SC22-1342

In the Supreme Court of Florida

KATHLEEN STEELE,
Appellant,

v.

KILOLO KIJAKAZI, Acting Commissioner of the Social Security Administration,
Appellee.

On Review of Certified Questions from the United States Court of Appeals for the Eleventh Circuit
Case No. 20-11656

AMICUS BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF APPELLANT

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IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The Attorney General submits this brief for the State of Florida as amicus curiae in support of Appellant as to the second question certified by the United States Court of Appeals for the Eleventh Circuit.[1] The Attorney General may appear in any suit in which the State has an interest. *See* § 16.01(4), Fla. Stat.

The second certified question concerns the inheritance rights of children conceived through assisted reproductive technology with a deceased person's reproductive cells. *See Steele v. Comm'r of Soc. Sec.*, 51 F.4th 1059, 1065 (11th Cir. 2022). The Social Security Administration and federal district court in this case incorrectly interpreted Florida law to categorically prohibit posthumously conceived children from inheriting intestate property from their predeceased parent. The State has an interest in resisting the categorical deprivation of intestacy rights for an entire class of children based on a misinterpretation of Florida law.

[1] The State takes no position on the first certified question, addressing the proper construction of the decedent's will in this case and whether it is sufficient to confer intestacy rights on posthumously conceived children under Section 742.17(4).

SUMMARY OF ARGUMENT

The Eleventh Circuit certified two questions to this Court: (1) whether the posthumously conceived child in this case, P.S.S., was "provided for" in the decedent's will under Section 742.17(4), Florida Statutes, and (2) whether a deceased parent's "provid[ing] for" a posthumously conceived child in a will permits the child to inherit the deceased parent's intestate property. *Steele*, 51 F.4th at 1065. The answers to those questions will determine whether P.S.S. and other posthumously conceived children in Florida can obtain child's insurance benefits under the Social Security Act, which defines a decedent's child as a child who could inherit from the decedent under state intestacy law. *Id.* at 1063.

Although the Eleventh Circuit posed the questions in that order, question two presents the preliminary issue in this case: whether a posthumously conceived child can ever inherit intestate property from the deceased parent's estate under Florida law. The answer to that predicate question will have broad implications for the inheritance rights of posthumously conceived children in Florida. The State agrees with Appellant that Section 742.17(4) allows parents to

draft their wills to confer intestacy rights on children posthumously conceived with the parents' reproductive cells.

With the rise of assisted reproductive technology and the ability to cryopreserve reproductive cells, the conception of a child using the reproductive cells of a deceased person is becoming increasingly more common. Courts have struggled to decide how posthumously conceived children fit into their states' intestate-succession schemes, which are often based on statutes and principles that long predate the technology necessary to posthumously conceive a child.

Florida, like many states, has attempted to resolve this confusion with legislation. The Florida Legislature enacted Section 742.17(4) to clarify the legal relationship between a posthumously conceived child and the deceased person whose reproductive cells were used, and thus establish the nature of any inheritance rights. The statute dictates that a posthumously conceived child "shall not be eligible for a claim against the [predeceased parent's] estate unless the child has been provided for by the [predeceased parent's] will." § 742.17(4), Fla. Stat.

That statute creates a simple legal test: if a posthumously conceived child is provided for in the predeceased parent's will, then the child has the same claims against the estate that any child would, including a claim to intestate property. If the child is not provided for in a will, then it has no claims as a child of the decedent. That test flows directly from the statute's language. The first clause states the rule that posthumously conceived children generally do not receive the legal rights that Florida law provides a decedent's children. But that clause is immediately followed by the word "unless," introducing the event in which that rule does not apply—when the decedent provided for posthumously conceived children in a will. Thus, the statute simply imposes a condition precedent—being provided for in the predeceased parent's will—to a posthumously conceived child's pursuing claims against the estate, including claims to inherit property either by will or through intestacy.

The Social Security Administration, however, did not view Section 742.17(4) as creating a legal test but rather a categorical prohibition on posthumously conceived children enjoying any rights whatsoever as a child of their predeceased parent—only allowing them to

inherit through a will. That reading, however, is contrary to the ordinary meaning of the term "unless," which introduces a condition that, when satisfied, negates the preceding clause. The statute does not, as the Administration claims, state that the only way for a posthumously conceived child to take property is through a will. It says that such a child is "eligible for a claim against the decedent's estate"—including the intestate estate—*if* "the child has been provided for by the decedent's will." A contrary reading would be out of step with many states that have similar statutes and would needlessly deprive posthumously conceived children of intestate property, despite the predeceased parent's clear intent to afford that child inheritance rights.

ARGUMENT

Section 742.17(4) allows posthumously conceived children to inherit from their predeceased parent's intestate estate if provided for in a will.

The Social Security Act provides a monthly benefit to specified surviving family members of a deceased insured wage earner. *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 547 (2012). One of those benefits, "child's insurance benefits," provides benefits to the decedent's

minor or disabled children. *See id.* To determine whether an individual is the decedent's "child," the Act instructs the Social Security Administration to consult the intestacy laws of the decedent's domicile and determine whether the individual could inherit from the decedent through intestacy. *See id.* at 544–45.

Phillip Steele was an insured wage earner under the Social Security Act. *See Steele*, 51 F.4th at 1060. Before his death, he executed a will that listed his then-current children but also stated that "[t]he terms 'children' and 'lineal descendants' shall include those later born or adopted and whenever used in this instrument shall be equivalent to blood relationship and relationship by adoption." *Id.* at 1061. He also left sperm samples to be cryopreserved at a fertility clinic. *Id.*

After Phillip's death, his widow, Kathleen Steele, conceived a child, P.S.S., through in vitro fertilization using Phillip's sperm samples. *Id.* When P.S.S. was born seventeen months after Phillip's death, Kathleen applied to the Social Security Administration for child's insurance benefits on behalf of P.S.S. *Id.* The Administration rejected the application, concluding that P.S.S. is not Phillips's

"child" under the Social Security Act because Section 742.17(4) of the Florida Statutes allows P.S.S. to inherit only though Phillip's will—not through intestacy—and that even so, P.S.S. is not "provided for" in Phillip's will. *Id.* at 1062.

Kathleen litigated those two issues to the Eleventh Circuit, which has certified both questions to this Court. The State submits that the Social Security Administration incorrectly concluded that Section 742.17(4) categorically bars posthumously conceived children[2] from inheriting from their predeceased parent through intestacy. The statute merely requires that, to have intestacy rights, posthumously conceived children must be provided for in a will. But the State takes no position on whether P.S.S. was "provided for" in Phillip's will.

[2] For purposes of this brief, "posthumously conceived child" refers to any child conceived from the eggs or sperm of persons who died before the transfer of their eggs, sperm, or embryos to a woman's body. *See* § 742.17(4), Fla. Stat.

Below, we describe relevant background principles of Florida inheritance law; discuss how the issue has recently emerged with advances in assisted reproductive technology; and explain why Section 742.17(4) favors Kathleen's position.

A. Background principles of inheritance under Florida law.

Some background is helpful. A deceased person's estate passes either as the decedent directed in a will or to the decedent's heirs under the laws of intestate succession. *See* § 732.101(1), Fla. Stat. A decedent can also do both, devising some property to specific people through a will while allowing the remainder of the estate to pass under the intestacy laws. *See Aldrich v. Basile*, 136 So. 3d 530, 534–35 (Fla. 2014). Property not effectively devised by will is known as intestate property or the intestate estate. *See* § 732.101(1), Fla. Stat. As an example: if Andrew dies with an estate worth $500,000 and his will devises $100,000 to his children but is silent as to the rest of the estate, the remaining $400,000 is intestate property and passes to Andrew's heirs accordingly.

Intestacy laws provide a sequence for the distribution of intestate property to a decedent's heirs. *See* §§ 732.102, 732.103, Fla.

Stat. Although most relatives qualify as heirs, spouses and descendants are the first priority. *See* §§ 732.102, 732.103, Fla. Stat. If a decedent leaves a surviving spouse and neither the decedent nor the spouse has any descendants who are not also descendants of each other, the spouse takes the entire intestate estate. § 732.102(1)–(2), Fla. Stat. If either the decedent or the spouse has descendants who are not descendants of the other, then the spouse takes half of the intestate estate and the other half is divided among the decedent's descendants. § 732.102(3)–(4), Fla. Stat. If, on the other hand, the decedent leaves no surviving spouse, the entire intestate estate is divided among the decedent's descendants. § 732.103(1).

In addition to receiving intestate inheritance rights as descendants of the decedent, children may have additional claims against the estate. Those may include a claim to prevent the devise of the decedent's homestead property, *see* § 732.4015(1), Fla. Stat., a claim to certain specified items of personal property deemed exempt from the decedent's creditors, *see* § 732.402, Fla. Stat., and a "family allowance"—money to support the child while the estate is being administered, *see* § 732.403, Fla. Stat.

B. Advances in technology have raised questions about the application of traditional intestacy laws to posthumously conceived children.

As the Eleventh Circuit noted, the rise of assisted reproductive technology and the ability to conceive children using deceased persons' reproductive cells have created questions about how to apply preexisting intestacy law. *See Steele*, 51 F.4th at 1060. Because posthumously conceiving a child was unimaginable when most intestacy laws were written, the application of those laws to posthumously conceived children can be challenging.

In Florida, for example, heirs of a decedent's intestate property include the decedent's "descendants." § 732.103(1), Fla Stat. A "descendant" is a "lineal descendant" or "a person in any generational level down the [decedent's] descending line and includes children." § 731.201(9), Fla. Stat. A child conceived from the reproductive cells of a deceased parent is the genetic child of that parent and thus unquestionably the parent's "lineal descendant." *See Lineal Descendant*, Black's Law Dictionary (11th ed. 2019) ("A blood relative in the direct line of descent"); *Natural Child*, Black's Law Dictionary (11th ed. 2019) ("A child by birth" who "is genetically related to the mother and

father"); *Biological Parent*, Black's Law Dictionary (11th ed. 2019) ("The woman who provides the egg or the man who provides the sperm to form the zygote that grows into an embryo"). In that sense, posthumously conceived children would seem to naturally qualify as heirs under traditional principles of intestate succession. Indeed, some courts have held as much even though their states had no statute specifically addressing posthumous conception. *See Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002) ("In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of 'issue' under the Massachusetts intestacy statute."); *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000) ("[O]nce we establish . . . that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent . . . .").

But treating posthumously conceived children as lineal descendants of the decedent for inheritance purposes creates tension with another traditional aspect of intestacy law—that inheritance rights are established at the decedent's death. *See* § 732.101(2), Fla. Stat. ("The decedent's death is the event that vests the heirs' right to

the decedent's intestate property."). Applying that principle, posthumously conceived children might appear ineligible to inherit the predeceased parent's intestate property because the children did not exist at the decedent's death. And for that reason, other courts have held that traditional intestacy law alone does not allow posthumously conceived children to inherit from their predeceased parents. *See Amen v. Astrue*, 822 N.W.2d 419, 422 (Neb. 2012) (holding that a posthumously conceived child does not "survive" its predeceased parent and thus cannot inherit under the state's intestacy laws).

But that traditional rule is also not absolute. Many states, including Florida, have long specified that children conceived before but born after the death of one of their parents can inherit from the predeceased parent's intestate estate despite having not yet been born at the decedent's death. *See* § 732.106, Fla. Stat. So, for example, if Andrew and Barbara conceive a child but Andrew dies before its birth, the child may still inherit Andrew's intestate property. *See id.*

Before the advent of assisted reproductive and cryopreservation technology, such children were the only possible posthumous children. Now, however, posthumously conceived children are possible. Charlie is a posthumously conceived child of Andrew and Barbara if he was conceived from their reproductive cells and transferred to a uterus, not merely born, after the death of either Andrew or Barbara.

Given this prospect, some states have addressed the intestacy rights of posthumously conceived children by statute. Many of these states allow posthumously conceived children to inherit through intestacy as long as the decedent indicated in writing that he intended his reproductive cells to be used to conceive children after his death. New York and California, for example, allow a posthumously conceived child to inherit from the predeceased parent's intestate estate if the parent consented in writing to the posthumous conception and the children are in utero within two years of the predeceased parent's death. N.Y. Est. Powers & Trusts Law § 4-1.3; Cal. Prob. Code § 249.5(a), (c). Oregon allows posthumously conceived children to inherit from their predeceased parent's intestate estate if the predeceased parent provided for posthumously conceived children in a will

or a trust, the predeceased parent consented in writing to the posthumous conception, and the child is in utero within two years of the predeceased parent's death. Or. Rev. Stat. § 112.077(4). The Florida Legislature passed Section 742.17(4) in 1993 with the same goal—to resolve confusion about the application of intestacy laws to posthumously conceived children.

C. Section 742.17(4) simply establishes a condition for a posthumously conceived child to receive intestate-succession rights.

Like the New York, California, and Oregon statutes, Section 742.17(4) clarifies the application of Florida intestacy law to posthumously conceived children by specifying the circumstances where they have full inheritance rights as children. And like those statutes, Section 742.17(4) requires that the predeceased parent have indicated in writing the intent to provide as a parent for any posthumously conceived children—in Florida's case, via a will. If the child is "provided for" in the will, it may inherit from the intestate estate; and if not, then it "shall not." That follows from Section 742.17(4)'s plain text, context, purpose, and history. The Social Security Administration's arguments to the contrary are unpersuasive.

1. Section 742.17(4) states that a posthumously conceived child "shall not be eligible for a claim against the [predeceased parent's] estate unless the child has been provided for by the [predeceased parent's] will." That plain language creates a straightforward legal test for determining when a posthumously conceived child has claims against the estate like any other child of the decedent. The statute accomplishes that by imposing a single condition precedent on a posthumously conceived child's claim to his deceased parent's intestate estate. *See Steele*, 51 F.4th at 1064 (explaining that "the phrase 'unless the child has been provided for by the decedent's will' . . . can be reasonably read as a condition for a posthumously conceived child to inherit a share of the decedent's property intestate"). If that condition is satisfied—that is, the predeceased parent "provided for" the child in a will—then the posthumously conceived child is eligible for any claim against the decedent's estate that Florida law otherwise provides to children, including a claim to inherit intestate property.

A breakdown of the text makes that clear. The first clause instructs that a posthumously conceived child "shall not be eligible for

a claim against the [deceased parent's] estate." § 742.17(4), Fla. Stat.[3] But that language does not stand by itself—rather, the next clause specifies that it operates "unless the child has been provided for by the [deceased parent's] will." *Id.* The term "unless" is a disjunctive conjunction that is generally interpreted as introducing a condition that, if met, categorically negates the clause that precedes it. *See State v. Byars*, 823 So. 2d 740, 742 (Fla. 2002) ("The plain intention of the Legislature's use of the disjunctive 'unless' was to create an exception to the preceding inclusive statement."). And that makes sense because "unless" generally means "except on the condition that." *Unless*, *Merriam-Webster.com Dictionary* (2022); *see also Steele*, 51 F.4th at 1064 (relying on the Merriam-Webster definition); *Fisk Elec. Co. v. Solo Constr. Corp.*, No. 07-cv-22120, 2009 WL

[3] Section 731.201(4), Florida Statutes, defines the term "claim" to include only claims for personal liability of the decedent and funeral expenses—not claims for inheritance. But that definition applies only to the Probate Code and other specified chapters of the Florida Statutes, not including chapter 742. *See* § 731.201, Fla. Stat. Thus, the term "claim" in Section 742.17(4) takes its ordinary meaning and includes claims for intestate inheritance. *See Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000) (noting that undefined statutory terms take their ordinary meaning); *Claim (3)*, *Black's Law Dictionary* (11th ed. 2019) ("A demand for money, property, or a legal remedy to which one asserts a right . . . .").

10669104, at *3 (S.D. Fla. May 12, 2009) (noting that "unless" means "except on the condition that").

In other words, Section 742.17(4) instructs that posthumously conceived children do not possess claims otherwise available to a decedent's children "except on the condition that" the decedent provided for the child in his will. If that condition is met, then the preceding instruction does not apply and the child is indeed "eligible for a claim" against the "estate." *See Byars*, 823 So. 2d at 742 (holding that the word "unless" following the elements of the burglary statute created a condition that, if met, categorically prevented application of the statute). If the rule barring posthumously conceived children from enjoying the legal claims of a decedent's child does not apply, then the children may exercise rights as the decedent's children. Thus, they naturally possess any claim that Florida law provides to a decedent's children.

Context underscores that Section 742.17(4) confers full legal-child status on posthumously conceived children who are "provided for" in their predeceased parent's will. That law appears in the Domestic Relations Code of the Florida Statutes in Chapter 742, titled

"Determination of Parentage." *See Horowitz v. Plantation Gen. Hosp. L.P.*, 959 So. 2d 176, 182 (Fla. 2007) (looking to the title of the chapter as relevant context in interpreting the meaning of a statute). In enacting Section 742.17(4), the Legislature was not concerned only with posthumously conceived children's receipt of property. Rather, the chapter title "Determination of Parentage" suggests that the focus of Section 742.17(4) is on establishing rules to determine when a posthumously conceived child and the deceased parent will be deemed to have a parent–child relationship in the eyes of the law. So understood, Section 742.17(4) provides that no parent–child relationship exists between a decedent and a posthumously conceived child unless the decedent assumed legal parentage by "provid[ing] for" any posthumously conceived children in a will.

That understanding best comports with the evident purpose of the statute. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 313 (Fla. 2006) (explaining that a statute's text should be interpreted "consistent with the statute's purpose"). Section 742.17(4) mitigates a primary concern about posthumously conceived children inheriting from the predeceased parent: that the predeceased parent never

wanted to conceive postmortem children and would not have intended to provide them an inheritance. Because deceased persons no longer have control over their genetic material or the distribution of their property, using their reproductive cells to conceive children they did not intend and using them to attack the estate raises concerns of fairness and fraud on the estate. *See Woodward*, 760 N.E.2d at 269–70; Cassandra M. Ramey, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 Nev. L.J. 773, 793–94 (2017). But when deceased persons provide for posthumously conceived children in their wills, thereby indicating their intent to be parents of such children, those concerns fall away.

By including the requirement that a predeceased parent "provide for" posthumously conceived children as a precondition to their receipt of intestacy rights, the Legislature resolved those concerns in a targeted way. Critically, however, addressing those concerns did *not* require—and the Legislature did not purport to require—barring posthumously conceived children from inheriting from an intestate estate outright.

The Legislature's solution to this problem was of a piece with the efforts of many other states. Nearly every state that has adopted similar legislation requires some sort of proof—usually in writing—that the predeceased parent intended to have posthumously conceived children. Section 742.17(4) was among the first statutes in a broader nationwide trend to grant intestacy rights to some posthumously conceived children. At least sixteen other states have since granted intestate inheritance rights to posthumously conceived children in at least some circumstances.[4] And Section 742.17(4)'s language is analogous to those statutes in that nearly all impose as a condition on a posthumously conceived child's right to inherit that the predeceased parent have indicated in writing an intent to provide for the child. Oregon, like Florida, even requires that the predeceased

[4] *See* Ark. Code Ann. § 28-9-221; Cal. Prob. Code § 249.5(a)–(c); Colo. Rev. Stat §15-11-120(11); Conn. Gen. Stat. § 45a-785(a); 755 Ill. Comp. Stat. 5/2-3(a)–(b); Iowa Code § 633.220A(1); La. Stat. Ann. § 9:391.1(A); Me. Stat. tit. 19-a, § 1927; *id.* tit. 18-C, § 2-118; Md. Code Ann., Est. & Trusts § 3-107(b); N.H. Rev. Stat. Ann. §§ 168-B:2(IV), 168-B:14; N.M. Stat. Ann. § 45-2-120(K); N.Y. Est. Powers & Trusts Law § 4-1.3(b); N.D. Cent. Code § 30.1-4-19(11); Or. Rev. Stat. § 112.077(4); R.I. Gen. Laws §§ 15-8.1-707(b), 33-1-4; Va. Code Ann. §§ 20-158(B), 64.2-204.

parent have demonstrated that intent by providing for posthumously conceived children in a will or a trust. *See* Or. Rev. Stat. § 112.077(4).

The contrary interpretation would place Florida in the extreme minority of states that have legislatively addressed this issue. Among states with legislation addressing the status of posthumously conceived children, the State is aware of only one—Minnesota—that categorically precludes intestate inheritance rights. *See* Minn. Stat. § 524.2-120(10). And that statute looks nothing like Section 742.17(4). Indeed, it is more explicit in barring posthumously conceived children from inheriting through intestacy, stating simply that posthumously conceived children are not legal children of the predeceased parent. *See id.* Notably, the Florida Legislature did not exclude posthumously conceived children from the definition of "child" for intestate-succession purposes. *See* § 731.201(3), Fla. Stat. (defining "child" under the Probate Code). It chose instead to align Florida with the policy that has become the clear trend in the United States: allowing posthumously conceived children to enjoy the rights of a child when the predeceased parent so intended.

In the event of any lingering doubt, Section 742.17(4)'s legislative history confirms this understanding. The Florida House Committee on Health Care described Section 742.17(4) as "precluding inheritance rights for any unused preembryos *absent prior arrangement*." Fla. H.R. Comm. on Health Care, Final Bill Analysis & Economic Impact Statement, CS/HB 703 1993 Sess., at 3 (Apr. 20, 1993) (emphasis added). Notably, the report makes no mention of inheriting only through a will. It says only that the statute requires a "prior arrangement" for posthumously conceived children to enjoy the full inheritance rights of a child.

2. The Social Security Administration sees things differently. On its telling, Section 742.17(4) does not create a legal test for deciding when a posthumously conceived child may inherit from the predeceased parent's intestate estate. Instead, it says, the law sets out a categorical rule barring any such intestate inheritance. To explain away the phrase "unless the child is provided for in the decedent's will," the Administration surmises that the phrase merely authorizes posthumously conceived children to claim property devised to them in a will.

To illustrate, as the Administration sees it, a posthumously conceived child who is devised $10,000 of Andrew's estate may inherit that $10,000 but, unlike Andrew's other children, may not inherit from Andrew's intestate estate. And that is true even though Andrew embraced that child as his own by "provid[ing] for" it in his will.

That is wrong. First, the Administration's argument changes the meaning of "unless" from "except on the condition that"—the generally accepted meaning of "unless"—to "except to the extent that." That is, according to the Administration, Section 742.17(4) deprives a posthumously conceived child of claims for property ordinarily enjoyed by a decedent's children except to the extent that the decedent devises the child property in a will. But "unless" does not mean "except to the extent that." *See Pub. Serv. Comm'n of N.Y. v. Mid-La. Gas Co.*, 463 U.S. 319, 326–27 & n.8 (1983) (distinguishing between the two and declining to apply the "except to the extent that" limitation where statute said only "unless"). "Unless" renders the preceding rule statement categorically inapplicable when the specified condition is met, whereas "except to the extent that" creates only a partial exception, leaving the rule statement largely applicable. *See United States*

v. Thomas, 999 F.3d 723, 739 (D.C. Cir. 2021) (Henderson, J., concurring) ("'[U]nless' and 'except to the extent' do not have identical meanings. *Unless* denotes an exception; *except to the extent* also denotes an exception but introduces detail about the scope of the exception."). Nothing in the statute's text limits the scope of the "unless" clause to "except to the extent that." This Court should not read such a limitation into the word "unless." *See State v. Peraza*, 259 So. 3d 728, 733 (Fla. 2018) (noting that the Florida Supreme Court will not read a meaning into a statute not "expressed in the [statute's] phraseology" (quotation omitted)).

Had the Legislature meant such a thing, it could have said so in numerous ways that would have been far more natural than the language it *did* use. In fact, it has done so with other categories of children. The statutory definition of "child" for inheritance purposes, for instance, specifically "excludes any person who is only a stepchild, a foster child, a grandchild, or a more remote descendant." § 731.201(3), Fla. Stat. To achieve what the Administration argues Section 742.17(4) does, the Legislature could simply have added posthumously conceived children to the list of categories of children

excluded from that definition. That the Legislature did not do so shows that posthumously conceived children are not categorically disqualified from inheriting intestate property from their predeceased parent. *See Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017) ("Under the canon of construction *expressio unius est exclusio alterius*, we conclude that the Legislature purposefully excluded items not included in a list.").

The Administration's reading could also have significant effects beyond Social Security benefits. Because the Florida Probate Code also defines "child" as one who is eligible to inherit intestate property as a child, *see* § 731.201(3), Fla. Stat., the Administration's interpretation, if adopted, would mean that a posthumously conceived child can never be considered the predeceased parent's child under the Probate Code. And if not the predeceased parent's child, then the child has no legal relationship to anyone in the predeceased parent's family. So not only would the Administration's interpretation categorically bar posthumously conceived children from ever inheriting intestate property from their predeceased parent, but it could also categorically bar them from ever inheriting intestate property from

any relative on their predeceased parent's side—such as grandparents, siblings, aunts, or uncles. Section 742.17(4) does not require that.

CONCLUSION

Section 742.17(4) allows posthumously conceived children to inherit from their predeceased parent's intestate estate if the parent "provided for" them in a will. The second certified question should be answered in the affirmative.

Dated: December 23, 2022

Respectfully submitted,

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I certify that the size and style of type used in this notice is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045(b), and that this brief contains 4,791 words in compliance with Fla. R. App. P. 9.370(b).

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