

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL J. ASTRUE, COMMISSIONER :

4 OF SOCIAL SECURITY, :

5 Petitioner : No. 11-159

6 v. :

7 KAREN K. CAPATO, ON BEHALF OF :

8 B.N.C., ET AL. :

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10 Washington, D.C.

11 Monday, March 19, 2012

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13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:02 a.m.

16 APPEARANCES:

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18 General, Department of Justice, Washington, D.C.; for

19 Petitioner.

20 CHARLES A. ROTHFELD, ESQ., Washington, D.C.; for

21 Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-159, Astrue v. Capato.

5 Mr. Miller.

6 ORAL ARGUMENT OF ERIC D. MILLER

7 ON BEHALF OF THE PETITIONER

8 MR. MILLER: Mr. Chief Justice, and may it
9 please the Court:

10 The Social Security Administration has
11 reasonably interpreted the Social Security Act to
12 provide that, as a general rule, a person seeking to
13 establish eligibility for child survivor benefits must
14 show that he or she would have been able to inherit
15 personal property from the decedent under applicable
16 State intestacy law. That interpretation is supported
17 by the text, structure, and history of the Act, and it
18 comports with principles of federalism because it defers
19 to State law on the determination of family status,
20 which is a traditional subject of State regulation.
21 It's reasonable and entitled to deference under Chevron.

22 Now, the textual arguments in this case
23 involve the interaction of three provisions of the Act.
24 And the first is section 402(d)(1), which is the basic
25 benefits-granting provision. And that says that under

1 certain conditions, the child of a wage earner is
2 entitled to benefits. And that provision has a
3 cross-reference to a definition of "child" in section
4 416(e) of the Act. And 416(e), which is reprinted at
5 page 4a of the appendix to our brief, says that the term
6 "child" means (1) the child or legally adopted child of
7 an individual, (2) a stepchild under certain cases, and
8 (3) a person who is the grandchild or stepgrandchild of
9 an individual.

10 Now, I think the one thing that's
11 immediately apparent from looking at that provision is
12 that under anyone's reading, it's a little bit confusing
13 because it uses the word "child" twice to mean two
14 different things. That is, the first "child" is broader
15 than the second, because the first one includes the
16 second as well as adopted child, stepchild, and so
17 forth.

18 JUSTICE ALITO: Suppose a State legislature
19 got the crazy idea that children born to married people
20 during the time of the marriage shouldn't inherit under
21 State intestacy law. Would that mean that they would be
22 ineligible for survivors' benefits?

23 MR. MILLER: Not necessarily, because if
24 somebody doesn't qualify under -- and I should say at
25 the outset that that is unlike the law of any State

1 either in 1939 or today.

2 JUSTICE ALITO: But what if they did -- what
3 if they did that?

4 MR. MILLER: There -- there are two
5 alternative mechanisms that Congress added to the
6 statute in the 1960s to allow children who lack
7 intestacy rights to establish their eligibility. Those
8 are 416(h)(2)(B) and 416(h)(3). And 416(h)(3) says that
9 an applicant who is the son or daughter of an insured
10 individual but is not a child under -- under paragraph
11 (A), which is the reference to State intestacy law,
12 shall nevertheless be deemed to be a child if there was
13 an acknowledgment in writing that the child was -- that
14 the applicant was the son or daughter, or there was a
15 court decree for support. So, I think --

16 JUSTICE GINSBURG: Those are -- those are
17 obviously meant to deal with -- with children whose
18 parents are not married.

19 MR. MILLER: That's right. And the reason
20 for that is that, in fact, under the law of every State,
21 both in 1939 and today, children whose parents are
22 married do have State -- do have intestacy rights. But
23 I think what the provision I just referred to
24 illustrates is that the term "child" in this statute is
25 a legal term of art, because if you were just looking at

1 the ordinary meaning of the word "child," the concept of
2 an applicant who is a son or daughter but is not a
3 child, would be completely nonsensical.

4 JUSTICE ALITO: Maybe it means something
5 else. Maybe it means that to the Congress that
6 initially enacted the predecessor of this provision a
7 child was a child. They knew what a child was. And the
8 type of child that I mentioned earlier was a child.
9 There wasn't a need for any definition of that. And
10 they -- they never had any inkling about the situation
11 that has arisen in this case, just as they had no
12 inkling that any State would go off and take away
13 intestacy rights for children born to married people
14 during the course of their marriage.

15 MR. MILLER: Well, I mean, I think -- I
16 think those are probably accurate factual claims about
17 what Congress was thinking, but had Congress wanted --
18 the way that Congress chose to make sure that the
19 children of married parents could establish their
20 eligibility was by looking to State intestacy law,
21 because Congress knew that under State intestacy law,
22 those children had such rights.

23 JUSTICE KAGAN: Isn't there something
24 sort of bizarre about your reading, because Congress in
25 the (e) section sets up very specific definitions about

1 stepchildren and grandchildren and even
2 stepgrandchildren in which State intestacy law is not
3 referenced? But you're saying that as to the largest
4 category, the category in which 90 percent of people are
5 going to get benefits, there Congress sent us all off to
6 State law.

7 MR. MILLER: Well, it -- that's -- that's
8 what section 416(h) says. Section 416(h) sets out a
9 rule --

10 JUSTICE KAGAN: Well, suppose I'm not so
11 convinced that (h) is as clear as you think it is,
12 because there are two sentences of -- of section (h).
13 I'm just asking you to provide a reason why Congress
14 would have specified everything about what -- how you
15 get benefits for stepchildren and grandchildren and
16 stepchildren, but not for the main category of people at
17 issue.

18 MR. MILLER: Well, I think -- I think it's
19 because with respect to the main category of people at
20 issue, the question Congress was asking is: What is the
21 class of people who are likely to have a sufficiently
22 close relationship to the insured person such that it
23 would be appropriate to provide benefits to replace the
24 loss of support that they would likely be getting during
25 the person's life? And if you look at what is the body

1 of law that defines that class of people who have a
2 close relationship with someone, it's State intestacy
3 law. And State intestacy law sets out sort of clear,
4 easy-to-apply rules for the distribution of estates.

5 CHIEF JUSTICE ROBERTS: Well, they don't
6 always do --

7 JUSTICE GINSBURG: Mr. Miller, there's one
8 provision in (h) that's puzzling, and maybe you can tell
9 me what it means. It's at (h)(2)(A), and it's the last
10 sentence of (A). It says: "Applicants who according to
11 State law would have the same status relative to taking
12 intestate personal property as a child ... shall be
13 deemed such." What person is that referring to?
14 Someone who is not a child but has the same status as a
15 child?

16 MR. MILLER: That -- that's right. The
17 first sentence sets out the general rule that you look
18 to State law for the definition of "child." And the
19 second sentence says that people who do not have the
20 status of children but nonetheless have the inheritance
21 rights of children shall be deemed children. And as a
22 practical matter, the people that that applies to are
23 people who have been equitably adopted.

24 There's a doctrine in the law of many States
25 where you have an adoption -- or you have an agreement

1 to adopt, but not yet a completed legal adoption. In
2 that circumstance, the would-be adoptee does not have
3 the status of a child for all purposes or even
4 necessarily for all inheritance law purposes, but can
5 take property from the adopting parents. So, that's who
6 would be covered by that sentence, and that's now
7 addressed in the regulations at --

8 JUSTICE GINSBURG: Anyone else or just that
9 category?

10 MR. MILLER: I think -- I think that is
11 the -- the most likely category that it would apply to.

12 CHIEF JUSTICE ROBERTS: Counsel --

13 JUSTICE SCALIA: I'm sorry. Go ahead.

14 CHIEF JUSTICE ROBERTS: You said earlier
15 that the State intestacy law provides clear rules, but I
16 assume that's not always the case, particularly with all
17 this new technological advancement. There must be
18 situations where you can't tell what State intestacy law
19 provides. And what does the Social Security
20 Administration do in that case?

21 MR. MILLER: The Social Security
22 Administration tries to apply State law. And --

23 CHIEF JUSTICE ROBERTS: No. My hypothetical
24 is that there's no clear answer. I mean, let's take a
25 situation where this type of reproduction is -- is new,

1 and the State legislatures haven't had a chance to
2 decide whether they want to recognize the offspring for
3 State intestacy law or not. What would SSA do?

4 MR. MILLER: Well, the SSA does the best
5 that it can to figure out what the State law is, and
6 then on review in the district court, you know, the
7 district court is able to review that. And there have
8 been cases in which district courts have certified
9 questions to State courts. And I think actually the
10 fact that there are those difficult questions that can
11 come up in some of the cases, particularly involving
12 assisted reproductive technology, really illustrates one
13 of the virtues of leaving it to the States rather than,
14 as Respondent would have it, effectively forcing SSA and
15 then the Federal courts on review of its decisions to
16 create a sort of Federal common law of parentage to
17 resolve all of those very difficult questions.

18 JUSTICE SOTOMAYOR: There was in my memory,
19 and it's been a while, that some States, if not all --
20 and that's what I was going to ask you -- basically deem
21 any child born during the marriage to be a child of the
22 marriage, whether it's a biological child or not, so
23 that if a mother has had a relationship outside of
24 marriage, the married parent's still responsible for
25 that child.

1 That would take care of, I think, a great
2 number, wouldn't it, of the new technology births that
3 occur without perhaps the input of one of -- the
4 biological input of one of the parents?

5 MR. MILLER: That -- that's right. And, in
6 fact, there are statutes in a number of States
7 addressing the question of when a -- yes.

8 JUSTICE SOTOMAYOR: Yes. My question was,
9 do all States have similar rulings? And for those that
10 don't, what happens to a child that's been born with, as
11 Justice Roberts said, as the Chief said, with new
12 technology? What happens to that child in terms of
13 their definition -- of whether they'll be considered a
14 child for Social Security purposes?

15 MR. MILLER: I -- I can't speak with
16 certainty to all of the States, but I believe that that
17 is the -- the general rule. So, I'm not aware of any --
18 any States where, when you have a married couple using
19 donor -- donor sperm, that the child would not be
20 deemed the child of the husband.

21 JUSTICE SCALIA: My impression is that, I'm
22 not sure it's by statute, but just by judicial decision,
23 a child born in the marriage is a child of the marriage
24 unless -- unless the child is repudiated by -- by the
25 father.

1 MR. MILLER: I believe that is -- that is
2 the general rule. And I think one thing that that
3 illustrates, of course, is that Respondents' definition,
4 which is also the court of appeals' definition, of what
5 a child is and the definition that they urge the Court
6 to apply in 416 is the biological child of married
7 parents.

8 And not only is the -- does the "married"
9 part of that not comport with the ordinary understanding
10 of "child," because of course in ordinary usage whether
11 somebody is a child doesn't depend on whether their
12 parents are married, but the biological part also does
13 not comport with legal usage because, both in 1939 and
14 today, there are many cases in which biological
15 parentage is not determinative of legal parentage, both
16 for the reason that we were just talking about and then
17 also for -- another example is when you have an
18 adoption; a child who has been adopted by somebody else
19 is no longer legally the child of his biological
20 parents.

21 JUSTICE KENNEDY: Would you tell me if -- if
22 the Capato twins are both found to be -- be children
23 within the meaning of the Act, will they meet the
24 dependency or the deemed dependency requirements? Or is
25 that a back-up argument that you have? Or --

1 MR. MILLER: We -- that -- that would be a
2 question for the agency to address in the first
3 instance. The agency has not addressed that question in
4 the administrative process here. So, we are not --

5 JUSTICE GINSBURG: It -- it was addressed in
6 the Ninth -- in the Ninth Circuit decision, wasn't it?

7 MR. MILLER: That's right. And the Ninth
8 Circuit read the dependency provision of the Act to say
9 that any legitimate child is deemed to be dependent, and
10 it then conducted an examination of legitimacy under
11 California law.

12 JUSTICE KENNEDY: You don't have a position
13 on that here? Or -- you want that to be elaborated more
14 by the agency?

15 MR. MILLER: That -- that's right. I mean,
16 I -- what I will say is, just speaking in general terms
17 about dependency, the statute creates a number of
18 presumptions that allow basically any -- any natural
19 child, any child under the -- that first -- that second
20 child in 416(e)(1), anyone who fits into that category
21 is deemed to be dependent. So, it doesn't necessarily
22 turn on -- on factual dependency, which is obviously not
23 present in --

24 JUSTICE SOTOMAYOR: Rebuttable presumption
25 or irrebuttable?

1 MR. MILLER: The presumption in favor of
2 dependency for anyone who qualifies is irrebuttable.

3 JUSTICE SCALIA: Well, you rely only on that
4 -- on that definition.

5 The section is entitled "Old-age and
6 survivors insurance benefit payments," and it also
7 provides in (d) that a child is entitled to the benefits
8 if, among other things, (C) was dependent upon such
9 individual, (i) if such individual is living at the time
10 that the application was filed, (ii) if such individual
11 has died at the time of death, or (iii) if such
12 individual had a period of disability, et cetera, et
13 cetera.

14 It seems to me -- is the word "survivor"
15 used anywhere in the text of this statute except in
16 the -- in the heading of this section?

17 MR. MILLER: I don't -- it doesn't appear in
18 any of the -- the operative definitional provisions, but
19 I would certainly agree with you that it is --

20 JUSTICE SCALIA: We use titles to determine
21 the meaning of ambiguous provisions later, don't we?

22 MR. MILLER: Yes, and I certainly would --
23 would agree with the -- the idea that it is difficult to
24 describe someone as a survivor who was not alive at the
25 time that -- or not --

1 JUSTICE SCALIA: Nor would -- nor would he
2 meet the requirements of (C), would he? Would he meet
3 any of the requirements of (C)? Of (d)(1)(C).

4 MR. MILLER: The dependency requirement is
5 defined in 402(d)(3) and -- which unfortunately is not
6 reproduced in the appendix, but which has the effect of
7 making anyone who qualifies under 416(h) be deemed
8 dependent. Now, we don't think that the children in
9 this case qualify under 416(h). So, there's no -- not
10 even any need to reach the dependency question there.

11 JUSTICE SCALIA: Then what does -- what does
12 (d)(1)(C) do if it's all washed out by --

13 MR. MILLER: Well, the dependency
14 requirement is something that people who don't qualify
15 under 416(h), people who are adopted children or
16 stepchildren or grandchildren, may in some cases have to
17 make an individualized determination of actual
18 dependency.

19 JUSTICE SCALIA: Well, it doesn't say -- it
20 says every child as defined in 416(e) has to meet that
21 requirement. If such -- such child, the one defined in (e).

22 MR. MILLER: Right, but then -- but then
23 402(d)(3) says a child shall be deemed dependent under
24 certain circumstances that effectively track the 416(h)
25 analysis. And I -- I would refer you on that point to

1 the agency's regulations defining dependency, which are
2 404.361, which say that any natural child -- which is
3 the term the agency uses for that second child in
4 416(e) -- any natural child is deemed dependent. Now --

5 JUSTICE SOTOMAYOR: Can I ask --
6 Justice Scalia said that the statute is ambiguous. Is
7 that your position? Is it your position that the
8 definition of "child" is ambiguous and that we have to
9 give the agency deference, or is it your position that,
10 in context, it's unambiguous and even if the Social
11 Security Administration wanted to extend benefits, it
12 couldn't, in the circumstances of this case?

13 MR. MILLER: I think that when the statute
14 was initially enacted in 1939 with more or less the same
15 structure of these provisions as we have now, it might
16 at that time have been ambiguous. But the agency
17 adopted an interpretation that is, again, in structure
18 materially identical to its current interpretation in
19 1940, and it has adhered to it ever since. And Congress
20 has amended the statute with the understanding that that
21 was the interpretation, that everybody had to go through
22 State law to qualify.

23 And I think in light of that history, at
24 this point -- and Congress's ratification of that
25 understanding, at this point the best view is that it is

1 unambiguous and clearly resolves the question in favor
2 of the interpretation set out in the agency's
3 regulations.

4 JUSTICE KAGAN: Mr. Miller, could I take you
5 back to 416(e)? I take it that you don't contest that
6 for purposes of deciding the -- which stepchildren get
7 benefits and which grandchildren get benefits, we're
8 just looking to Federal law, that we don't look to State
9 law on those questions; is that correct?

10 MR. MILLER: Yes, because those terms do not
11 appear in 416(h). There's -- there's no instruction in
12 the statute that those terms be defined by reference to
13 State law, as there is with respect to "child."

14 JUSTICE KAGAN: And, you know, I'm looking
15 at some of these, the grandchildren one, for example.
16 It says a person who is the grandchild, but only if,
17 blah, blah, blah. It seems to have just sort of an
18 understanding of what a grandchild is. In other words,
19 it's not really defining a grandchild here; it's
20 limiting a class of grandchildren with a pre-existing
21 understanding of what a grandchild is. And so, I'm
22 wondering, if that's true of grandchildren, why isn't it
23 also true of children?

24 MR. MILLER: Well, I should say two things
25 about that, then. The first is, specifically with

1 respect to grandchildren, the agency's -- the agency
2 defines a grandchild as the child, within the meaning of
3 the statute, of a child. And that's set out in the
4 regulations at 404.358.

5 JUSTICE KAGAN: I'm sorry, the child of a
6 child. The child -- what kind of child?

7 MR. MILLER: Well, somebody -- somebody who
8 would qualify under 416(h) as a child.

9 JUSTICE KAGAN: Oh, so, for grandchildren,
10 the agency is also looking to State law?

11 MR. MILLER: Indirectly. I mean, a
12 grandchild is not expressly defined in the Act, but
13 somebody who qualifies either under State law or you can
14 also qualify as a stepchild or adopted child of someone
15 who qualifies as a child in that same sense.

16 But -- I mean, again, the lack of a -- what's
17 significant, I think, is the lack of any other provision
18 in the statute that tells you how to define
19 "grandchild." I mean, the -- the run of cases that
20 Congress was concerned about involved children, and for
21 -- in explaining to the agency how to deal with those
22 cases, Congress gave explicit guidance, and that's to
23 look to State law, in 416(h).

24 Now, Respondent makes much of the fact that
25 the benefits-granting provision, 402(d), has an express

1 cross-reference to the definition in 416(e) but doesn't
2 cross-reference the definition in 416(h).

3 And I think there are two problems with that
4 argument, the first of which is that 416(h) by its own
5 terms says that it applies for purposes of this
6 subchapter, that is throughout all of the parts of the
7 Act that we're talking about here. So, effectively
8 416(h) incorporates itself into the 416(e) definition,
9 and there's no need for an express cross-reference.

10 The second point about that is that the
11 structure of the definitions here is very similar to the
12 structure of the definitions used in defining other
13 family relationships that are eligible for benefits.
14 So, under 402, some of the other subsections of 402,
15 there are benefits for the wife or husband or widow or
16 widower of an insured person. And just to take the
17 benefits for a wife as an example, in 402(b) the statute
18 says that the "wife (as defined in section 416(b) of
19 this title)" under certain circumstances can get
20 benefits.

21 If you look at the definition in 416(b) of
22 "wife," it's very much like the definition in 416(e).
23 It says, "the term 'wife' means the wife of an
24 individual," and then it has some limitations. So, if
25 you were to --

1 JUSTICE SCALIA: Could you -- go ahead and
2 finish.

3 MR. MILLER: If you were to take
4 Respondents' approach, you would just stop there and
5 apply some sort of Federal standard of figuring out
6 whether people are married or not. But in fact 416(h),
7 in paragraph (1) of 416(h), says an applicant is the
8 wife or husband or widow or widower of an insured person
9 if the State courts would regard them as being married.

10 So -- and in the 1939 Act, all of those
11 references to State law for wives and widows and
12 children were all combined in one paragraph, so it was
13 even clearer that that was how the statute worked, that
14 you look to State law for defining all these family
15 relationships.

16 JUSTICE SCALIA: Counsel, I now have in
17 front of me (h)(3). I don't see how it has anything to
18 do with whether the child was dependent under (d)(1)(C).
19 Why do you think it has something to do with that?

20 MR. MILLER: I'm sorry. The -- the
21 definition of dependency is in -- is in (d)(3),
22 402(d)(3), not -- if you're -- 402(d)(3) says a child
23 shall be deemed dependent upon his father unless at such
24 time such individual was not living with or contributing
25 to the support of such child and the child is neither

1 the legitimate nor adopted child of the individual. So,
2 the effect of that is anyone who is a legitimate child
3 is deemed dependent under 402(d)(3).

4 JUSTICE SCALIA: Well, unless such
5 individual was not living with or contributing to the
6 support of such child -- which is certainly the case
7 here; the child had not yet been born -- and other
8 qualifications. The principal condition does not exist.
9 Shall be deemed dependent upon his father or adopting
10 father unless at such time such individual, mother or
11 father or adopted father was not living with or
12 contributing to the support of such child. How does
13 that alter the dependency requirement of (d)(1)(C)?

14 MR. MILLER: Well, because the child is
15 deemed dependent unless he was -- I mean, again,
16 since -- to be clear, we -- we think that the children
17 in this case do not -- are not eligible for child status
18 because they don't meet the requirements of 416(h).

19 JUSTICE SCALIA: Well, that may well be.

20 MR. MILLER: And --

21 JUSTICE SCALIA: If that is ambiguous, why
22 doesn't -- why doesn't (d)(1)(C), despite -- what is it
23 (h)(3) or whatever the 3 we're -- we've been playing
24 with here -- despite (d)(3), despite that, it seems to
25 me that they don't meet that requirement.

1 MR. MILLER: That -- that might well be the
2 case. Our position is simply that that's not an issue
3 that the agency has addressed and that would be a matter
4 for the agency to resolve in the first instance if this
5 Court were to disagree with us on the definition of
6 "child."

7 I referred a minute ago to the 1939 Act and
8 the structure of that Act, and I think that that's very
9 instructive because, again, the way that the provisions
10 were arranged in the 1939 Act, as we set out in our
11 brief, were the same for present purposes as they are
12 today. And Congress, when it amended the Act in the
13 1960s to allow certain nonmarital children to be
14 eligible for child status, recognized that that was the
15 case, recognized the commission's interpretation that
16 everybody had to go through 416(h) and establish their
17 eligibility under State law, and then chose to make
18 express exceptions to the requirement of State law for
19 those children. No such exception applies here.

20 If I could reserve the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Miller.

23 Mr. Rothfeld.

24 ORAL ARGUMENT OF CHARLES A. ROTHFELD

25 ON BEHALF OF THE RESPONDENTS

1 MR. ROTHFELD: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 If I can, I'll start with a question that
4 Justice Sotomayor asked about the ambiguity or not of the
5 statute, and we think that in fact the statute is not
6 ambiguous at all. We think that it unambiguously
7 dictates the reading that we advance. And it's useful,
8 I think, in addressing the case to recognize that it
9 presents essentially two issues. One is whether all of
10 the categories of applicants for child survivor benefits
11 that are defined to be children in the statutory
12 definition of "child," section 416, qualify for child
13 benefits without reference to State law, as we submit.

14 If they do, then the second question is
15 whether the children in this case, the Capato twins,
16 fall within one of the categories of children so
17 defined. And we think that they very clearly do.

18 Congress said expressly that every child as
19 defined by 416(e) shall receive benefits so long as they
20 satisfy certain criteria that are not at issue in this
21 case. Section 416(e), to which Congress has expressly
22 directed us in determining who is a child eligible for
23 these benefits, defines a child to be (1) a child or
24 adopted child, (2) a stepchild --

25 JUSTICE SOTOMAYOR: Excuse me. Could you

1 tell me what purpose 416(h) serves in this statute --

2 MR. ROTHFELD: We think --

3 JUSTICE SOTOMAYOR: -- given that you
4 believe that 416(e) is self-sufficient unto itself?

5 MR. ROTHFELD: We think subsection 416(e) is
6 sufficient as to the children defined to be a child
7 within that statute.

8 JUSTICE SOTOMAYOR: As the child who should
9 receive. So, what's the purpose of (h)?

10 MR. ROTHFELD: And our understanding of who
11 falls within section 416(e), (e)(1), definition of
12 "child," is the natural child, the biological child of
13 married parents. There are, of course --

14 JUSTICE SOTOMAYOR: So, the -- a child who
15 was born during marriage but is not a biological child
16 wouldn't qualify?

17 MR. ROTHFELD: No -- well --

18 JUSTICE SOTOMAYOR: Even though they qualify
19 under State law as a child?

20 MR. ROTHFELD: Well, as to the question of
21 what (h) is designed to accomplish, we think that
22 Congress enacted (h) for children whose parentage or
23 parental relationships were unclear, which would
24 principally have been children who were born outside of
25 marriage, as to whom there was no presumption --

1 JUSTICE SOTOMAYOR: So, would this -- let's
2 assume Ms. Capato remarried but used her deceased
3 husband's sperm to -- to birth two children. They're
4 the biological children of the Capatos. Would they
5 qualify for survivor benefits even though she's now
6 remarried?

7 MR. ROTHFELD: Well, I think that's an
8 interesting and more difficult question than what we
9 have here. I think that the answer may well be "yes,"
10 and I think that the -- situations like that can arise
11 really in -- outside of the IVF context. That's a
12 related situation.

13 JUSTICE SOTOMAYOR: Well, that's -- you see,
14 a situation like that is what is making me uncomfortable
15 because I don't see the words "biological" in the
16 statute. I don't see the word "marriage" directly
17 when -- within the definition of "child." So, where do
18 I draw them from? Where do I come --

19 MR. ROTHFELD: Well, let me answer both of
20 those questions. As to where marriage comes from, I
21 think from a number of sources. One is the point that
22 was raised by Justice Alito and Justice Kagan, that at
23 the time Congress enacted the statute in 1939, the
24 overwhelming majority of children in the United States,
25 more than 90 percent -- it was actually more than 95

1 percent -- were the children of married parents. And
2 so, when Congress --

3 JUSTICE SOTOMAYOR: That would be true
4 under State intestate law.

5 MR. ROTHFELD: Well, simply as to what
6 Congress had in mind when it said a child is a child --
7 and you asked where marriage comes from in the
8 statute -- I think when Congress said a child is a
9 child, as I think Justice Alito's question suggested, it
10 would have had in mind the paradigm of a child at that
11 time, which was the children --

12 JUSTICE GINSBURG: But the words -- you say
13 this is plain meaning. It says the child of a wage
14 earner, an individual; a child -- it seems to me you are
15 importing the term "married," because someone can be the
16 undisputed child of a wage earner who is unmarried. So,
17 it's not a question of disputed versus undisputed. A
18 wage earner can have a child, undisputed that the wage
19 earner is the parent, but the wage earner is not married.

20 MR. ROTHFELD: Well, let me say two things
21 about that. And, first, to continue the question of
22 where marriage comes from, there is a textual reference
23 to marriage which appears in section 416(h)(2)(B), the
24 companion to the intestacy provision upon which the
25 Government relies.

1 JUSTICE GINSBURG: But I thought we weren't
2 supposed to look to (h) at all. I mean, your thesis is
3 (e) covers it --

4 MR. ROTHFELD: But --

5 JUSTICE GINSBURG: -- and there's no reason
6 to refer to (h).

7 MR. ROTHFELD: But I think (h) reflects what
8 Congress had in mind in the statutory definition,
9 because in the provision that I'm referring to, Congress
10 said that if the parents went through a form of marriage
11 that was defective in some sense, nevertheless the child
12 would be deemed to be a child, which tells us that
13 marriage (a) was a significant part of what constitutes
14 childness as defined --

15 JUSTICE SCALIA: I don't -- I don't -- look,
16 when Congress says "child," "child" means child, and the
17 mere fact that Congress wrote that at an age when most
18 children were indeed children of married people doesn't
19 change the word "child." I mean, we don't go back and
20 say -- Congress often uses words that go beyond what --
21 what their immediate concern is, and here they used the
22 word "child."

23 MR. ROTHFELD: But --

24 JUSTICE SCALIA: You want us to probe their
25 mind and say, well, since 90 percent of all children

1 were children of married people, that's what they must
2 have meant by "child." I just don't think that follows
3 at all. "Child" means child.

4 MR. ROTHFELD: If I may, Your Honor,
5 Congress wrote a Federal definition of "child," and as
6 Mr. Miller acknowledged in his opening argument, when
7 Congress defined "child," it defined "child" to include
8 a number of things. The first thing that it defined was
9 a child is a child or adopted child and stepchild,
10 grandchild, stepgrandchild. Congress used the word
11 "child" to have a particular meaning, because it said a
12 child is a child and other things. The other things
13 that it mentioned were --

14 JUSTICE KAGAN: But, Mr. Rothfeld, I guess
15 the question is, when it says a child is a child, does
16 it mean a child is a child born in wedlock or a child is
17 just a child? And we know that Congress knew how to
18 distinguish between the two because Congress
19 distinguished between the two in this very Act in the
20 dependency provisions. It talks about the legitimate
21 child of such individual. Well, here it didn't add that
22 word. It just said "the child."

23 MR. ROTHFELD: But -- and I think the reason
24 it did that, I mean, as -- again, as Mr. Miller said,
25 Congress used the "child" in two senses. It used the

1 word "child" in the generic sense: Everyone who
2 qualifies for child benefits is a child. So, it said
3 "child" is, in that sense, a child, adopted child,
4 stepchild, so forth.

5 In the dependency section, Congress is
6 referring to all children, all children in that -- in
7 the generic sense, everybody who qualifies for benefits
8 as a child. And, therefore, Congress had to distinguish
9 between what we say it meant when it said a child is a
10 child, natural child of married parents --

11 JUSTICE KAGAN: Are there any other statutes
12 that you can point to around this time which support the
13 notion that when people said "child" they meant child
14 within a legal marriage?

15 MR. ROTHFELD: I can't point to specifically
16 that, because I think it was clear when Congress used
17 the word "child" that that's what they had in mind as a
18 generic matter. As I suggested, when --

19 JUSTICE KAGAN: I'm sorry. You can't point
20 to anything because it's so clear?

21 MR. ROTHFELD: In a sense, that's right. If
22 everyone knew what the word meant -- the word "child" was
23 used to define, I think, the category that people would
24 have had in mind when they thought of a child in the legal
25 sense.

1 JUSTICE GINSBURG: Mr. Rothfeld, don't you
2 run into a problem? Perhaps not in 1939, but since then
3 this Court has had a number of decisions that deal with
4 the distinction between children born in and out of
5 wedlock, and in some of those cases, it has held that
6 the distinction between the two is unconstitutional,
7 that there are no illegitimate children. All children
8 are legitimate, whatever their parents may be.

9 MR. ROTHFELD: That is true. But I think
10 the question is, what was the intent of Congress when it
11 wrote this statute in 1939?

12 JUSTICE GINSBURG: Yes, but if we are going
13 to apply those equal protection decisions to this
14 statute --

15 MR. ROTHFELD: Well, that -- that may
16 suggest that an unfavorable application of the statute
17 to children born out of wedlock would be
18 unconstitutional. But the question of whether or not
19 Congress intended to provide benefits to these
20 children --

21 JUSTICE KAGAN: Well, I suppose the question
22 is aren't you at the very least getting us into a
23 situation where we should interpret the statute the
24 Government's way because of constitutional avoidance
25 concerns?

1 MR. ROTHFELD: I think that the contrary is
2 true. I think that you should interpret it our way
3 because the Government's application sort of disfavors
4 children who are born through, you know -- through
5 assisted means by its incorporation of State law in
6 favor of --

7 JUSTICE SCALIA: Oh, it disfavors children
8 who are born after the father has died, which is in
9 accord with the title of the statute: survivors
10 benefits.

11 MR. ROTHFELD: But --

12 JUSTICE SCALIA: What's issue here -- what's
13 at issue here is not whether children that have been
14 born through artificial insemination get benefits. It's
15 whether children who are born after the father's death
16 get -- get benefits.

17 MR. ROTHFELD: But I think -- I suspect the
18 reason that Mr. Miller was resisting your questions on
19 that point is there is no question that children who are
20 born -- who are, quote, conceived naturally in the marriage
21 and are born after the father's death are deemed to be
22 dependents and receive benefits. That has been the
23 consistent position of the agency, and we think that
24 that's clearly right. So, I don't think that the fact
25 the child was born after death says dispositively that

1 they were not dependent upon --

2 JUSTICE SOTOMAYOR: I'm interested as to
3 what your definition of "child" is. Is it just a
4 biological offspring? Is it limited to a biological
5 offspring born of a particular marriage, but in what
6 context? Because we go back to Justice Ginsburg's
7 question of what happens if the -- if the decedent is
8 the mother. There's no question that she bore this
9 child. Married or unmarried, does it matter?

10 Does marriage matter only if it's the father
11 that's the decedent? What is your --

12 MR. ROTHFELD: We think --

13 JUSTICE SOTOMAYOR: If there is a sperm
14 donor, does any offspring that sperm donor have qualify?

15 MR. ROTHFELD: No, we -- we think not,
16 because what we think what Congress had in mind when it said
17 in the first part of clause (1) of the definition of
18 child is the child, the natural child -- and I use
19 natural as distinct from adopted child or stepchild who
20 are dealt with separately in the statute, which is why
21 we think it is clear that Congress was there talking
22 about natural children, biological children -- the
23 natural children of married parents, which we -- as I
24 say, the reason we think --

25 JUSTICE SOTOMAYOR: So, a mother who is

1 unmarried who bears a child, this child is not
2 automatically covered.

3 MR. ROTHFELD: We think that as Congress
4 wrote the statute in 1939, that's correct, and that
5 child would then have been referred to the intestacy
6 provision upon which the Government relies, and --

7 JUSTICE SOTOMAYOR: Oh, so there are
8 situations in which you think those provisions should
9 govern.

10 MR. ROTHFELD: Yes. Absolutely. We think
11 that those provisions were added as an additive
12 provision as a mechanism for children who do not qualify
13 for the definition to be deemed a child.

14 JUSTICE SOTOMAYOR: This is what was not
15 clear to me. So, you're -- you're not arguing that
16 "child" has just one natural meaning.

17 MR. ROTHFELD: We -- we argue that Congress
18 used the word "child" --

19 JUSTICE SOTOMAYOR: In whatever meaning you
20 could give it.

21 MR. ROTHFELD: We -- I wouldn't say that. I
22 think that when Congress said a child is a child, which
23 is the provision of the statute we were referring to,
24 it was distinguishing the child from the adopted child and
25 stepchild, and we think they were doing it in the

1 context of marriage because (a) that was the paradigm of
2 family relationships at the time; (b) we think the
3 reason -- what Congress was very concerned with
4 accomplishing in the statute was guaranteeing certainty
5 in the -- in parentage and the parental relationship.

6 And it set up a system of -- because in 1939
7 there were no genetic paternity tests, there was no --
8 it was impossible to be absolutely, scientifically
9 certain as to who the -- at least as to who the father was,
10 Congress set up a series of proxies to establish whether
11 or not the applicant for child benefits was in fact the
12 child.

13 The principal one of those was the marital
14 relationship because in 1939, as I think
15 Justice Scalia's question suggested, there was a very
16 strong, virtually per se conclusive presumption that a
17 child born in marriage was the biological natural child
18 of both the father and mother, of the married couple.
19 And so, the existence of the marriage was a way of
20 establishing in 1939 dispositively that the child was
21 the child of the parents, the child of the survivor --
22 of the insured whose eligibility for benefits are being
23 invoked here.

24 JUSTICE KAGAN: Mr. Rothfeld, I'm curious
25 why you didn't argue a different theory, which is that

1 (e) refers to all biological children whether in
2 marriage or outside of marriage, and then (h) is set up
3 for cases in which biological status is contested.

4 I mean, what would you think of that theory?

5 MR. ROTHFELD: Well, I -- we would certainly
6 embrace it if the Court were --

7 JUSTICE KAGAN: Well, why didn't you argue
8 it?

9 MR. ROTHFELD: I think -- we think that we
10 are arguing essentially a -- sort of a subset of that
11 theory. Our sense of what Congress was up to was that
12 it wanted to assure certainty, as I just said in
13 response to the previous question, in establishing
14 parentage. And the principal way in 1939 that Congress
15 could do that was by (a) invoking existence of a
16 parental relationship which established sort of as a per
17 se matter that the children born within the marriage
18 were the children of each of the married -- each member
19 of the married couple.

20 For parents -- children who did not fall
21 into that category, there was this additive provision,
22 section (h), which provided a mechanism for doing it,
23 and establishing that State intestacy law would
24 recognize this child as the child of -- typically it was
25 going to be the paternity that was contested -- the

1 child of the father, (h) established a mechanism for
2 doing that. So, I think that we are getting to the same
3 place --

4 CHIEF JUSTICE ROBERTS: What if --

5 MR. ROTHFELD: -- that your question
6 suggests.

7 CHIEF JUSTICE ROBERTS: What if the children
8 -- well, I don't want -- the Capato twins were conceived
9 4 years after of the death in this case? Would your
10 argument be the same?

11 MR. ROTHFELD: I think that our argument
12 would be the same, but as a practical matter, almost all
13 of these cases involve children who were born relatively
14 soon after.

15 CHIEF JUSTICE ROBERTS: Why is that? Why
16 would they all involve children born relatively soon
17 after?

18 MR. ROTHFELD: They don't necessarily have
19 to, but I think the practical reason why they do is that
20 it's often the case that the surviving mother has
21 children to produce a family sibling for an already
22 existing child as was -- as was the case --

23 CHIEF JUSTICE ROBERTS: Well, there's no
24 reason it couldn't take place 4 years after.

25 MR. ROTHFELD: There is no reason. That's

1 correct.

2 CHIEF JUSTICE ROBERTS: So, what happens if
3 the biological mother remarries or something and then
4 goes through this process? Does the child get double
5 survivor benefits or --

6 MR. ROTHFELD: Well, it --

7 CHIEF JUSTICE ROBERTS: Which -- I assume
8 you would argue that in that case the child is eligible
9 through two different routes.

10 MR. ROTHFELD: Potentially, that's correct.
11 There are rules in the Act that prevent double recovery
12 of survivor benefits. And so, I don't think that would
13 be an issue that would arise here. But --

14 JUSTICE GINSBURG: Mr. Rothfeld, these
15 children were born 18 months after the insured wage
16 earner died. If we look to other categories of
17 children, say, stepchildren -- and there is also one for
18 adopted children. For stepchildren, they qualify only
19 if they had that status no less than 9 months before the
20 wage earner died, and adopted children is also a
21 limitation. The stepchild and the adopted child --
22 there could never be any question of being born
23 18 months later. They wouldn't qualify. There's --
24 there is a time limit for the other children. And if
25 Congress had thought about this problem, maybe it would

1 have put a time limit on this, too.

2 MR. ROTHFELD: Well, I think that the
3 question that the Court has to confront here is,
4 Congress wrote a Federal definition of the word "child."
5 And it was -- sort of the first question in the case, I
6 think, is whether we are correct in our understanding
7 that, when Congress wrote this definition, all
8 applicants for child survivor benefits who fall within
9 that category, those defined categories, qualify.

10 And then we have -- if the answer to that is
11 "yes," and so children as defined in clause (1) of the
12 definition, which we think that the Capato children do,
13 whether or not all children so defined qualify for
14 benefits without regard to State intestacy law. If we
15 are right about that, then that raises the question what
16 is the meaning of "child" in the -- in the statute? And
17 we think that --

18 JUSTICE BREYER: The question is what -- you
19 haven't mentioned the text that suggests you're not
20 right, which is right in (h) which says: In determining
21 whether an applicant is a child of an insured, the
22 Commissioner shall apply such law as intestacy law.

23 Okay? That's what it says. Now, how do you
24 get out of that?

25 MR. ROTHFELD: Because --

1 JUSTICE BREYER: Because you say, well,
2 there's an implicit exception.

3 MR. ROTHFELD: No, no. That's not what we
4 --

5 JUSTICE BREYER: You're saying that that
6 doesn't apply. And so, I've listened carefully to your
7 reasons for saying why (h) doesn't apply when its
8 language seems to say it does apply, and I'm not sure of
9 why it doesn't apply. I mean --

10 MR. ROTHFELD: Because --

11 JUSTICE BREYER: Suppose that two parents
12 have lived together for 6 years and 4 months in State X,
13 and they have a child. Fine. The father dies. Were
14 they married? They never went through a ceremony. Is
15 there a common law marriage? Might it depend on the
16 State? Do you know the answer in every State? My
17 answer is: You don't know. And I don't know. And,
18 therefore, we have to look to the law of the State in
19 order to see whether that (e) is satisfied. Now, we
20 have to look to it to decide if they're married. Even
21 you say that.

22 So, what Congress did is it found a pretty
23 good shorthand way of saying where you look. We're not
24 going to worry about 6 years and 2 months; we're just
25 going to look at their intestacy law. That's, as I read

1 it, what it seems to say.

2 Now, I have been listening to you ,
3 and I don't see how you're going to save us from
4 even worse problems, particularly when I started looking
5 at the state of the artificial insemination and so
6 forth, and every State has a dozen different variations.
7 There are uniform acts. There are things you have to
8 acknowledge in writing. It's a very complicated
9 subject. And -- and that's why I am rather hesitant to
10 read it the way you want. But I want you to reply to
11 that.

12 MR. ROTHFELD: Well, the answer to the first
13 sentence of section (h), if that were the only thing in
14 the statute, I think that you would be right, but
15 there's a second sentence to (h), which says in -- in
16 applying State intestacy law, the -- the Commissioner is
17 supposed to look at the status of an applicant and
18 determine whether or not the status of the applicant is
19 the same as that of a child. And if so, the applicant
20 is deemed --

21 JUSTICE BREYER: Where is that sentence?

22 MR. ROTHFELD: That appears in -- it's --

23 JUSTICE BREYER: Is it the bottom of the
24 paragraph?

25 MR. ROTHFELD: It's the bottom of the

1 paragraph.

2 JUSTICE BREYER: It says, "Applicants who
3 according to such law would have the same status
4 relative to taking intestate property as a child or a
5 parent shall be deemed such."

6 MR. ROTHFELD: And that --

7 JUSTICE BREYER: So?

8 MR. ROTHFELD: But as a child. Why does it
9 -- it requires a comparison to someone who is a child.
10 "Child" is defined in section (h). If -- if -- I think
11 the problem with the Government's interpretation of the
12 first sentence of that -- of section (h) is that it
13 makes the -- the statute circular.

14 JUSTICE SCALIA: I haven't found the
15 sentence you're talking about. Where is it?

16 JUSTICE BREYER: At the bottom of the paragraph.

17 JUSTICE SCALIA: Bottom of what? Page what?

18 MR. ROTHFELD: It is at page 9a of the --
19 the appendix to the Government's brief.

20 JUSTICE BREYER: It's sort of like a -- you
21 say there is no board of tax -- sorry. I won't get into
22 that. But -- because they used the word "deemed." Is
23 that right?

24 MR. ROTHFELD: Well --

25 JUSTICE BREYER: That's the heart of your

1 argument there.

2 MR. ROTHFELD: That's our explanation of
3 what Congress was up to in the statute.

4 JUSTICE BREYER: Yes, all right.

5 MR. ROTHFELD: It --

6 JUSTICE BREYER: Okay.

7 MR. ROTHFELD: It was an additive provision
8 that says that if you are the same -- and I think this
9 is an important point, Justice Breyer. If you are the
10 same as a child, you are deemed to have child status.

11 You can't --

12 JUSTICE KAGAN: But then, Mr. Rothfeld, why can't
13 one just say, well, first sentence, who is a child? Look
14 to State law. Second sentence, when State law treats
15 other people as children, you should treat them as other
16 -- as children, too. So, the two sentences can cohere
17 fine. For children, look to State law, and also look to
18 State law to see who they treat just like children.

19 MR. ROTHFELD: But I -- I think that is not
20 a plausible reading of -- of the text, Justice Kagan.

21 JUSTICE BREYER: The obvious practical thing
22 is --

23 JUSTICE KAGAN: Well, why not?

24 JUSTICE BREYER: -- is that -- that, you
25 know, once you get beyond this and the child wasn't

1 even -- if he's conceived -- or what the father could
2 do, couldn't he just write a note and say this is my
3 child even if it's conceived later, and then wouldn't he
4 fall within one of these other exceptions, the exception
5 for being acknowledged?

6 MR. ROTHFELD: He -- he would not. The
7 father here did in fact write such a note, but I --

8 JUSTICE BREYER: He has acknowledged in
9 writing that the applicant is his son or daughter. What
10 about that one?

11 MR. ROTHFELD: I -- I think that the problem
12 is that that has to be during the life of the father.

13 JUSTICE BREYER: Does it? It doesn't say
14 it. I mean, it seemed to me easier to work with that
15 one than the one you're trying to work with. But I -- I
16 don't know. You're the -- but -- but anyway, what I'm
17 worried about here --

18 MR. ROTHFELD: Well, I -- well, I don't want
19 to argue against my position, Justice Breyer, but --

20 JUSTICE BREYER: No, no, I know.

21 (Laughter.)

22 JUSTICE BREYER: Okay. What I'm actually
23 worried about and want you to address is I just -- if we
24 were to adopt what you said, what they're concerned
25 about is many different applicants coming back later.

1 That's what State intestacy is concerned about. And you
2 don't really know who their parents is. Another thing
3 is there are already children who are eating up all of
4 the money. And then some new person shows up, and you
5 have to take the money away from the other children in
6 order to give it to this new child. And all the time,
7 you don't know if that's what the parent who is dead
8 really wanted.

9 And so, that's why the States have gone into
10 all kinds of writing requirements. And -- and you want
11 us to sort of -- applying this old law to new
12 technology, just overlook those complications.

13 MR. ROTHFELD: Well, Congress wrote a
14 Federal definition of "child," and it's not an
15 extraordinary thing for Congress to write a statute that
16 has language that applies in certain circumstances, and
17 the world changes. New developments require application
18 of the statutory text to those new developments.

19 If our reading of the statute is correct --
20 if what we think that Congress had in mind when it wrote
21 this statute was that it wanted to set in place
22 categories of applicants for child benefits as to whom
23 parentage in a relevant sense could be determined with
24 certainty, and it did that by focusing on the status of
25 the marital relationship between the parents, and it did

1 it by providing an alternative basis in section (h) --

2 JUSTICE GINSBURG: Well, that would be fine
3 if the statute said what you claim it says. It says a
4 child is a child of a wage earner. And you'd have to
5 import these things that Congress didn't say to get to
6 what you claim is the plain meaning. But what do you do
7 with the sentence in (h)(2)(A) that says "in determining
8 whether an applicant is a child of an insured individual
9 for purposes of this subchapter"? The subchapter is not
10 for purposes of (h), but for purposes of the entire
11 subchapter, which would include (e).

12 MR. ROTHFELD: Right. And I think actually
13 that is a helpful point for us, Justice Ginsburg,
14 because in determining whether an applicant is a child
15 for purposes of the subchapter, it's referring to the
16 use of the word "child" in the generic sense, in the
17 sense -- when -- when Congress said a child is defined
18 to include people who fall in these various categories
19 of children. So, everybody --

20 JUSTICE GINSBURG: But how could it do that
21 when the rest of the sentence says, "to determine
22 whether an applicant is a child for purposes of this
23 subchapter, the Commissioner shall apply the State law
24 of intestacy"?

25 MR. ROTHFELD: But I -- I think that -- that

1 these two sentences have to be read together as
2 accomplishing the same thing. What I think what the --
3 it's saying that in making the determination whether or
4 not a child qualifies for child benefits, that the
5 Commissioner -- applicants who according to such law
6 would have the same status relative to taking intestate
7 personal property as a child shall be deemed such.

8 I think one can't apply the statute without
9 knowing who a child is, because it -- it is directing
10 the Commissioner to engage in a comparison. It's
11 directing the Commissioner to say: Does this applicant
12 have the same status as a child?

13 JUSTICE KAGAN: Well, that's exactly right,
14 Mr. Rothfeld. But you have two choices. In the second
15 sentence, you do have two groups, and one has to be
16 compared to the other, which is children. The question
17 is, are children described by the first sentence of
18 that, or are children described by the (e) section?

19 So, you're just reading the first sentence
20 out of the statute and saying that the second sentence
21 totally subsumes the first sentence, and we have to go
22 back to (e).

23 But the first sentence exists. And it says:
24 Who are children? Children are who they are under State
25 law.

1 MR. ROTHFELD: No, and I -- I think that
2 what it's telling the Commissioner to do is to determine
3 whether or not -- when an applicant who does not fall
4 within one of the defined categories in section (e)
5 applies for benefits, the Commissioner is to determine
6 whether or not that child has the same status relative
7 to State law as the child as defined in the definitional
8 section.

9 The Congress -- as I say, Congress said
10 expressly that a child as defined in section 416(e) of
11 the statute qualifies for benefits. And so, I think it
12 establishes a Federal standard as to what -- what a
13 child is for purposes of the Act.

14 The Court has to determine what that
15 standard means to apply to any particular child.

16 CHIEF JUSTICE ROBERTS: Counsel, under
17 Chevron, you lose if the statute is ambiguous. Is there
18 any reason we shouldn't conclude based on the last hour
19 that it's at least ambiguous?

20 (Laughter.)

21 MR. ROTHFELD: Well --

22 JUSTICE KAGAN: It's a mess.

23 (Laughter.)

24 MR. ROTHFELD: I think the problem is that
25 we are dealing with new technologies that Congress

1 didn't -- wasn't anticipating at the time. I think --
2 one of the questions that was suggested to my friend,
3 Mr. Miller, by Justice Alito, I think, that if the child
4 who is the -- in 1939, who is the child of married
5 parents, natural child of married parents, sought
6 benefits under this statute and they were denied because
7 some State developed an aberrant law of intestacy and
8 said that such child would not qualify, would not be
9 deemed to be the child of their parents, I think that
10 that would have been regarded as a clear misreading of
11 the statute.

12 JUSTICE SOTOMAYOR: How -- do you think that
13 Congress thought of either of these situations as real
14 possibilities? Do you really think that the 1939
15 Congress, or even the one that passed the later statute,
16 ever thought that a State would disinherit a naturally
17 born -- all naturally born children -- or that children
18 could be born 18 months, 4 years, 50 years later?

19 MR. ROTHFELD: Well --

20 JUSTICE SOTOMAYOR: They weren't thinking of
21 either.

22 So, the question becomes, given the language
23 of (h) that says define "child" this way throughout the
24 subchapter, why shouldn't we give that directive its
25 plain meaning?

1 That's really the argument that you have to
2 convince us of.

3 MR. ROTHFELD: Well, if we have to convince
4 you not to give the statute its plain reading, then we
5 will -- not going to prevail. I certainly recognize
6 that -- that plain meaning has to control. And as I
7 suggested at the outset, the reason we think we prevail
8 is that the plain meaning of this statute as was written
9 in 1939, as it would have been understood by the 1939
10 Congress that adopted it, was that the natural children
11 of married parents, the paradigm of the situation of the
12 child at that time, would fall into this category. Now,
13 it is certainly true, as you say --

14 JUSTICE SOTOMAYOR: But that's because every
15 State law recognized them as such as well, correct?

16 MR. ROTHFELD: And every State law -- and I
17 would put it the other way: Every State law recognized
18 them as such because that was the way in which children
19 were understood -- the meaning of the term "child" was
20 understood at the time. And --

21 JUSTICE SCALIA: Mr. --

22 JUSTICE GINSBURG: Well, if we're going back
23 to 1939 understanding, wasn't it also understood that
24 the marriage ends when a parent dies?

25 MR. ROTHFELD: Well --

1 JUSTICE GINSBURG: So, there wouldn't be --
2 a child that's born 18 months after the father died
3 wouldn't be considered a child of a marriage because the
4 marriage would have ended.

5 MR. ROTHFELD: Well, I think that one has to
6 look at what Congress at the time -- I guess I would put
7 it this way: If -- if the Court were to accept our view
8 that Congress had in mind the children of married
9 parents, the question is whether any particular child
10 falls in the box Congress would have regarded as the
11 marital box or the non-married box.

12 Situations like this simply could not have
13 arisen in 1939. Congress would not have specifically --
14 as Justice Sotomayor said, Congress would not have
15 specifically had in mind, contemplated, the question of
16 posthumous conception because --

17 JUSTICE SCALIA: Mr. Rothfeld, I know that
18 the Government didn't rely on it, but just to satisfy my
19 curiosity, how -- how can this child satisfy the
20 requirements of (d)(1)(C), with regard to dependency
21 upon the father?

22 MR. ROTHFELD: I guess two responses to
23 that. One, as Mr. Miller said, this -- that issue was
24 remanded to be addressed by --

25 JUSTICE SCALIA: I understand. But --

1 MR. ROTHFELD: But the answer --

2 JUSTICE SCALIA: -- that is connected with
3 this other issue.

4 MR. ROTHFELD: The answer -- the answer why
5 we think -- and if I may, Mr. Chief Justice, answer.

6 The reason that we think we would prevail on
7 that question is because, as Mr. Miller said, Congress
8 created a -- an irrebuttable presumption that the child
9 of -- the legitimate child of -- of a parent is deemed
10 to have been dependent upon that parent at the time of
11 the parent's death. And that --

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. ROTHFELD: Thank you very much, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: Mr. Miller, you have
16 4 minutes.

17 REBUTTAL ARGUMENT OF ERIC D. MILLER

18 ON BEHALF OF THE PETITIONER

19 MR. MILLER: Thank you, Mr. Chief Justice.

20 Since 1940, the Social Security
21 Administration has consistently interpreted the Act to
22 require all natural children to establish their
23 eligibility under 416(h), either by establishing that
24 they can inherit under State law or by showing that they
25 qualify under one of the express exceptions --

1 JUSTICE KAGAN: Mr. Miller, what do you
2 think is wrong with the alternative theory that -- that
3 I suggested, that (e) is all biological children in a
4 marriage, not in a marriage, doesn't matter; and that
5 (h) is designed to deal with situations in which
6 biological status is contested?

7 MR. MILLER: Well, I -- the principal
8 problem with that, I think, is that it lacks -- it's not
9 supported by the text of what 416(h) says.

10 JUSTICE KAGAN: But why do you think that?
11 What would you point to in (h) that is inconsistent with
12 the theory that I just gave you?

13 MR. MILLER: I would point to (h)(2)(B) and
14 (h)(3), both of which are -- are the exceptions to allow
15 people to qualify when they can't establish State
16 intestacy rights, and both of which refer to someone who
17 is the son or daughter of the insured person but is not,
18 and is not deemed to be, the child.

19 So, if biological parentage were -- were
20 what was determinative under (e), and if you only looked
21 at (h) when there was some question about biological
22 parentage, it would -- the idea of someone who is a son
23 or daughter but isn't a child would make no sense.

24 And so, to give effect to those meanings --
25 to give effect to those provisions, to give them

1 meaning, 416(h) has to have broader application than
2 just in cases of disputed biological parentage. It is
3 in fact the gateway through which everyone has to pass,
4 and that's how the -- the agency has -- has so regarded
5 it.

6 The final point I would make is simply that,
7 even if the statute were silent on whether to look to
8 State law, it would be appropriate for the Court to
9 hesitate, I think, before creating what in effect is a
10 body of Federal common law about parental status. Here,
11 of course, there's an express textual command the
12 other way. And it would be particularly inappropriate
13 to create, as Respondents are urging, a Federal rule
14 that goes well beyond what any State would allow in the
15 context of --

16 JUSTICE ALITO: Why doesn't the last
17 sentence of -- what is it -- (h)(2)(A) show that
18 Congress had in mind a certain idea of a category of
19 people who were indisputably children? I don't see how
20 you can get around that, because it says what you're
21 looking for under State law is to determine whether
22 someone has the same status relative to taking intestate
23 personal property as a child.

24 MR. MILLER: I think the answer to that is
25 the one suggested by Justice Kagan a few minutes ago,

1 and that is that you have to read the first and second
2 sentences together. And the first sentence sets up a
3 general rule that you're looking to State law, and then
4 the second is about people who would have the same
5 status as children under State law. So, that the basic
6 background definition in either case is coming from
7 State law.

8 JUSTICE ALITO: So, if the person is a
9 child -- you have applicants who according to State law
10 had the same status as a child, a person has that status
11 because the person is a child, and the person is deemed
12 to be a child, it seems very clear that that shows that
13 (h) -- that this provision is directed to people that
14 Congress in 1939 did not think fell within this paradigm
15 of a child.

16 MR. MILLER: The -- well, the second --
17 maybe, I may be misunderstanding you, but our view of
18 what the second sentence does is that it covers people
19 who are not treated as children, who are not children
20 under State law but nonetheless have the inheritance
21 rights of children. So, principally the -- in the case
22 of equitable adoption, those people would have the
23 status of children.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Miller, Mr. Rothfeld.

1 The case is submitted.

2 (Whereupon, at 11:03 a.m., the case in the
3 above-entitled matter was submitted.)

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