). Accordingly, the court of appeals should have affirmed the Social Security Administration's determination that respondent's children are not eligible for survivor benefits based on Mr. Capato's earnings record.

2. The court of appeals nevertheless reversed the SSA's eligibility determination. It did so by effectively engrafting onto the statute an amorphous fifth category of eligibility, covering applicants who are the "undisputed biological children" of deceased wage earners. Pet. App. 10a. The court made little effort to anchor that position to the text of the statute, other than to make clear that it is *not* based on Section 416(h). *Id.* at 11a ("[W]e do not read [Sections] 402(d) or 416(e) as requiring reference to [Section] 416(h) to establish child status."). But neither Section 402(d)(1) nor Section 416(e)—nor, for that matter, Section 416(h)(2) or (3)—uses the term "undisputed biological child[]" or "biological child" in defining whether an applicant quali-

fies as a "child." And there is no basis in the Act for adding to Section 416(h)(2) and (3)'s carefully drawn list of situations in which an applicant qualifies as a "child" for purposes of Section 416(e)(1). To the contrary, the mandatory language of Section 416(h)(2)(A)—"[i]n determining whether an applicant is the child * * * the Commissioner * * * *shall* apply such law," 42 U.S.C. 416(h)(2)(A) (emphasis added)—demonstrates that the test set out in that provision is exclusive where, as here, the alternative tests in Section 416(h)(2)(B) and (3)(C) are not satisfied.

3. In reaching a contrary conclusion, the court of appeals placed great weight on the word "child" in Section 416(e). The court cited *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), in which this Court stated that, "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning,'" *id.* at 207 (quoting *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)); Pet. App. 10a. But Section 416(h) provides a clear "indication to the contrary" because it expressly states that in determining whether an applicant qualifies as a "child," for purposes of eligibility for benefits under Title II of the Social Security Act, the agency must look to state intestacy law. By contrast, the court of appeals looked only to Section 416(e). That provision, however, defines "child" as meaning something *other* than "child" in the strictly biological sense respondent urges—for example, by expanding the eligibility categories to include certain grandchildren and stepchildren. In such a context, it makes little sense to invoke the "ordinary meaning" of "child." Rather, as Section 416(e) and Section 416(h) make clear, "child" is a term of art under the

Act that describes the *legal* relationship the applicant must have to the insured in order to be eligible for benefits.

The court of appeals saw no need to refer to Section 416(h) because, in its view, the text of Section 416(e) "is so clear." Pet. App. 10a. As the Fifth Circuit has observed, however, the "definitional tautology" in Section 416(e)—*i.e.*, "a 'child' is a child"—"does not provide much guidance" in determining whether an applicant qualifies as the child of a deceased wage earner as a legal matter. *Conlon ex rel. Conlon* v. *Heckler*, 719 F.2d 788, 800 (1983); cf. *United States* v. *Bestfoods*, 524 U.S. 51, 56, 66 (1998) (describing the definition of "owner or operator" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(20)(A)(ii) ("any person owning or operating such facility"), as a "tautology" that is "useless[]" in construing the statute). Indeed, "it is not clear just how the SSA *could* give 'full meaning' to the statutory proposition that 'a "child" is a child' without help from neighboring provisions." *Schafer* v. *Astrue*, 641 F.3d 49, 56 (4th Cir. 2011). Even the court of appeals acknowledged that it is easy to imagine cases in which the determination of biological parentage is complex. Pet. App. 11a (noting that "[t]he use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents") (quoting Gov't C.A. Br. 36). As the Fourth Circuit correctly concluded, "it [is] very unlikely Congress would have left the SSA so utterly in the dark about such a critical term." *Schafer*, 641 F.3d at 55. And, in fact, Congress did not do so. Its "more comprehensive effort[]" to supply a definition in Section 416(h) provides a "plain and explicit instruction on how the determination of child status should be made." *Id.* at 54.

That does not mean that Section 416(e) is superfluous. To the contrary, Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits; Section 416(e)(2) includes certain stepchildren; and Section 416(e)(3) includes even certain grandchildren and stepgrandchildren. The inclusion of those potential beneficiaries "importantly expands the scope of the Act and distinguishes it from narrower benefits programs." *Schafer*, 641 F.3d at 56; cf. *Cleland* v. *OPM*, 984 F.2d 1193, 1195 (Fed. Cir. 1993) (holding that grandchildren are not entitled to survivorship benefits under the civil-service retirement program, 5 U.S.C. 8341(e)(2), because they are not specifically identified in that statute).[2]

Nor is the court of appeals' interpretation compelled, or even supported, by Section 402(d)'s cross-reference to Section 416(e). That cross-reference serves, *inter alia*, to clarify that the Act provides benefits to the grandchildren and stepchildren described in the provision. There is no need for Section 402(d) to cross-reference Section 416(h) in addition because that provision, by its own terms, is already incorporated into Section 416(e)(1)'s definition of "child." Section 416(h)(2)(A) plainly states that the Commissioner "shall" apply state intestacy law in determining whether an applicant is a child "for purposes of this subchapter"—that is, for purposes of the subchapter in which Section 416(e) is lo-

[2] Section 416(h)(2)(A)'s rule for determining child status governs only status as a "child" under Section 416(e)(1), not a legally adopted child, stepchild, grandchild, or stepgrandchild of a deceased wage earner as defined in Section 416(e)(2) and (3). The SSA sometimes uses the term "natural child" to distinguish applicants seeking benefits as a Subsection (e)(1) "child" from applicants seeking benefits as an adopted child, stepchild, grandchild, or stepgrandchild. See, *e.g.*, 20 C.F.R. 404.354, 404.355; pp. 23-24, *infra*.

cated. As the Eighth Circuit has explained, "[i]f natural 'child' in [Section] 416(e) is further defined by [Section] 416(h), then Congress can incorporate the definitional provisions of [Section] 416(h) without an explicit cross-reference to that subsection. It is reasonable for the Commissioner to conclude that [Section] 402(d)(1)'s cross-reference to [Section] 416(e) picks up all subsidiary provisions that flow back through [Section] 416(e)." *Beeler* v. *Astrue*, 651 F.3d 954, 963 (2011), petition for cert. pending, No. 11-667 (filed Nov. 23, 2011); see *Schafer*, 641 F.3d at 56 (observing that "it is not at all unusual for Congress to refer explicitly only to one section even though some of that section's terms are given their full import by another, unmentioned section").

Congress took a similar approach in other provisions of Title II. Section 402(b) provides benefits to "[t]he wife (as defined in section 416(b) of this title) * * * of an individual entitled to old-age or disability insurance benefits," if certain conditions are satisfied, 42 U.S.C. 402(b)(1), and Section 402(c) similarly provides benefits to "[t]he husband (as defined in section 416(f) of this title) * * * of an individual entitled to old-age or disability insurance benefits," 42 U.S.C. 402(c)(1). Likewise, Section 402(e) provides benefits to "[t]he widow (as defined in section 416(c) of this title) * * * of an individual who died a fully insured individual," 42 U.S.C. 402(e)(1), and Section 402(f) similarly provides benefits to "[t]he widower (as defined in section 416(g) of this title) * * * of an individual who died a fully insured individual," 42 U.S.C. 402(f)(1). Like Section 416(e), the cited definitional provisions are, at least in part, tautological. See, *e.g.*, 42 U.S.C. 416(b) ("The term 'wife' means the wife of an individual, but only" under certain conditions.). And although none of those sections con-

tains an express cross-reference to Section 416(h), that provision's rules for the "[d]etermination of family status" govern the application of all of them. See 42 U.S.C. 416(h)(1)(A)(i) (looking to state law to determine when "[a]n applicant is the wife, husband, widow, or widower of a fully or currently insured individual").

4. The court of appeals' view that Section 416(h) has "no relevance" where a biological relationship is established, Pet. App. 8a (quoting *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004)), is contrary to the statutory text and renders several other provisions of Section 416(h) superfluous. But see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted). Section 416(h)(2)(B) and (3)(C) provide that an applicant who is ineligible to inherit under state law may nevertheless be deemed a "child" if he or she "is the son or daughter of [the] insured" and satisfies certain other criteria. 42 U.S.C. 416(h)(2)(B) and (3)(C). The terms "son" and "daughter," which are not otherwise defined in the Act, refer to an applicant who is the natural (biological) child of the insured. But that biological relationship is not alone enough to qualify; the applicant must satisfy additional criteria. If being an "undisputed biological child[]" were sufficient for eligibility, then none of those provisions would serve any purpose, since each of them applies only to applicants who are the biological children ("sons" and "daughters") of insured wage earners but who must also satisfy additional criteria. See *Beeler*, 651 F.3d at 963 (The SSA's interpretation of the Act "is fortified by the fact that Congress elsewhere

required proof beyond undisputed biological parentage to obtain 'child' status under [Section] 416(e)."); *Schafer*, 641 F.3d at 55 ("Congress would not have imposed an additional proof requirement on these undisputed children if undisputed biological parentage sufficed under [Section] 416(e)(1)."). Because Section 416(h)(2)(B) and (3)(C) apply to a son or daughter who does not qualify as a "child" under Section 416(h)(2)(A), the latter provision necessarily applies to biological children as well.

The court of appeals' interpretation of the Act is further refuted by Section 416(h)(1)(A). As explained above, that provision instructs the Commissioner to look to state law to determine whether an applicant is eligible for benefits as the wife, husband, widow, or widower of the insured. Under that provision, the applicant is eligible if the courts of the State where the insured was domiciled would find that the applicant and insured were married; and failing that, the applicant shall "nevertheless" be "deemed" to be the wife, husband, widow, or widower if the courts of that State, in determining the devolution of intestate personal property, would accord the applicant the same status as a wife, husband, widow, or widower. 42 U.S.C. 416(h)(1)(A)(ii). Thus, as the heading to Section 416(h) ("Determination of family status") makes clear, the tests in Section 416(h)(1), (2) and (3) are intended to be used in *all* cases to determine whether the requisite family status is established as a legal matter. 42 U.S.C. 416(h). The court of appeals erred in refusing to apply the plain terms of that provision.

B. Legislative History Confirms That The Applicant Must Establish A Legal Relationship With The Deceased Wage Earner Under Section 416(h)

In departing from the text of Section 416(h), the court of appeals relied in part on its understanding of the legislative history of that provision. The court adopted the reasoning of the Ninth Circuit's decision in *Gillett-Netting* that language in Section 416(h)(2) and (3) was "added to the Act [in 1965] to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute." Pet. App. 8a (quoting *Gillett-Netting*, 371 F.3d at 596). Because the text of the Act is clear, there was no occasion for recourse to legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, the Ninth Circuit's view of the 1965 amendments was "simply wrong." *Schafer*, 641 F.3d at 57.

As enacted in 1939, the child survivor provisions of the Social Security Act were similar in structure to the current law. They contained a provision granting benefits to every "child," see 42 U.S.C. 402(c)(1) (1940); a provision paralleling the current definition of "child," see 42 U.S.C. 409(k) (1940) ("The term 'child' * * * means the child of an individual," as well as certain stepchildren and adopted children.); and a provision paralleling the current versions of Section 416(h)(1)(A) and (2)(A), see 42 U.S.C. 409(m) (1940) ("In determining whether an applicant is the wife, widow, *child*, or parent of a fully insured or currently insured individual for purposes of sections 401-409 of this title, the Board shall

apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled * * * or * * * in which he was domiciled at the time of his death.") (emphasis added). Under those provisions, the only way *any* son or daughter (or wife, widow, or parent) could be eligible for benefits was by establishing that he or she would have been able to inherit from the insured wage earner under state intestacy law.

In 1965, Congress amended the Act to broaden eligibility for child survivor benefits by adding Section 416(h)(3)(C). See Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, § 339, 79 Stat. 409.[3] The Senate Report accompanying those amendments made clear Congress's understanding that "whether a child meets the definition of a child for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 109 (1965) (Senate Report). The Committee went on to observe that "States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights." *Ibid.* In that context, some States prohibited intestate succession altogether, while others were more generous. *Id.* at 109-110. Indeed, several courts of appeals had affirmed the denial of survivor benefits to the undisputed children of a deceased wage earner because the children were born out of wedlock and thus had no intestacy rights under applicable

[3] Section 416(h)(2)(B) was added by the Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b) and (d), 74 Stat. 924, 951-952. See *Mathews* v. *Lucas*, 427 U.S. 495, 515 n.17 (1976).

state law. See, *e.g.*, *Gainey* v. *Flemming*, 279 F.2d 56 (10th Cir. 1960) (applying Colorado law); *Robles* v. *Folsom*, 239 F.2d 562 (2d Cir. 1956) (applying New York law), cert. denied, 353 U.S. 960 (1957); *Hobby* v. *Burke*, 227 F.2d 932 (5th Cir. 1955) (applying Georgia law).

The Committee explained that in order to provide greater uniformity in the provision of benefits, the amendments provided for the eligibility of children who could not inherit under state law, "if the father had acknowledged the child in writing, had been ordered by a court to contribute to the child's support, had been judicially decreed to be the child's father, or is shown by other evidence satisfactory to the Secretary of Health, Education, and Welfare to be the child's father and was living with or contributing to the support of the child." Senate Report 110. Those amendments are now codified in Section 416(h)(3)(C). Importantly, neither the amendments themselves nor their legislative history suggest any intention to change the Act's well-established requirement that an indisputably natural "child" under Section 416(e)(1) must establish a child-parent relationship with the deceased wage earner as a legal matter under Section 416(h).

The history of the 1965 amendments demonstrates that Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits. In amending Section 416(h) to broaden eligibility for benefits, Congress did not alter the role of Section 416(h) as the provision that governs the determination of family status, including an applicant's status as a "child." Instead, it added alternative mechanisms to Section 416(h) under which a son or daughter who could not inherit under

state intestacy law could nonetheless establish the requisite child-parent relationship. As the Fourth Circuit correctly concluded, "[t]he Act's legislative history could hardly be clearer" in establishing that "Congress understood the Act's framework as requiring all natural children to pass through [Section] 416(h) to claim child status." *Schafer*, 641 F.3d at 58; accord *Beeler*, 651 F.3d at 964.

C. The SSA's Interpretation Of The Act Is Consistent With Principles Of Federalism And Promotes The Statutory Purpose

1. Even in the context of federal programs, child-parent relationships are generally determined by state law. See *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989) ("Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area."); see also *United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (identifying "family law" as a field of "traditional state regulation"); *Schafer*, 641 F.3d at 62 ("Congress's efforts toward cooperative federalism here are hardly surprising. Family and inheritance law fall squarely within the states' historic competence."). As this Court has explained, "[t]he word 'children,' although it to some extent describes a purely physical relationship, also describes a legal status," which "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956). The Act contains nothing to suggest that Congress wished to depart from its usual practice by displacing state law and creating a federal rule governing parent-child relationships. To the contrary, Section 416(h)(2)(A) directs precisely the opposite.

2. Section 416(h)(2)(A)'s incorporation of state intestacy law rests not only on principles of federalism but also on the congressional judgment that, because survivor benefits are designed to provide support to survivors from the insured's Social Security wage account, state intestate-succession laws provide a sound guide in determining eligibility. This Court has explained, in discussing the "child" benefit provisions of the Act, that as a general matter, "where state intestacy law provides that a child may take personal property from a [parent's] estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Mathews* v. *Lucas*, 427 U.S. 495, 514 (1976).

In holding that the biological relationship between a posthumously conceived child and the deceased biological parent is sufficient, by itself, to establish the requisite child-parent relationship for benefits purposes under Title II of the Act, the court of appeals adopted a rule that is broader than that adopted by any State in legislation directly addressing the question of posthumous conception. See, *e.g.*, Ala. Code § 26-17-707 (LexisNexis 2009); Cal. Prob. Code § 249.5 (West Supp. 2011); Colo. Rev. Stat. § 19-4-106(8) (2011); Del. Code Ann. tit. 13, § 8-707 (2009); Fla. Stat. Ann. § 742.17(4) (West 2010); La. Rev. Stat. Ann. § 9:391.1 (West 2008); N.M. Stat. § 40-11A-707 (Supp. 2011); N.D. Cent. Code § 14-20-65 (2009); Tex. Fam. Code Ann. § 160.707 (Vernon 2008); Utah Code Ann. § 78B-15-707 (2008); Va. Code Ann. § 20-158 (2008); Wash. Rev. Code Ann. § 26.26.730 (West 2005); Wyo. Stat. Ann. § 14-2-907 (2011) (all either excluding posthumously conceived children from intestate succession, or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous

conception); see Unif. Parentage Act § 707 (amended 2002), 9B U.L.A. 73 (Supp. 2011) (a deceased individual is not a "parent" of a posthumously conceived child unless the individual "consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of a child"); Unif. Probate Code § 2-120(k) (amended 2008), 8 U.L.A. 58 (Supp. 2011) (treating a posthumously conceived child as "in gestation at the individual's death," but only if certain time limits are met).

If Congress wishes to adopt a broad rule like that announced by the court below and by the Ninth Circuit, it has the authority to do so. But in light of the many complexities arising from rapid technological change in this area, the Act thus far leaves the matter to applicable state law, just as it left the eligibility of a child born out of wedlock to state law prior to the 1965 amendments that enacted additional ways in which such a child could qualify. While the SSA's interpretation respects Congress's choice by giving effect to Section 416(h)(2)(A)'s reference to state law, the court of appeals' position would force the agency and the federal courts to create a federal common law of parental relationships in the context of posthumously conceived children. That enterprise has no basis in the Act.

3. Extending eligibility to children who were conceived after the death of a parent is not only inconsistent with principles of federalism, but also is poorly tailored to "the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent." *Schafer*, 641 F.3d at 58; see *Lucas*, 427 U.S. at 507 (observing that the Act is "not a general welfare provision for legitimate or otherwise 'approved' children of deceased insureds, but was intended just to replace

the support lost by a child when his father dies") (internal quotation marks and ellipses omitted). By definition, posthumously conceived children are brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for the child's support. The court of appeals' approach thus "serve[s] a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses." *Schafer*, 641 F.3d at 59. Indeed, although this case involves a deceased father who was married to the children's mother, the logic of the court of appeals' decision would be equally applicable to children conceived by means of sperm from an anonymous donor who was insured under the Act, who happened to die before conception, but who was later identified.

Moreover, because the Act caps the total amount of benefits payable on a single earnings record, treating all posthumously conceived children as eligible for benefits could result in a reduction of benefits for other preexisting children of the wage earner. See 42 U.S.C. 403(a)(1); 20 C.F.R. 404.403. In that respect, the court of appeals' approach threatens the interests of the Act's "core beneficiary class: the children of deceased wage earners who relied on those earners for support." *Schafer*, 641 F.3d at 58.

D. The SSA's Interpretation Of The Act Is Entitled To Deference

Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in disregarding the SSA's longstanding interpretation of the statute to the contrary, which is entitled to deference. Because the agency's position is, at a minimum, reasonable, it should be upheld.

1. The agency's longstanding position has been that the determination under Section 416(h) of whether an applicant who is the natural or biological child of the insured wage earner is eligible for benefits as the "child" of the deceased wage earner governs the meaning of "child" in Section 416(e)(1), and thus Section 402(d)(1). In a regulation that parallels Section 416(e), the SSA has explained that an applicant "may be related to the insured person in one of several ways and be entitled to benefits as his or her child, *i.e.*, as a *natural child*, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child." 20 C.F.R. 404.354 (emphasis added). Subsequent provisions address each of those categories of eligibility. See 20 C.F.R. 404.355-404.359. As relevant here, 20 C.F.R. 404.355 (entitled "Who is the insured's natural child?") explains that an applicant "may be eligible for benefits as the insured's *natural child* if any of the following conditions is met," and it then lists four conditions, the first of which is that the applicant "could inherit the insured's personal property as his or her *natural child* under State inheritance laws." 20 C.F.R. 404.355(a)(1) (emphasis added); see 42 U.S.C. 416(h)(2)(A). The remaining three conditions—all of which likewise refer to the insured's "natural child"—are those described in Section 416(h)(2)(B) and(3)(C), namely, that the insured and the other parent "went through a ceremony which would have resulted in a valid marriage between them except for a 'legal impediment,'" 20 C.F.R. 404.355(a)(2), see 42 U.S.C. 416(h)(2)(B); that, before death, the insured had acknowledged paternity in writing, been decreed by a court to be a parent, or been ordered to pay child support, 20 C.F.R. 404.355(a)(3), see 42 U.S.C. 416(h)(3)(C)(i); or that it is shown by evidence satisfac-

tory to the Commissioner that the insured was the applicant's parent, and the insured was living with or supporting the applicant at the time of the insured's death, 20 C.F.R. 404.355(a)(4); see 42 U.S.C. 416(h)(3)(C)(ii).

Thus, as the Eighth Circuit recognized, the SSA's "regulations make clear that the * * * provisions of [Section] 416(h) are the exclusive means by which an applicant can establish 'child' status under [Section] 416(e) as a natural child." *Beeler*, 651 F.3d at 960-961. The agency's regulations articulating that interpretation date back to 1940, the year after Congress first added child survivor benefits to the Act. See 5 Fed. Reg. 1880 (May 23, 1940) ("A son or daughter (*by blood*) of a wage earner, who is the child of such wage earner or has the same status as a child, *under applicable State law*, is the 'child' of such wage earner.") (citation omitted, emphasis added) (20 C.F.R. 403.832(a) (Cum. Supp. 1943)); accord 20 C.F.R. 404.1101 (Supp. 1960); 20 C.F.R. 404.1109 (Supp. 1960). Significantly, that interpretation was well settled in 1965 when Congress amended Section 416(h), but Congress did nothing to disturb it. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The agency's consistent and longstanding interpretation of the statute is set out in published regulations that are the product of notice-and-comment rulemaking and were issued under the Commissioner's authority to promulgate rules that are "necessary or appropriate to carry out" his functions and the relevant statutory provisions. See 42 U.S.C. 405(a), 902(a)(5). The agency's interpretation therefore is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See

Barnhart v. *Walton*, 535 U.S. 212, 217-222, 225 (2002) (deferring to the Commissioner's "considerable authority" to interpret the Social Security Act).

2. Even if the SSA's regulations were themselves ambiguous, the agency has resolved any ambiguity through published guidance that specifically addresses the eligibility of posthumously conceived children for survivor benefits. Because posthumously conceived children are categorically unable to establish a child-parent relationship under Section 416(h)'s alternative mechanisms (all of which require that an action by the deceased wage earner or a court while the wage earner was still alive), the agency's Program Operations Manual System (POMS) explains that "[a] child conceived by artificial means after the [insured's] death" is entitled to benefits only "if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), http://policy.ssa.gov/poms.nsf/lnx/0200306001; see 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005) ("[T]o meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law.").

The POMS provision reflects the SSA's interpretation of both the Act and the agency's regulations implementing it. See POMS GN 00306.001 (citing 42 U.S.C. 402(d), 416(e), (h)(2) and (3), as well as 20 C.F.R. 404.350-404.366). To the extent that the provision reflects an interpretation of the statute, it is entitled at least to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385-386 (2003) (according deference to a provision of the POMS). And to the extent it reflects an interpretation of the SSA's own regulations, it is entitled

to even greater deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). See *Talk America, Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
MICHAEL S. RAAB
KELSI BROWN CORKRAN
Attorneys

DAVID F. BLACK
General Counsel
Social Security Administration

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APPENDIX

1. 42 U.S.C. 402 provides, in pertinent part:

Old-age and survivors insurance benefit payments

* * * * *

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of

such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month;

(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22—

(i) the termination month, subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(H) if the benefits under this subsection are based on the wages and self-employment income of a stepparent who is subsequently divorced from such child's natural parent, the month after the month in which such divorce becomes final.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

* * * * *

2. 42 U.S.C. 416 provides, in pertinent part:

Additional definitions

For the purposes of this subchapter—

* * * * *

(e) Child

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately

preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958. For pur-

poses of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage. For purposes of clause (2), a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year. For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

* * * * *

(h) Determination of family status

(1)(A)(i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly mar-

ried at the time such applicant files such application or, if such insured individual is dead, at the time he died.

(ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

(B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (d), (f), or (g) of this section such applicant is not the wife, divorced wife, widow, surviving divorced wife, husband, divorced husband, widower, or surviving divorced husband of such individual, but it is established to the satisfaction of the Commissioner of Social Security that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, then, for purposes of subparagraph (A) and subsections (b), (c), (d), (f), and (g) of this section, such purported marriage shall be deemed to be a valid marriage. Notwithstanding the preceding sentence, in the case of any person who would be deemed under the preceding sentence a wife, widow, husband, or widower of the insured individual, such marriage shall not be deemed to be a valid marriage unless

the applicant and the insured individual were living in the same household at the time of the death of the insured individual or (if the insured individual is living) at the time the applicant files the application. A marriage that is deemed to be a valid marriage by reason of the preceding sentence shall continue to be deemed a valid marriage if the insured individual and the person entitled to benefits as the wife or husband of the insured individual are no longer living in the same household at the time of the death of such insured individual.

(ii) The provisions of clause (i) shall not apply if the Commissioner of Social Security determines, on the basis of information brought to the Commissioner's attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage.

(iii) The entitlement to a monthly benefit under subsection (b) or (c) of section 402 of this title, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife or husband of such insured individual but for this subparagraph, shall end with the month before the month in which such person enters into a marriage, valid without regard to this subparagraph, with a person other than such insured individual.

(iv) For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the procedure followed in connection with such purported marriage.

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, 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 such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (l) of this section), whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of the applicant at the time such applicant's application for benefits was filed;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of that applicant at the time such applicant's application for benefits was filed;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

For purposes of subparagraphs (A)(i) and (B)(i), an acknowledgment, court decree, or court order shall be deemed to have occurred on the first day of the month in which it actually occurred.

* * * * *

3. 20 C.F.R. 404.354 provides:

Your relationship to the insured.

You may be related to the insured person in one of several ways and be entitled to benefits as his or her child, i.e., as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child. For details on how we determine your relationship to the insured person, see §§ 404.355 through 404.359.

4. 20 C.F.R. 404.355 provides:

Who is the insured's natural child?

(a) *Eligibility as a natural child.* You may be eligible for benefits as the insured's natural child if any of the following conditions is met:

(1) You could inherit the insured's personal property as his or her natural child under State inheritance laws, as described in paragraph (b) of this section.

(2) You are the insured's natural child and the insured and your mother or father went through a ceremony which would have resulted in a valid marriage between them except for a "legal impediment" as described in § 404.346(a).

(3) You are the insured's natural child and your mother or father has not married the insured, but the insured has either acknowledged in writing that you are his or her child, been decreed by a court to be your father or mother, or been ordered by a court to contribute to your support because you are his or her child. If the insured is deceased, the acknowledgment, court decree, or court order must have been made or issued before his or her death. To determine whether the conditions of entitlement are met throughout the first month as stated in § 404.352(a), the written acknowledgment, court decree, or court order will be considered to have occurred on the first day of the month in which it actually occurred.

(4) Your mother or father has not married the insured but you have evidence other than the evidence described in paragraph (a)(3) of this section to show that the insured is your natural father or mother. Addition-

ally, you must have evidence to show that the insured was either living with you or contributing to your support at the time you applied for benefits. If the insured is not alive at the time of your application, you must have evidence to show that the insured was either living with you or contributing to your support when he or she died. See § 404.366 for an explanation of the terms "living with" and "contributions for support."

(b) *Use of State Laws*—(1) *General.* To decide whether you have inheritance rights as the natural child of the insured, we use the law on inheritance rights that the State courts would use to decide whether you could inherit a child's share of the insured's personal property if the insured were to die without leaving a will. If the insured is living, we look to the laws of the State where the insured has his or her permanent home when you apply for benefits. If the insured is deceased, we look to the laws of the State where the insured had his or her permanent home when he or she died. If the insured's permanent home is not or was not in one of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands, we will look to the laws of the District of Columbia. For a definition of permanent home, see § 404.303. For a further discussion of the State laws we use to determine whether you qualify as the insured's natural child, see paragraphs (b)(3) and (b)(4) of this section. If these laws would permit you to inherit the insured's personal property as his or her child, we will consider you the child of the insured.

(2) *Standards.* We will not apply any State inheritance law requirement that an action to establish paternity must be taken within a specified period of time mea-

sured from the worker's death or the child's birth, or that an action to establish paternity must have been started or completed before the worker's death. If applicable State inheritance law requires a court determination of paternity, we will not require that you obtain such a determination but will decide your paternity by using the standard of proof that the State court would use as the basis for a determination of paternity.

(3) *Insured is living.* If the insured is living, we apply the law of the State where the insured has his or her permanent home when you file your application for benefits. We apply the version of State law in effect when we make our final decision on your application for benefits. If you do not qualify as a child of the insured under that version of State law, we look at all versions of State law that were in effect from the first month for which you could be entitled to benefits up until the time of our final decision and apply the version of State law that is most beneficial to you.

(4) *Insured is deceased.* If the insured is deceased, we apply the law of the State where the insured had his or her permanent home when he or she died. We apply the version of State law in effect when we make our final decision on your application for benefits. If you do not qualify as a child of the insured under that version of State law, we will apply the version of State law that was in effect at the time the insured died, or any version of State law in effect from the first month for which you could be entitled to benefits up until our final decision on your application. We will apply whichever version is most beneficial to you. We use the following rules to determine the law in effect as of the date of death:

(i) If a State inheritance law enacted after the insured's death indicates that the law would be retroactive to the time of death, we will apply that law; or

(ii) If the inheritance law in effect at the time of the insured's death was later declared unconstitutional, we will apply the State law which superseded the unconstitutional law.