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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL SENIOR CITIZENS LAW CENTER AND NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

LAWRENCE D. ROHLFING
LAW OFFICES OF
LAWRENCE D. ROHLFING
12631 E. Imperial Highway
Suite C115
Santa Fe Springs, California
90670

ROCHELLE BOBROFF
Counsel of Record
GERALD MCINTYRE
FEDERAL RIGHTS PROJECT
NATIONAL SENIOR CITIZENS
LAW CENTER
1441 I Street, NW,
Suite 1100
Washington, DC 20005
(202) 289-6976
rbobroff@nsclc.org

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST[1]

The **National Senior Citizens Law Center** ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For 40 years, NSCLC has served low-income older persons through advocacy, litigation, and the education and counseling of local advocates nationwide. From the beginning, NSCLC has had a core interest in the Social Security program and in assuring that benefits are made available to the program's intended beneficiaries. NSCLC's *Federal Rights Project* works to ensure access to the federal courts to enforce safety net and civil rights statutes. NSCLC has participated as counsel in numerous lawsuits involving benefits under the Social Security Act. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' access to benefits.

The **National Organization of Social Security Claimants' Representatives** ("NOSSCR") is a national membership organization comprising approximately 4,000 professionals, mostly attorneys,

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing this brief, and letters of consent have been lodged with the Clerk of the Court.

who represent individuals applying for Social Security benefits under Titles II and XVI of the Social Security Act. NOSSCR members include employees of legal services organizations, educational institutions, and other non-profits; employees of for-profit law firms and other businesses; and individuals in the private practice of law. NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. NOSSCR has a great interest in ensuring that its members' clients get the benefits for which they qualify.

SUMMARY OF ARGUMENT

When Congress enacted the survivor benefits provisions of the Social Security Act ("Act"), in vitro fertilization had not yet resulted in a human birth. At that time, Congress was unaware that this future technology would succeed in facilitating procreation, and therefore could not possibly have addressed this technology. While other forms of reproductive technology had been developed, Congress did not choose to limit benefits for children produced with the assistance of science. Instead, Congress enacted a broad definition of a "child" that disregards any scientific procedures assisting with procreation.

The statute provides that the natural child of married parents is a "child" entitled to benefits. 42 U.S.C. § 416(e)(1). A biological child of a married couple conceived through posthumous in vitro fertilization meets this definition. As a result, there is no

need to determine "whether the applicant is a child" under the law's provision for addressing whether to impart benefits to illegitimate children, 42 U.S.C. § 416(h). Because the statutory text is unambiguous in awarding benefits under the definition in § 416(e), there is no need to give deference to the contrary view of the government that the children are excluded by the provision concerning illegitimate children.

The government and the Fourth Circuit contend that children conceived through posthumous in vitro fertilization should be excluded from survivor benefits, on the ground that the Social Security Act is primarily intended to provide benefits in the event of an "unexpected" death. Gov't Br. 21-22; *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011). Neither the government nor the Fourth Circuit cite any support in the text or legislative history, and indeed no basis exists in the text or legislative history for this purported purpose of the Act. With the development of modern science, previously "unexpected" deaths are often highly predictable now, sometimes years in advance of one's actual demise. The Act does not in any way restrict benefits for survivors of parents who choose to conceive or adopt a child despite knowledge of impending death from a diagnosis of a potentially fatal illness.

As avenues for creating life and means for predicting death expand, the interpretation of the Social Security Act should be governed by the statute's fundamental goal of providing "adequate protection to

the family" of a deceased wage-earner. H.R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). The father of the Capato twins paid Social Security taxes on his earnings with the expectation that it would insure his family against financial hardship, in the event of his death. It comports with the goals of the Social Security Act to provide benefits to the family of the insured. The statute's goals should not be contorted to view human beings as nothing more than their parents' "reproductive plans." Gov't Br. at 22; *Schafer*, 641 F.3d at 59.

ARGUMENT

I. THE PROVISION OF SURVIVOR BENEFITS COMPORTS WITH THE TEXT OF THE SOCIAL SECURITY ACT

Congress amended the Social Security Act in 1939 to include survivor benefits for children, Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1360, 1363, and then again in 1965 to expand the definition of a "child" born out of wedlock who can receive survivor benefits, Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 286, 409. When these provisions were enacted, posthumous conception through in vitro fertilization ("IVF") was not scientifically possible. As a result, Congress could not have addressed IVF when it enacted these provisions.

Some forms of reproductive technology to assist couples in overcoming infertility had been developed at that time. For instance, the use of artificial insemination became widespread in the 1960s. Stacey Sutton, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 862 (1999). It was not until thirteen years later that the first successful birth of a "test tube baby" utilizing IVF occurred in England in 1978. *Id*. at 865. The technology rapidly spread worldwide, with thousands of successful IVF births in the United States over the next decade. Elizabeth Ann Pitrolo, *The Birds, The Bees and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies*, 19 HOUS. J. INT'L L. 147, 149 (1996).

The Act's provisions regarding survivor benefits do not address reproductive technology, not even mentioning those methods in existence at the time of passage. Sweeping broadly, the law utilizes a wide-reaching definition of a child survivor that does not exclude children created with the assistance of reproductive technology. In 42 U.S.C. § 402(d)(1), the statute states that "Every child (as defined in section 416(e)) . . . shall be entitled to a child's insurance benefit." The words "every" and "shall be entitled" demonstrate congressional intent to confer a clear right to benefits for an expansive and inclusive group of children. This definition makes it clear that the use of reproductive technology does not factor into entitlement for benefits.

The survivor benefits provision, 42 U.S.C. § 402(d)(1), explicitly references the definition of a "child" in 42 U.S.C. § 416(e), wherein the statute identifies three types of parents: natural parents, adoptive parents, and stepparents. Accordingly, the definition of a child in § 416(e)(1) as a "child or legally adopted child of an individual," is not a tautology, as suggested by the government and the Fourth Circuit. Gov't Br. 11; *Schafer*, 641 F.3d at 64. Instead, § 416(e)(1) refers to a biological or adopted child, as distinguished from the child of a stepparent referenced in § 416e(2). There is no basis in the definition of a child in § 416(e) to exclude a child conceived through posthumous IVF.

Children whose birth was facilitated by posthumous IVF meet the definition of a "child" in § 416(e). Biological parenthood or adoption, not reproductive technology, establish who is a child of an insured wage-earner.

Because the Capato twins' parents were married, there is no need to address the question of "whether an applicant is a child," under the criteria for children of unwed parents in § 416(h)(2)(A). Through the first half of the twentieth century, the legal presumption that a married father was the natural father of his children was virtually insurmountable, with the exception of African-American babies born to white couples. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 565 n.142 (2000). Up until the development of the human leukocyte

antigen ("HLA") blood test in the late 1970s, blood testing for paternity was quite unreliable. *Id*. at 555. In the late 1980s, genetic testing with 99% accuracy was developed. *Id*. Nevertheless, the "presumption of legitimacy" remains "a fundamental principle of the common law," and marriage to a child's biological mother is sufficient to establish paternity. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

The enactment of § 416(h) was designed to increase the number of illegitimate children obtaining benefits. Congress estimated that 20,000 children would gain immediate access to survivor benefits as a result of the "[b]roadened definition of child" in § 416(h). S. Rep. No. 89-404, S. Rep. No. 404, 89th Cong., 1st Sess. 1965, 1965 U.S.C.C.A.N. 1943, 1945. This provision was not intended to call into question whether the child of a married couple is truly the "child" of the father.

As this Court recently noted, when statutory text is not ambiguous, the court "need not consider the Government's assertion that we should defer to the [agency's] interpretation." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 n.8 (2011). Because the statutory text resolves the issue in this case, the contrary interpretation of the government is not entitled to deference.

II. THE PROVISION OF SURVIVOR BENEFITS COMPORTS WITH THE PURPOSE OF THE SOCIAL SECURITY ACT

Rather than pointing to any words in § 416(e) that justify denial of benefits, the government conjures up an unfounded purpose of the Act, claiming that the statute primarily seeks to help children for whom the death of a parent was "unexpected." Gov't Br. 22. Nowhere in the Act's text does the statute limit survivor benefits to instances where the death of a parent was "unexpected." Tellingly, the government does not cite the statute or any legislative history as a basis for this purported goal of the Act. The government cites the Fourth Circuit's recitation of this supposed purpose in *Schafer v. Astrue*, 641 F.3d at 59, which likewise did not point to any words in the statute or legislative history. The government further cites *Matthews v. Lucas*, 427 U.S. 495, 507 (1976). Gov't Br. 21. *Lucas* did not consider whether survivor benefits are designed to assist families principally in the event of an unexpected death. The Court did not address in *Lucas* whether the death of the wage-earning biological father was expected or a surprise. The case concerned whether an illegitimate child was dependent on the biological father prior to the father's death. The question of dependency[2] is

[2] This brief does not address the issue of dependency which was not reached by the Third Circuit but rather was remanded to the district court with instructions to remand that question to the Commissioner to resolve as a factual matter in further administrative proceedings.

distinct from the definition of a child in § 416(e), and this Court's decision regarding dependency in *Lucas* provides no support for the government's contention that Congress limited benefits in § 416(e) to those families in which a parent's death was "unexpected."

The ability to predict disease and death is advancing over time with the advent of modern scientific discoveries.[3] In the past decade, the Human Genome Project has successfully mapped out the sequence of human genes, which is expected to lead to the development of highly effective diagnostic tools. NATIONAL HUMAN GENOME RESEARCH INSTITUTE, *The Human Genome Project Completion: Frequently Asked Questions* (last updated Oct. 30, 2010), http://www.genome.gov/11006943. There are presently fairly accurate gene tests for a propensity to develop Alzheimer's disease and breast cancer, although other genetic tests are not yet as accurate. Robert Langreth, *Gene Tests that Predict When You Will Die*, FORBES MAGAZINE (2010), http://www.forbes.com/sites/robertlangreth/2010/10/14/gene-tests-that-predict-when-you-will-die/. As technology develops, individuals will have increased information about the timing of their

[3] In a general sense, every rational person expects to die. For example, a worker performing a hazardous job – even an ordinary truck driver or delivery driver – knows that he or she may die that very day. And anyone who commutes to work knows that he or she may die on the way to work. Historically the life of any parent was precarious, particularly the mother in childbirth and the father in ordinary but hazardous work activity.

deaths. *See, e.g.,* Alice Park, *A Blood Test to Predict Death? It Could be Possible,* TIME MAGAZINE (2011), http://healthland.time.com/2011/08/31/a-blood-test-to-predict-death-it-could-be-possible/?xid=huffpo-direct.

Moreover, with the assistance of reproductive technology, older individuals, who have a shorter expected future lifespan, are able to produce children. In 2009, in the US, women ages 40-44 gave birth to 105,827 babies; women ages 45-50 gave birth to 7,320 babies; and women ages 50-54 gave birth to 569 babies. Joyce Martin, et al., NATIONAL VITAL STATISTICS REPORT, *Births: Final Data for 2009,* at Table 2 (2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf. Likewise, a significant percentage of men over 50 are fathers of newborns. In 2009, 2.6% of newborns had fathers ages 50-54, while .3% of newborns had fathers 55 years and older. *Id*. at Table 17. Also, in 2004, 1.6 million children were being raised by their grandparents. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, *Living Arrangements of Children: 2004,* at 2 (2008), *available at* http://www.census.gov/prod/2008pubs/p70-114.pdf. Federal adoption law directs states to give preference to relatives seeking to adopt children, which encourages grandparent adoption. Sara Mills, *Perpetuating Ageism Via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC'Y 69, 99 (2011). No one questions the potential right of these children to survivor benefits on the earnings record of their adoptive grandparents.

The Social Security Act does not address the ability of science to predict death. It provides benefits to children irrespective of whether a parent's death was expected for years or was a surprise. The statute contains no moral judgments regarding parents' desire to procure children biologically, with or without reproductive technology, or through adoption, when death is expected in the near future due to a diagnosis of a potentially fatal disease or advanced age.

The actual purpose of the Act can be found by looking at the text and legislative history of the statute. The statutory text demonstrates that its aim is to establish the entitlement of children to survivor benefits based on the death of a fully insured parent. 42 U.S.C. § 402(d)(1). The legislative history indicates that Congress' goal when enacting this provision in 1939 was to provide "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. The legislative history of the 1965 revisions to the survivor benefits provision shows that the alteration of the statute was intended to expand coverage to thousands of children born out of wedlock who had previously been excluded from benefits. S. Rep. No. 89-404, S. Rep. No. 404, 89th Cong., 1st Sess. 1965, 1965 U.S.C.C.A.N. 1943, 1958.

This Court has long recognized that the "underlying purpose" of the Act is "the protection of its beneficiaries from some of the hardships of existence." *U.S. v. Silk*, 331 U.S. 704, 711 (1947). The Social Security system is "a form of social insurance . . . whereby persons gainfully employed, and those who employ

them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents." *Flemming v. Nestor*, 363 U.S. 603, 609 (1960). The law "is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability, or death, by providing benefits to replace the lost wages." *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977). Social Security is not a public assistance statute based on need, but rather its "primary objective was to provide workers and their families with basic protections against hardship." *Matthews v. De Castro*, 429 U.S. 181, 185-86 (1976). Thus, a "primary purpose" of the "Social Security scheme is to provide support for dependents." *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974).

The Act's purpose is well served by the provision of survivor benefits to the Capato twins. Mr. Capato's payment of Social Security taxes served to insure him and his family against the economic impact of his death. As the biological children of a worker who contributed his fair share in contributions, the twins are entitled to basic protections against hardship.

The government makes several groundless policy arguments against the provision of benefits to the Capato twins. The government argues, quoting the Fourth Circuit, that the decision below would improperly "subsidiz[e] the continuance of reproductive plans." Gov't Br. at 22 (quoting *Schafer*, 641 F.3d at 59). The Fourth Circuit gave no citations for its

suggestion that children produced with the assistance of posthumous IVF are viewed by the Act as "reproductive plans" scheming to get a subsidy. This approach dehumanizes children whose birth depended on reproductive technology. It has no basis in the text or legislative history of the Act nor in this Court's jurisprudence. The provision of survivor benefits no more subsidizes the reproductive plans of couples utilizing posthumous IVF than it does the reproductive plans of married couples or an unwed parent conceiving a child without the assistance of reproductive technology. The Act provides support for children, without passing judgment on the circumstances of conception, planned or not.

The government further contends, again quoting the Fourth Circuit, that providing benefits to children conceived through posthumous IVF "threatens the interests of the Act's 'core beneficiary class: the children of deceased wage earners who relied on those earners for support.'" Gov't Br. 22 (quoting *Schafer*, 641 F.3d at 58). While 42 U.S.C. § 403(a)(1) does cap survivor benefits in some cases, nothing in the Act designates "core" beneficiaries who are more worthy than other survivors. For example, there is no dispute that a child conceived on the day before a wage earner dies is entitled to benefits, even though such a child would never have relied on the deceased for support. The government's interpretation would pit survivors against each other in a manner not supported by the purpose of the Act.

Indeed, the instant case illustrates how the government's current interpretation defeats the purposes of the Act and leads to counterproductive results. No one has questioned that Mr. and Mrs. Capato are the parents of three children, the first of whom was conceived after Mr. Capato was diagnosed with cancer and undergoing treatment. The government has acknowledged that this son, born in August 2001, shortly before Mr. Capato's death, is Mr. Capato's child eligible for survivor's benefits. But the government finds that Mr. Capato's other two children are not his survivors and not eligible for benefits on his account. Not only are these full siblings treated differently from each other, but even the first child is harmed by the government's current position. Because the later born twins are being denied benefits on their father's account, their mother (his widow) is receiving less benefits for the surviving family than she could otherwise obtain under the government's "family maximum" rules, with, consequently, less money to raise all three children.

In sum, the interpretation of § 416(e) to require the provision of survivor benefits to children conceived through posthumous IVF comports with the text, purpose, and policy concerns of the Act. The provision of survivor benefits to the Capato twins is consistent with the Act's reliance on biological parenthood, adoption, and marriage to determine parenthood and avoids moralistic judgments in determining who is a child. In this case, "considering the provision in conjunction with the purpose and

context leads us to conclude that only one interpretation is permissible." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct 1325, 1331 (2011). By preventing financial hardship to the family of a deceased wage-earner, the provision of survivor benefits to the Capato twins fully comports with the Act.

CONCLUSION

For the reasons stated, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

LAWRENCE D. ROHLFING
LAW OFFICES OF
LAWRENCE D. ROHLFING
12631 E. Imperial Highway
Suite C115
Santa Fe Springs,
California 90670

ROCHELLE BOBROFF
Counsel of Record
GERALD MCINTYRE
FEDERAL RIGHTS PROJECT
NATIONAL SENIOR
CITIZENS LAW CENTER
1441 I Street, NW,
Suite 1100
Washington, DC 20005
(202) 289-6976
rbobroff@nsclc.org

Attorneys for Amici Curiae