

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT)
OF HEALTH AND SOCIAL SERVICES,)
ADAM CRUM, in his official capacity)
as Commissioner of the Department,)
OFFICE OF CHILDREN’S SERVICES,)
and KIM GUAY, in her official capacity)
as Director of OCS,)

Appellants/Cross-Appellees,)

v.)

Z.C., through his next friend, LORENZ)
KAUFMAN, on behalf of himself and)
those similarly situated,)

Appellees/Cross-Appellants.)

Supreme Court No. S-18249/
S-18259

Superior Court Case No. 3AN-14-07961 CI

ON APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA,
THIRD JUDICIAL DISTRICT, ANCHORAGE,
THE HONORABLE WILLIAM F. MORSE, PRESIDING

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES Z.C., ET AL.

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Amici Curiae Facing Foster Care in Alaska; Children’s Advocacy Institute; Children’s Defense Fund; Children’s Rights; First Focus on Children; Foundation for Research on Equal Opportunity; Gen Justice; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; Partnership for America’s Children; Youth Law Center; and Daniel L. Hatcher (“Amici”), submit this amici curiae brief supporting Appellees Z.C., et al.¹ in seeking affirmance of the Superior Court’s grant of summary judgment on their due-process claim under Article 1, Section 7 of the Alaska Constitution. [Exc. 183-205]. For convenience, this brief incorporates Amici’s brief filed on June 4, 2022 supporting Z.C. et al.’s cross-appeal.

PRELIMINARY STATEMENT

Foster children are uniquely disadvantaged. They depend on a state agency, OCS, to manage all aspects of their lives as their legal custodian and fiduciary. This dependence on the state compounds the already extreme circumstances of their lives: placement in a stranger’s home or facility if a relative is not available; severe trauma that compelled removal from their families; separation from siblings; lack of privacy; lack of control over the most basic aspects of their lives, including where and with whom they will live; multiple moves, transient placements, and uncertainty over future placements and plans; lack of resources for successful transition from foster care; and sometimes even trauma occurring while in foster care. OCS’s appeal presents the important question of whether, given the Foster Children’s unique circumstances, this all-powerful state actor in the Foster

¹ All undefined capitalized terms have the same meaning as used in Amici’s opening brief.

Children's lives owes them a due-process right to notice when it seeks to become representative payee with plenary power over their SSI and OASDI benefits.

According to OCS, the Foster Children have no right to notice that their state-agency legal custodian (a) has obtained federal benefits on their behalf; (b) is seeking appointment as their RP fiduciary with plenary control over those benefits; and (c) has a policy of diverting their funds into its own coffers to reimburse itself to defray the cost of their care. OCS does not dispute their lack of notice and lack of an effective opportunity to object.

OCS contends that its RP appointment impairs, at most, the Foster Children's "free use" of the benefits but does not affect their nominal ownership of the benefits. This is a negligible deprivation of property, OCS claims, and is too trivial to require notice under the *Mathews v. Eldridge* balancing test. [OCS Br. 34-36]. But OCS's policy of diverting nearly all funds to benefit itself, not the Foster Children, is tantamount to a full deprivation of property—a *de facto* "taking" that falls squarely within *Mathews*' wheelhouse.

OCS essentially argues that the Foster Children have no right to know that they have been awarded benefits and thus have no effective right to participate meaningfully in the selection of their RP fiduciary who will decide how the funds should be used or conserved in the child's best interest. Under OCS's myopic view, the Foster Children's rights are limited to having their names stamped on secret accounts with funds that they do not know to exist and cannot access, and which almost never will be spent on or saved for them beyond the regular foster-care services that the state pays for all children in its care. They have no right to know the facts that would allow them meaningful opportunity to challenge the rote appointment of OCS as RP fiduciary with plenary control over their benefits. In

essence, OCS contends that the Foster Children are not entitled to *any* notice. This is patently unconstitutional. As *Mathews v. Eldridge* squarely acknowledges, due process prohibits governmental deprivation of a significant property interest without providing *some* notice and opportunity to be heard.

OCS's position treats the Foster Children as second-class citizens. They have no right to control their property, no right to use their property, no right to economic gain from their property, no right to save their property, no right to know who controls their property, no right to know the disposition of their property, and, indeed, no right to know that they even "own" their property. OCS's response that it exercises those rights on behalf of the Foster Children, and that the Supreme Court sanctioned this authority in *Keffeler II* [OCS Br. 36-37], is no answer. The Foster Children are powerless to affect OCS's decisions because they never are informed of OCS's appointment and self-interest in the first place, let alone given a fair opportunity to object. Nominal ownership of property means nothing when the nominal property owners do not know of the property or that a state actor has engineered its appointment as fiduciary and seized the property for its own financial gain.

In every other sphere of life, individuals are entitled to notice before a fiduciary is appointed to take control of their life, liberty, or property. A trustee cannot be appointed to administer an estate, and a conservator or guardian cannot be appointed to make life-affecting decisions, without advance notice to affected individuals and fair opportunity to object and be heard. But that is exactly what occurs here. Indeed, the affront to due process is even worse because the Foster Children already have diminished liberty due to their minor age, dependent status, and involuntary commitment to state custody. The fiduciary

is a state actor, asserting its state power over disabled and orphaned children committed to its custody, to seize control and divert the funds to its own state coffers. Appointing *the state* to control the Foster Children’s property by stealth raises the constitutional stakes.

OCS insists that any blame for a lack of notice falls on Congress or SSA. *See* OCS Br. 27, 29, 31, 39-40. But SSA does not act in a vacuum. OCS provides the information used to establish eligibility, OCS applies for the funds, and OCS engineers its RP appointment to receive the funds. The issue here is *OCS’s* role as a state actor in securing *its* appointment as RP to obtain control over the funds for *its* benefit. OCS is no passive bystander that incidentally obtains a bounty of federal funds.

Indeed, OCS actively manipulates the process. Even though OCS is required by law to obtain the information SSA needs to locate and investigate higher-ranking individuals as alternatives, OCS presented no evidence below that it shares such information with SSA. The record evidence demonstrates that OCS *withholds* identities of relatives who could serve as RPs. It is difficult to imagine a clearer violation of due process than a state agency that surreptitiously uses its court-ordered custody of disabled and orphaned foster children to secure control of their benefits by concealing relatives or other preferred RP candidates.

The secretive diversion of funds violates the Foster Children’s dignitary right to fair governmental treatment. As Justice Frankfurter once explained, due process “[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government.”² To the Foster Children, whose liberty interests are already

² *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

severely impaired by their status as wards of the state, OCS’s clandestine siphoning of their funds is the ultimate indignity. It is fundamentally unfair. Fair notice and opportunity to be heard are the least that the Alaska Constitution should require.

OCS’s argument that federal law preempts Article I, Section 7 [OCS Br. 24-32] fares no better. Nothing in the Social Security Act—not its text, not its history, not its implementation by SSA—suggests that Congress intended to *prohibit* states from requiring notice when they seek to become RP. OCS makes much of the fact that the Act requires SSA to notify parents [*id.* at 30], but the Act says nothing about what a state RP must do. That silence speaks volumes about the lack of congressional intent to preempt state law.

The Foster Children’s right to notice is not ephemeral. SSA regulations make OCS the RP option of last resort. Given child-welfare confidentiality laws, that policy cannot be given effect if OCS does not inform SSA of higher-ranked possibilities. The Foster Children need notice so they have the ability to seek appointment of someone else as RP.

STATEMENT OF INTEREST OF AMICI

Amici incorporate by reference their Statement of Interest in their opening brief supporting Cross-Appellees Z.C., et al. [Amici Br. 4-9]. In addition:

The Youth Law Center (“YLC”) is a national organization, founded in 1978, that advocates to transform the foster care and juvenile justice systems so that children and youth can thrive. Through legal, legislative, and policy advocacy, YLC works to advance the rights of young people who come into contact with the juvenile justice and child welfare systems and to strengthen the supports available to them so they can transition successfully to adulthood and thrive.

ARGUMENT

Amici incorporate by reference the facts set forth in Sections I through III and IV.C of their opening brief supporting Cross-Appellants Z.C., et al. [Amici Br. 9-22, 31-37].

I. The Foster Children Have a Constitutional Right to Notice by the State.

This case presents the question of whether Article I, Section 7 gives the Foster Children a right to notice and opportunity to be heard when OCS, an Alaska state agency, seeks appointment as the children’s fiduciary to control their federal benefits with the power and intent to siphon those benefits to its own coffers. OCS concedes, as it must, that the benefits are the Foster Children’s property and, as such, are constitutionally protected. *See* OCS Br. 33 (“OCS does not dispute that Social Security benefits are a type of property interest entitled to the protections of procedural due process—protections that flow from the government entity that actually *administers* those benefits.”) (emphasis in original). *Goldberg v. Kelly*, 397 U.S. 254 (1970), resolved long ago any question about whether due process protects an entitlement to public benefits. Nevertheless, OCS contends that this constitutional protection is immaterial, and thus, as a practical matter, worthless to the Foster Children because (a) SSA, not OCS, is responsible for providing notice under the Act; (b) SSA’s regulations require SSA to search for relatives as alternatives to OCS; (c) OCS’s policy of using its RP power to repay itself with the federal benefits is legal under federal law per *Keffeler II* and does not “deprive” the Foster Children of anything; and (d) the Foster Children suffer from the same lack of control over use of their benefits that all child-beneficiaries experience due to the universal requirement that RPs must be appointed for children. [OCS Br. 3-4, 33-34].

Due process cannot be so easily skirted. Blaming SSA for the lack of notice does not excuse OCS's derelictions. OCS is a state actor subject to the Alaska Constitution. It independently owes the Foster Children fiduciary duties of candor, disclosure, and loyalty arising from the Foster Children's commitment to its legal custody. *See* nn.22-23, *infra*. OCS actively conceals key information from SSA about other potential payees to engineer OCS's appointment as RP for its own financial gain. That key omission alone violates due process. In any event, if an Alaska state agency seeks to obtain fiduciary control over the property rights of Alaska Foster Children, it has a duty to notify the Foster Children. Otherwise, the Foster Children are excluded from the selection process of *who* gets to control the use of their funds: someone who will favor their unmet current and future needs or the state agency that conceals information from SSA and that will automatically use their funds for its own benefit. Because they are left in the dark, the Foster Children also are effectively denied the right to petition OCS to use the funds to meet their needs, as opposed to meeting OCS's budget. OCS never explains why *these* deprivations do not trigger due process protection. For the reasons discussed below, they do.

A. OSC's Appointment as RP with Control over the Foster Children's Benefits, Without Providing the Foster Children *Any* Notice and Opportunity to Be Heard, Violates Due Process.

The actionable events here occur in secret, unbeknownst to the very Foster Children in whose name OCS purports to act. As the Superior Court found, the Foster Children do not receive any notice from SSA about OCS's appointment as RP. [Exc. 190]. In fact, the veil of secrecy is much broader than that. Neither OCS nor SSA tells the Foster Children or their representatives that they have been awarded the benefits, or that OCS has applied

to be appointed as the RP with full control over use of the benefits, or that relatives with a strong connection to the children have a clear priority status, or that OCS intends to use the funds to defray the cost of their care, or that other RP appointees could spend the funds directly on the children instead, or that the children have the right to propose alternatives as RP, or that the children have the right to appeal OCS's appointment as RP.

These facts are conceded or not disputed by OCS [*see* Exc. 115-18], which instead tries to deflect all blame and responsibility on to SSA. *See* OCS Br. 7-13, 38-40. But OCS acknowledges that SSA's policies require SSA only to notify the children's *parents*—from whose custody the Foster Children have been removed—or their legal guardian (which often is OCS) and to send token notice of the Foster Children's appeal rights to *OCS, id.* at 10-11, 39-40, an abject exercise in futility and a mockery of genuine due process. OCS does not even attempt to pass on this notice to the Foster Children.

A state agency cannot *secretly* obtain benefits on behalf of a foster child, especially after having accepted responsibility for informing SSA about relatives who could serve as RP but then failed to do so in apparent concealment of the facts. Unlike a private RP, OCS is subject to Article I, Section 7 and is required to give notice of its actions and provide an opportunity to cure or challenge them.³

³ In discussing Article I, Section 7, this brief applies the federal standards for due process, *see Tagaban v. City of Pelican*, 358 P.3d 571, 576 n.16 (Alaska 2015); *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352, 1356 (Alaska 1974), including the *Mathews v. Eldridge* balancing test. *See Hilbers v. Mun. of Anchorage*, 611 P.2d 31, 36 (Alaska 1980). But federal law sets the minimum floor of due process, not the limit. Where federal protections are insufficient, this Court may apply a more rigorous standard. *See State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1060-61 (Alaska 2005) (“[W]e have often held that Alaska's constitution is more protective of rights and liberties than is the United States Constitution. ... We therefore stress that the results we derive under the

Notice and opportunity to be heard are “central to the Constitution’s command of due process.”⁴ As this Court has repeatedly held, “[b]efore property rights can be taken *or infringed upon by government action*, there must be notice of the action proposed to be taken and an opportunity to be heard.”⁵ Secrecy is the bane of due process because “there is a certain level of procedural fairness that must be accorded to an affected party” when due process attaches, and “[t]his ‘fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights.’”⁶ OCS’s failure to provide *any* notice of the award of benefits or its appointment as RP violates due process because it deprives the Foster Children of any opportunity to participate in the RP selection process—the process that determines the fiduciary with plenary control over their funds—or any meaningful right of appeal. The lack of even a modicum of due process is unconstitutional.

OCS justifies its lack of notice by misreading *Mathews v. Eldridge*. The *Mathews* balancing test does not apply to *prima facie* violations when no process is provided at all; no notice, no opportunity to be heard. *Mathews* itself confirms that notice is *always* required when the state infringes upon a valuable property right: “This Court consistently

Alaska Constitution need not correspond with those the Supreme Court might reach under the federal constitution.”); *Doe v. State, Dep’t of Pub. Safety*, 92 P.3d 398, 404 (Alaska 2004) (“[F]ederal law does not preclude the Alaska Constitution from providing more rigorous protections for the due process rights of Alaskans.”). As *Doe* explains, “we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” *Id.*

⁴ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993).

⁵ *Heitz v. State, Dep’t of Health & Soc. Servs.*, 215 P.3d 302, 306 (Alaska 2009) (emphasis added) (quoting *City of Homer v. Campbell*, 719 P.2d 683, 685 (Alaska 1986)).

⁶ *Campbell*, 719 P.2d at 685 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)).

has held that *some* form of hearing is required before an individual is finally deprived of a property interest.”⁷ As the D.C. Circuit has explained, “however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero—that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest.”⁸ The Sixth Circuit further explains that “Supreme Court precedent, including precedent applying *Mathews*, indicates that *any time* a citizen is deprived of ‘notice of the factual basis’ for a governmental determination and ‘a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,’ the risk of error is too high” and due process is violated.⁹ Hence, “[t]he *Mathews* test is reserved for situations when the court is determining whether a pre-deprivation versus a post-deprivation hearing is required.”¹⁰

⁷ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added); accord *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (“Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale.”). Alaska follows this principle. See, e.g., *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659 (Alaska 1974) (“Due process of law requires that before valuable property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard.”).

⁸ *Propert v. D.C.*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (emphasis in original) (internal citations omitted).

⁹ *Hicks v. Comm’r of Soc. Sec.*, 909 F.3d 786, 800 (6th Cir. 2018) (emphasis added) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (O’Connor, J., plurality op.)).

¹⁰ *Tyler J. v. Saul*, No. 17 CV 50090, 2019 WL 3716817, at *4 (N.D. Ill. Aug. 7, 2019), *aff’d on other gds. sub nom. Jaxson v. Saul*, 970 F.3d 775 (7th Cir. 2020). As the Tenth Circuit put it, “Time and again, the Supreme Court has made clear that ‘some form of hearing,’ and thus notice also, “‘is required before an individual is finally deprived of a property interest.’ And although the Court has crafted a nice balancing test to determine what such a hearing should look like, we need not consider that test here because the ... ordinance provides no hearing whatsoever.” *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) (footnote omitted) (quoting *Mathews*, 424 U.S. at 333)).

The issue here, by contrast, involves a *complete* lack of notice. Balancing comes into play only in determining what process is due.¹¹

Maryland’s highest court confirms that foster children have a protected property interest in their benefits that requires due process when a state foster-care agency applies to be a foster child’s RP and again when it receives the benefits, and that the *Mathews* balancing test is then used to determine what process is due.¹² Nevertheless, OCS denies any cognizable property interest, arguing that there is “[n]o constitutionally protected private interest in the potential financial benefit of having a non-OCS representative payee.” [OCS Br. 32-33]. According to OCS, any impairment of the Foster Children’s asserted right to “free use” of the benefits is not a protected property interest, and because such impaired “free use” is the only adverse consequence from OCS’s appointment as RP, OCS’s appointment does not trigger any due process rights. *Id.* OCS seems to contend that only a direct loss of the benefits themselves is a protected property interest. *See id.* at 33 (OCS’s RP applications “create no risk of deprivation of the actual constitutionally protected interest in the benefits”).

¹¹ *See, e.g., Aguchak*, 520 P.2d at 1357 (if plaintiff “demonstrates a prima facie denial of due process of law,” the court must “balance the interest of the state in the act or procedure challenged against the right denied the individual” to determine the process that is due); *In re KLJ*, 813 P.2d 276, 279 (Alaska 1991) (“In Alaska, we have adopted the balancing test from *Mathews v. Eldridge* ... to determine what process is due.”); *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (2002) (same); *Hicks*, 909 F.3d at 799 (describing *Mathews* as a “two-step template” that first considers whether the state provided the minimum floor of due process (some form of notice and opportunity to be heard) and then a balance of private and public interests to determine what additional process is necessary).

¹² *See In re Ryan W.*, 76 A.3d 1049, 1068 (Md. 2013) (“Because Ryan, like all OASDI beneficiaries, has a property interest in his benefits, the Department’s actions implicate Ryan’s due process rights. In determining what process is due, this Court will balance both the government interests and the private interests affected.”) (internal citation omitted).

A federal three-judge panel has squarely rejected this argument, ruling that a state’s “practice of taking custody and control of all [OASDI] monies” of state psychiatric hospital patients “deprives plaintiff of her rights to use of her property” and violates due process by denying notice and an opportunity to be heard.¹³ The violation was especially troubling given the state’s dual role as fiduciary and creditor, where “the state interference with the plaintiff’s right to use and control her property is in behalf of itself as creditor.”¹⁴

OCS’s cramped view of due process ignores the Alaska law defining the bundle of recognized property ownership rights.¹⁵ Property “ownership” has a “distinct” meaning “as [t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.”¹⁶ Thus, any state action that impairs owners’ control over property, including the right to use and manage it, constitutes a deprivation. The deprivation need not be total: due process is violated by a complete lack of notice “no matter how small the interest or how great the governmental burden.”¹⁷ What matters is that the interest be “affected” or “infringed.” OCS’s view that a total deprivation of benefits must occur, rather than an infringement of interests, is simply wrong. The test is disjunctive, applying to either direct takings of property *or infringements*: “Due process of law requires that before

¹³ *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361, 1370 (E.D. Pa. 1974).

¹⁴ *Id.*

¹⁵ See *Cool Homes, Inc. v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1254 (Alaska 1993) (“Ownership of property consists of a bundle of separate rights, powers and privileges.”) (citing Wm. E. Burby, *Handbook on the Law of Real Property* § 9, at 13-14 (3rd ed. 1965)).

¹⁶ *Gillis v. Aleutians E. Borough*, 258 P.3d 118, 124 & n.30 (Alaska 2011) (quoting *Ownership*, Black’s Law Dictionary 1215 (9th ed. 2009)).

¹⁷ *Hicks*, 909 F.3d at 800.

valuable property rights can be taken directly *or infringed upon* by governmental action, there must be notice and an opportunity to be heard.”¹⁸ Other cases describe the test as whether a significant interest is “adversely affected.”¹⁹ Under either formulation, only a significant impact is needed, not a complete deprivation of the property.

Having an RP fiduciary with broad authority to control and siphon the Foster Children’s benefits does not just impair their general property rights: it effectively strips away all value of the benefits. They cannot save the benefits for future use or spend the benefits on current needs beyond OCS’s existing obligations. Because they do not even know of the benefits’ existence, they cannot take any action to challenge OCS’s use of the

¹⁸ *Frontier Saloon*, 524 P.2d at 659 (emphasis added); *accord Heitz*, 215 P.3d at 306 (“[B]efore property rights can be taken *or infringed upon* by government action, there must be notice of the action proposed to be taken and an opportunity to be heard.”) (emphasis added); *Gottstein v. State, Dep’t of Nat. Res.*, 223 P.3d 609, 622 (Alaska 2010) (“due process requires notice and an opportunity to be heard prior to governmental deprivation *or infringement of valuable property rights*,” but defendant “neither deprived *nor infringed on* [the] overriding royalty interest”) (emphasis added); *PLC, LLC v. State, Dep’t of Nat. Res.*, 484 P.3d 572, 79-80 (Alaska 2021) (“neither deprived nor infringed”) (quoting *Gottstein, id.*); *City of Homer*, 719 P.2d at 685 (“It is a fundamental element of due process that before property rights can be taken *or infringed upon* by government action, there must be notice of the action proposed to be taken and an opportunity to be heard”) (emphasis added); *Hill v. Giani*, 296 P.3d 14, 23 n.28 (Alaska 2013) (“taken directly or infringed upon”) (quoting *Herscher v. State, Dep’t of Comm.*, 568 P.2d 996, 1002 (Alaska 1977)).

¹⁹ *See Heustess v. Kelley-Heustess*, 158 P.3d 827, 835 n.20 (Alaska 2007) (“adversely affected”); *Crutchfield v. State*, 627 P.2d 196, 199 (Alaska 1980) (“The core content of procedural due process placed upon government the duty to give notice ... to individuals ... whose interests in life, liberty of property are *adversely affected* by government action.”) (quoting Lawrence Tribe, *American Constitutional Law* § 10-8, at 512)) (footnotes omitted); *City of Homer*, 719 P.2d at 686 (affirming that due process requires government to “inform interested parties of action *affecting* their property rights”) (quoting *Mullane v. Cen. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be *affected* are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’”) (citations omitted) (emphasis added in all).

benefits. It is no exaggeration to say that the Foster Children almost never see any value in the benefits. This is a complete deprivation in every way except nominal ownership with almost none of the rights and powers normally incident to ownership. A *de facto* loss of almost all attributes of ownership *to a state agency* is more than ample deprivation to trigger constitutional protection of due process under Article I, Section 7.

But even if OCS were not pocketing the Foster Children's funds for its own gain, the Foster Children still would have an absolute right to notice and opportunity to be heard regarding OCS's appointment as RP. The Foster Children's complete surrender of control over their funds to an RP fiduciary is no different than the appointment of a receiver of distressed property, a trustee of an estate, a guardian of property, or a conservator for financial or other decisions. Notice is required whenever appointment of these fiduciaries is considered. *See, e.g.*, AS § 13.36.060 (requiring notice to all interested parties when petitioning to establish a trust); 11 U.S.C. § 1104(a) (requiring notice and a hearing before appointment of bankruptcy trustee). An RP's plenary control over federal benefits easily matches or exceeds a trustee's authority over property placed into a trust. Imagine the outcry if trustees were appointed and allowed to operate in secret.

This deprivation constitutes a much greater intrusion than a mere encumbrance on property such as a lien or attachment that infringes upon but does not "directly take" that property away. Yet even the limited intrusion of a lien requires due process. As the U.S. Supreme Court summarized the law, "our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are

sufficient to merit due process protection.”²⁰ Those Fourteenth Amendment protections extend to the holders of liens and attachments and even to claims by unsecured creditors.²¹

As for the significance of the affected interest, the *Keffeler III* dissent explained the importance of giving foster children a voice in who is selected as their RP:

If a foster child were entitled to [SSI and/or OASDI] benefits . . . , who would *he* rather have as his representative payee, the State or grandma? I posit the answer to the question does not require a degree in rocket science but is well within the comprehension of the average well-informed six-year-old.²²

The dissent discusses in resonant terms how a caring grandmother RP could spend the benefits on better meals for the child, better clothing, better recreational activities, better travel arrangements, better educational activities, better vocational opportunities, and better opportunities to save for the future.²³ The Superior Court made similar findings. [Exc. 196-97]. OCS’s position that the choice of RP is of no moment or legal consequence to the Foster Children—disparaging the issue as a claimed entitlement to a “financially advantageous” RP [OCS Br. 3, 35]—blithely ignores the stark difference between a state agency whose priority is financial self-interest and a loving, devoted close relative. When OCS is RP, the Foster Children receive negligible economic benefit. When close relatives

²⁰ *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988)).

²¹ For example, mortgagees and lienholders are entitled to notice of a foreclosure sale of property because “actual notice is a minimal constitutional precondition to a proceeding which will adversely affect the . . . property interests of *any* party.” *Tagaban*, 358 P.3d at 577 (emphasis in original) (discussing *Mennonite Bd. of Missions*, 462 U.S. at 795); see also *Tulsa Prof’l Collec’n Serv. v. Pope*, 485 U.S. 478, 485 (1988) (affirming due process protection for unsecured claim against an estate).

²² *Guardianship Est. of Keffeler v. State*, 88 P.3d 949, 956 (Wash. 2004) (“*Keffeler III*”) (Sanders, J., dissenting).

²³ *Id.* at 957-58 (Sanders, J., dissenting).

are RP, the Foster Children are likely to receive tailored spending and saving that otherwise would never occur.

Finally, separate from any effect of the duties owed as applicant or appointed RP, OCS already stands as the Foster Children’s fiduciary through its legal custody of the Foster Children by their commitment to OCS as Children in Need of Aid.²⁴ The triple duties of candor, disclosure, and loyalty are fundamental elements of that fiduciary duty, requiring OCS as fiduciary to make “full and fair disclosure” to the Foster Children (or their legal representatives) “of all facts that materially affected [their] rights and interests.”²⁵ Alaska law has long held that “[t]he fiduciary has a duty to fully disclose information which might affect the other person’s rights and influence his action.”²⁶ This duty is comprehensive: “The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.”²⁷ OCS thus has dual obligations to disclose this information, one constitutional and the other fiduciary.

OCS’s principal responses are that (a) due process does not attach because all children need RPs and therefore always must surrender any asserted right to “free use” of

²⁴ OCS admits its fiduciary status. *See* Exc. 199 & n.49 (Sup. Ct. Order); Exc. 116, 430 (OCS admissions); *see also* *Dapo v. State, Off. of Children’s Servs.*, 454 P.3d 171, 180 (Alaska 2019) (OCS has a “fiduciary relationship” with “children in its legal custody”).

²⁵ *Cummings v. Sea Lion Corp.*, 924 P.2d 1011, 1021 (Alaska 1996) (quoting jury instructions on breach of fiduciary duty); *see also* *Borer v. Eyak Corp.*, 507 P.3d 49, 59 (Alaska 2022), *reh’g denied* (May 25, 2022) (board of directors’ “general fiduciary duty” includes “a duty of ‘complete candor to its shareholders to disclose all germane or material information’”) (citation omitted).

²⁶ *Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 634 (Alaska 1996) (quoting *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988)); *see also* Exc. 199 & n.49 (Sup. Ct. Order).

²⁷ *Greater Area Inc. v. Bookman*, 657 P.2d 828, 830 (Alaska 1982) (internal quotation marks and citation omitted).

their benefits to their RP, regardless of who serves as RP; (b) the Foster Children have no constitutional right to appointment of a speculative “financially advantageous” RP; and (c) using the benefits to reimburse itself for its care and maintenance of the Foster Children is appropriate and legal under the Social Security Act’s anti-attachment clause per *Keffeler II*. [OCS Br. 3, 36]. But that is exactly why selection of the RP is so incredibly important. The Foster Children are entitled to a *voice* in selecting the RP who will have plenary control of their funds, which includes the right to suggest relatives as alternatives to OCS. The secrecy surrounding OCS’s application and selection as RP abrogates their right to *participate* in that selection. This is a pure process violation, no different than denying a trust beneficiary of notice and opportunity to be heard on who will be appointed trustee. In mischaracterizing the Foster Children’s claim as an asserted right to select a speculative “financially advantageous” RP [OCS Br. 3, 35], OCS avoids the actual issue: whether the Foster Children have a right to be heard on who should be appointed their RP?

As for the asserted legality of OCS’s self-reimbursement, OCS again confuses the issue. Due process does not depend on whether OCS’s diversion violates the Act (though it is unconstitutional as argued in Z.C.’s cross-appeal); rather, it addresses whether the process that culminated in that diversion lacked notice and opportunity to be heard.

OCS’s cases do not hold otherwise.

Their lead case for their “free use” of benefits argument, *McGrath v. Weinberger*, 541 F.2d 249 (10th Cir. 1976), is a fact-based decision that found no due-process violation under diametrically different facts. In *McGrath*, two patients at a state psychiatric hospital challenged a determination by the SSA that they required appointment of relatives as RPs

due to a medical determination by the hospital that they were not competent to manage their benefits. *Id.* at 251. They received timely notice and could challenge the determination through a post-decision appeal. *McGrath* addresses only the limited issue of whether they had a due process right to *pre-decision* notice and a *pre-decision* evidentiary hearing *prior to* any decision by the SSA, as opposed to the post-decision rights that were available. *Id.* It does not consider the questions here of whether (a) RP appointments may be made in secret and without *any* notice; (b) the selection of *who* will serve as an RP and thus will have control over the funds affects a significant property interest; (c) OCS’s policy of using the funds to reimburse itself rather than to benefit the Foster Children creates an even stronger need for due-process protection; and (d) the record evidence that OCS tilts SSA’s decision-making process in its favor by concealing information about potential relative candidates for RP further requires notice and the opportunity to be heard. *McGrath* did not rule, as OCS argues here, that beneficiaries have no protected property interest in the decision of who will be their RP. Instead, *McGrath* deemed the interest minimal given the very different circumstances of that case. *Id.* at 253-54 (describing unique facts of case).

OCS’s other principal authority, *Keffeler*, also is inapt.

First, OCS conflates *Keffeler II*’s *statutory* ruling that the practice of a state RP using foster children’s benefits to repay itself did not violate the Act’s anti-attachment clause with the *constitutional* question of whether the Foster Children have a cognizable property interest in how those benefits are used on their behalf. *See* OCS Br. 3 (“*Keffeler II* confirms that no constitutionally protected privacy interest exists”), 36 (arguing that *Keffeler II* “forecloses the argument that foster children have a legally protected interest in

the selection of a payee who will use benefits to supplement other resources”). But *Keffeler II* expressly *declined* to address *any* constitutional or statutory issues beyond the narrow anti-assignment question upon which *certiorari* was granted.²⁸ *Keffeler II* is a purely statutory ruling that says nothing about the right to due process for decisions that affect federal benefits. Appointing OCS as RP *affects* the Foster Children’s benefits because it vests OCS with broad plenary control over how to use the benefits. OCS is not excused from providing due process merely because its actions as RP do not violate a federal law.

Second, OCS relies on *Keffeler III*, which rejected foster children’s procedural due-process claim after remand from the Supreme Court [OCS Br. 38-39], but OCS ignores a key fact difference. No evidence indicated that the Washington state agency withheld from SSA the names of relatives who, according to SSA regulations, might have had higher priority. Indeed, *Keffeler III* assumed that the SSA investigates such relatives.²⁹ This does not occur in Alaska because OCS, the only party with knowledge, fails to disclose known relatives when it submits Form BK-11 to SSA. *See* Amici Br. 19-20 & n.39 (discussing 42 representative Forms BK-11 submitted by OCS, R. 734-961). *Keffeler III* assumed that the system functions as designed on paper; the record here shows otherwise.

Third, *Keffeler III* rotely *assumes* that the foster children receive SSA’s notice about the state agency’s appointment as RP.³⁰ Here, by contrast, the Superior Court expressly

²⁸ *See Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 389 n.12 (2003) (“*Keffeler I*”).

²⁹ *See Keffeler III*, 88 P.3d at 955-56 (“[SSA] does an investigation of potential representative payees prior to appointment.”).

³⁰ In support, *Keffeler III* merely cites to the requirement that SSA send notice to an unemancipated child’s legal guardian or representative or to minors over 15. *See id.* at 955

found that the Foster Children do *not* receive SSA’s notice. [Exc. 190]. Thus, the due-process issues differ diametrically. This case addresses a complete absence of notice; *Keffeler III* addresses the less weighty question of who must provide the notice.

Fourth, *Keffeler III* erroneously relies on the statutory requirement that SSA send a pre-selection notice to the child’s legal guardian. As *Ryan W.* explains, this notice “goes directly to the representative payee (the Department as [the child’s] legal guardian).”³¹ Sending notice *to the state agency* of a right to challenge appointment of that very agency as RP is the epitome of futility. Again, per *Ryan W.*, “[i]f the beneficiary is neither aware that he or she is entitled to benefits, nor that a representative payee is receiving and using those benefits on his or her behalf, he or she is unlikely to benefit from the presence of an adequate federal remedy to test perceived irregularities.”³²

Finally, for the last *Mathews* element, *Keffeler III* held that “the governmental interest in not implementing additional procedures is high,” directly contrary to the Superior Court finding that the “burden to the State” is “minimal” [Exc. 200], which is not challenged on appeal.³³ This distinction alone makes *Keffeler III*’s balancing analysis inapt.

(“The risk of erroneous deprivation of any private interest the children may have is low because the notice notifies the beneficiary/guardian of the appointment prior to any payment and encourages the beneficiary/guardian to contact the agency if he/she disagrees.”). Here, by contrast, the Foster Children receive *no* notice. [Exc. 115-17, 190].

³¹ *In re Ryan W.*, 76 A.3d at 1069.

³² *Id.*

³³ *Compare Keffeler III*, 88 P.3d at 956, with Exc. 200-04 (explaining why notice to the Foster Children is not burdensome). Moreover, *Keffeler III* involved a different proposed remedy: extremely costly appointment of counsel for each affected child in juvenile court proceedings. *See* 88 P.3d at 956. No such cost burden is at issue here.

Thus, *Keffeler III* is factually inapposite and, as *Ryan W.* held, legally erroneous.³⁴ But even *Keffeler III* does not go so far as to hold, as OCS argues here, that Social Security beneficiaries have *no* property interest affected by the determination of who will control their benefits, such that no due process is required. Neither does *McGrath*.

Alaska and federal law require due process for any governmental action that affects valuable property rights. The *Keffeler III* dissent provides concrete examples of how the loss of “free use” of the benefits materially affects the Foster Children, causing them to lose virtually all economic value of their benefits. These are examples of what happens in real life and not in the highly idealized world of OCS, where Alaska foster children have all needs met and have no need for additional help from their Social Security benefits. The right to participate in selecting an RP thus is a key stick in the Foster Children’s bundle of property rights. Failure to provide *any* notice and opportunity to be heard, even as OCS profits from its position of control, is a clear deprivation of a valuable property interest.

B. The Foster Children Are Also Deprived of Constitutionally Required Notice and Opportunity to Be Heard under the *Mathews v. Eldridge* Balancing Test.

Even under the *Mathews v. Eldridge* balancing test weighing the relative strength of private and governmental interests, OCS fails to account for the deprivation it inflicts when it hijacks the Foster Children’s benefits by engineering its appointment as their RP.

The first prong of the *Mathews* test considers the strength of the protected interest. OCS argues that *no* protected property interest exists but does not make the alternative

³⁴ *Id.* (“We disagree with the conclusions of the Washington Supreme Court in analyzing the *Mathews* factors, as applied to the facts of the present case.”).

argument that, if there is a protected interest, it is weak. [OCS Br. 33-37]. Such an argument would fail anyway, as the Foster Children’s loss of the right to a voice in the selection of the RP to control their benefits, with the inevitable outcome of state control, nominal ownership, and diversion of the funds to the economic benefit of the state, is a significant deprivation. Without notice, there is no oversight by beneficiaries, and without oversight, even the modest protections added in 2004 are futile, as *Ryan W.* noted: “Without actual and direct notice, however, a child beneficiary, through his legal representative, is unlikely to know of and utilize timely the review process added by the 2004 amendments....”³⁵

OCS’s lack of accountability to the Foster Children is unique. In what other setting may a public agency act in secret to obtain fiduciary control of public benefits of a minor or other legally incompetent person, use those benefits for its economic gain, and suppress the beneficiary’s ability to propose a less self-interested RP or to object to its use of their funds? If trust beneficiaries are entitled to due process when their trustee is selected, then surely the Foster Children are entitled to equally strong protection when an RP is selected to control their federal benefits. The Foster Children are not second-class citizens.

For the second *Mathews* prong, the risk of an erroneous deprivation of rights, OCS argues that the risk is “low” by pointing to the Social Security Act’s notice requirements, which require SSA to provide notice to parents or the legal guardian of a child beneficiary. [OCS Br. 37]. The holes in this argument are detailed above: as the Superior Court found,

³⁵ *In re Ryan W.*, 76 A.3d at 1069. Oversight and accountability also are important for detecting and curing errors. For example, in *Ryan W.*, an \$8,075.32 error was discovered that “should not have been used for the cost of Ryan’s care, and had to be reimbursed by the Department” to his account. *In re Ryan W.*, 56 A.3d 250, 253 (Md. Ct. Spec. App. 2012), *aff’d in part, vacated in part, rev’d in part*, 76 A.3d 1049 (2013).

the notice never reaches the child and instead is sent to OCS in closed-loop fashion informing OCS of its own application to SSA. *Ryan W.* explains that this circularity creates a grave risk of error in SSA’s selection of the RP and prevents any oversight by the affected beneficiary, who remains in the dark and is in no position to assess how the RP uses the benefits, let alone to ask OCS to pay for legitimate unmet needs with the child’s own funds.³⁶ Those concerns are not idle conjecture. The record evidence showing that OCS fails to inform SSA of the Foster Children’s relatives, even though OCS is required by federal law to gather that information, proves the high risk of an erroneous selection of OCS as RP. Child-welfare confidentiality rules compound that impact, as SSA lacks independent means to investigate families of children placed in foster care.

Finally, OCS does not challenge the Superior Court’s finding that notice poses only “minimal” burden on OCS and that the third prong of the *Mathews* test, which considers the state’s interest and its burden of providing the requested process, favors the Foster Children. [Exc. 200-01; OCS Br. 32 (acknowledging that its appeal challenges only the first two factors)]. Thus, OCS concedes that it readily *can* provide notice to the Foster Children; it simply prefers not to do so, no doubt keenly aware of the economic gains that it has generated by proceeding in secret.

The *Mathews v. Eldridge* balancing test does not justify the secrecy by which OCS secures its appointment as the Foster Children’s RP. All three factors point in one direction:

³⁶ See *In re Ryan W.*, 76 A.3d at 1069 (“Because the representative payee—in this case, the Department—has discretion in determining the proper allocation of a child’s social security benefits, the risk that the child might be deprived erroneously of his or her interest in the benefits may also be substantial.”). Such an error occurred in *Ryan W.* See n.35, *supra*.

the Foster Children are entitled to notice and an opportunity to object to OCS's appointment as RP. OCS's policy of secrecy is patently unconstitutional.

C. OCS's Policy of Secrecy Violates the Foster Children's Dignitary Interest Underlying the Right to Due Process.

At its core, due process protects the dignity of the individual against unfair action by the state. Justice Frankfurter famously explained the broader meaning of the Constitution's due process right, stating that it protects the "profound attitude of fairness between man and man, and more particularly between the individual and government":

The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history ..., "due process" cannot be imprisoned within the treacherous limits of any formula. *Representing a profound attitude of fairness between man and man, and more particularly between the individual and government*, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.³⁷

Moreover, as Justice Frankfurter further explained, and as this Court has agreed, the right to notice is a cornerstone of individual dignity with respect to government:

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."³⁸

As one commentator explains, "Due process affirms a person's identity and recognizes her inherent dignity when confronted by the state; it does so by mandating some form of notice

³⁷ *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 162-63 (Frankfurter, J., concurring).

³⁸ *Id.* at 171-72 (Frankfurter, J., concurring), *quoted by State v. Norene*, 457 P.2d 926, 931 (Alaska 1969).

and opportunity to be heard prior to being harmed by a state actor.”³⁹ Under this lens of personal dignity and fairness, individual property rights are equally as deserving of constitutional protection as is personal liberty.⁴⁰

This “profound attitude of fairness” that constrains how government may act against an individual is not reconcilable with OCS’s insistence that it can obtain the Foster Children’s benefits in secret, pocket their funds for its own economic benefit in secret, and conceal the identities of relatives who, by law, are higher-ranking candidates to manage their benefits. Shrouding in secrecy its efforts to become RP and control their benefits is unfair in any context. But here, where the victims of that secrecy are disabled and orphaned foster children under OCS custody, the degree of unfairness and affront to dignity is quantum levels higher. To a foster child whose liberty interests are already compromised and whose life all too often is a daily struggle, it is a paramount indignity.

It takes no imagination to appreciate the anger and indignity felt by a former foster child who learns years later that her foster-care agency secretly expropriated for its own gain tens of thousands of dollars in survivor benefits that were owed to her due to the death of her parent.⁴¹ Using Justice Frankfurter’s test, no sentient foster youth would ever say that “justice was done” upon discovering this secret practice.

³⁹ Sara B. Tosdal, *Preserving Dignity in Due Process*, 62 *Hastings L.J.* 1003, 1005 (2011).

⁴⁰ *Norene*, 457 P.2d at 931.

⁴¹ The National Public Radio/Marshall Fund interviews of former Alaskan foster children discussed in Amici’s opening brief relate the shock and dismay that these foster-care alumni experienced when they discovered their entitlement to federal benefits that OCS had surreptitiously diverted. *See* Amici Br. 12-13 & n.19. NPR recently published a follow-up report on former foster children’s frustration after hearing the earlier report, when states would not tell them what had happened to their past benefits. *See* Alexandra Arriaga,

Secretly obtaining and pocketing the Foster Children’s benefits, without even informing them of the benefits’ existence, is a palpable affront to their dignity. OCS’s actions violate due process because, at their core, they are grossly unfair and unjust.

II. Federal Law Does Not Preempt Alaska’s Constitutional Right to Due Process.

OCS’s preemption argument devolves to a simple fallacy: if Congress has addressed an issue in a federal law, it must have intended to preempt all state laws addressing that subject. In OCS’s view, the provisions requiring *SSA* to provide notice to parents and legal guardians mean that Congress intended for no one else to provide notice. *See* OCS Br. 27. OCS even contends that the Superior Court’s order that it provide notice “conflicts” with federal law, even though the Superior Court modified its order to meet SSA’s concerns, eliminating any specific “conflict.” *Id.* at 31. These arguments are meritless.

Amici’s opening brief sets forth the pertinent law of preemption, *see* Amici Br. 31-37, and is incorporated by reference. Among the most salient principles, OCS fails to account for the overriding legal presumption *against* preemption. This Court must presume that “Congress did not intend to displace state law”⁴² “unless that was the clear and manifest purpose of Congress.”⁴³ It also must “start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was

Decades after foster care, she learned she was owed benefits. Where did the money go?, Nat’l Pub. Radio (July 22, 2022), <https://www.npr.org/2022/07/22/1112705301/decades-after-foster-care-she-learned-she-was-owed-benefits-where-did-the-money-go?>

⁴² *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

⁴³ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

the clear and manifest purpose of Congress.”⁴⁴ These and other black-letter principles control here. The Act has no provisions, express or implied, reflecting legislative intent to preempt state constitutional law requiring notice by state agencies.

A. Conflict preemption. OCS’s asserted conflict between federal and state law is contrived. “Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law ‘stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.’”⁴⁵ OCS does not explain the conflict here: How is it impossible for OCS to comply with both federal and state law? More specifically, how does the Superior Court’s *modified* injunction order, as revised to accommodate SSA’s concerns, make it impossible for OCS to comply with federal law or otherwise conflict with the purposes and objectives of federal law? OCS does not say. What provision of the Act is defeated by a state-law requirement that a state agency provide notice to affected children in its legal custody? Again, OCS does not say, beyond pointing to a provision requiring the *federal agency* (SSA) to send its notice of certification of benefits “solely” to the child’s legal guardian or representative.⁴⁶ How are OCS’s responsibilities as RP adversely affected by requiring it to provide notice? From OCS’s silence, the answer apparently is “none.”

The arguments that OCS does make are readily answered.

⁴⁴ *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Rice*, 331 U.S. at 230).

⁴⁵ *Allen v. State, Dep’t of Health & Soc. Servs.*, 203 P.3d 1155, 1162 (Alaska 2009) (quoting *Roberts v. State, Dep’t of Revenue*, 162 P.3d 1214, 1223 (Alaska 2007)).

⁴⁶ See OCS Br. 30 & n.102 (citing 42 U.S.C. §§ 405(j)(2)(E)(ii), 1383(a)(2)(b)(xii)).

1. OCS cites federal requirements for SSA's notice to legal guardians and parents explaining a right of appeal. [OCS Br. 28-29]. Requiring OCS to provide its own additional notice does not hinder or affect SSA's notice obligations at all. To the contrary, it complements SSA's notice by filling in the interstitial gap created by SSA's lack of notice to the Foster Children. Two complementary notices are better than one.

2. OCS complains that the Superior Court's original injunction order conflicted with federal privacy law. [OCS Br. 29-30]. It did not, but the issue is moot because the Superior Court *granted* reconsideration in pertinent part and substantially revised the order to address SSA's concerns. Indeed, OCS later concedes that the modified injunction order does not conflict with federal privacy law. *Id.* at 30.

3. OCS tries to recast conflict preemption, contending that notice by OCS is prohibited because it purportedly "does not advance *Congress's* purpose underlying the benefit programs[.]" [OCS. Br. 27-28]. But there is no obligation that state law *advance* federal objectives; preemption applies only to state laws that *obstruct* federal goals. OCS cannot plausibly allege any such obstruction. For the same reason, OCS's complaint that the content of the notice "is not consistent with the actual selection process or Congress's goals" [OCS Br. 29] fails to identify any *conflict* with the selection process or statutory goals. Far from conflicting with federal law, the notice correctly reflects federal policies that a state foster-care agency is the RP of last resort and that relatives with a close connection to the child are preferred; it also informs the Foster Children of the financial advantages of having a private RP, which is consistent with federal policy. [Exc. 711]. SSA

has not complained about this content. But, if some inconsistency exists, OCS’s remedy is to appeal the order’s language; tellingly, OCS does not seek any such relief from this Court.

4. In cursory and cryptic terms, OCS suggests that the required notice somehow conflicts with Title IV-E by encouraging private RPs to receive SSI benefits for Title IV-E-eligible foster children. [OCS Br. 28]. It is difficult to understand how a mere notice could have this effect, especially where, rather than prohibiting dual benefits, federal policy expressly permits foster children to receive SSI and Title IV-E concurrently.⁴⁷ In any event, OASDI is not affected by Title IV-E. And again, the fact that SSA did not inform OCS of any such conflict is ample corroboration that none exists.

5. OCS has no support in the caselaw. *C.G.A. v. State*, 824 P.2d 1364 (Alaska 1992), which held that the Social Security Act’s anti-attachment clause, 42 U.S.C. § 407(a), preempts a support order requiring an RP of a juvenile in state custody to remit his OASDI benefits to the state to pay for his care, is inapt. *C.G.A.* applies *express* preemption, stating that Section 407(a) “unambiguously rules out any attempt to attach Social Security benefits.” *C.G.A.*, 824 P.2d at 1367; *see* Amici Br. 36. Requiring OCS to provide notice does not attach benefits and thus does not violate Section 407(a).

⁴⁷ *See* DHHS, Children’s Bureau, *Child Welfare Policy Manual* § 8.4D, “TITLE IV-E, General Title IV-E Requirements, Concurrent Receipt of Federal Benefits,” available at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws/policies/laws/cwpm/index.jsp (last accessed Aug. 1, 2022): “Question 1—What is the Department’s policy, under title IV-E, on concurrent receipt of benefits under title IV-E and Supplemental Security Income (SSI)?” Answer: “There is no prohibition in title IV-E against claiming Federal financial participation ... for foster care maintenance payments ... made on behalf of a child who is receiving SSI benefits. ... A child, if eligible, may receive benefits from both programs simultaneously.”).

B. *Field preemption.* Even though the Superior Court found sufficiently comprehensive statutory language to “occupy the field” and preempt the Foster Children’s equal-protection claim, it recognized that nothing comparable in the Act impliedly preempts an innocuous state constitutional requirement that OCS provide notice to the Foster Children. [Exc. 591]. The Superior Court’s distinction illustrates just how weak OCS’s field-preemption theory is when applied to due process.⁴⁸ OCS relies upon the Act’s requirements prescribing notice by *SSA*, but these say nothing—not a word—about what state agencies, which have separate obligations and duties under state law—should or should not do and what they may or may not say to the beneficiary. Their silence leaves ample room for states to require additional protections. As a New York court aptly put it when requiring due process for state psychiatric hospital patients subject to a statutory scheme appointing the hospitals as RPs for the patients and authorizing them to use Social Security benefits to pay for the patients’ care and maintenance, “[t]he Supremacy Clause ... does not preclude the State from promulgating additional procedural safeguards governing the handling of social security benefits by State-payee.”⁴⁹

In a similar case, future Third Circuit chief judge Edward R. Becker punctured the fallacy that the Act’s provisions touching on notice and RPs preclude states from applying additional non-conflicting due-process safeguards pursuant to general state law principles:

⁴⁸ A similar distinction was made by the Court of Appeals of Maryland in *Ryan W.*, albeit implicitly. The majority opinion concluded that juvenile court jurisdiction over a foster child’s OASDI funds was barred by the Supremacy Clause, as that authority is vested exclusively in SSA, but nonetheless affirmed the child’s due-process right to notice from the state-agency RP. *See* 76 A.3d at 1060-61, 1067-70.

⁴⁹ *Shields v. Katz*, 533 N.Y.S.2d 451, 453 (N.Y. App. Div. 1988).

[W]hen the SSA chooses to make a state revenue agent the recipient of a patient's social security benefits it is within a state's power to require simply that the agent should still act in accordance with his state legislative directives. ... There is positively nothing in the Social Security Act or the SSA regulations which requires Pennsylvania to offer its revenue agents for unconditional service as representative payees.⁴

⁴We do not, of course, dispute the general proposition that federal law supersedes inconsistent state law. The flaw in the defendants' supremacy argument, however, is their seeming presumption that the operation of any federal law at all on the subject of the appointment of a payee is automatically and necessarily exclusive.⁵⁰

So, too, here. The lack of any indication that the Act's procedural safeguards regarding RPs are exclusive, especially regarding foster children in the state custody, leaves significant holes in the federal scheme. Field preemption is inapt if "Congress has left some room for state involvement"⁵¹ because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."⁵² Where "Congress has done nothing to suggest it is inappropriate" for a state to require its state-agency RP to provide notice to affected children in its custody, "[t]he federal scheme thus leaves room for a [state] policy requiring [its] state officials to" comply with the state constitution.⁵³ Here, Congress has not disturbed multiple cases allowing for complementary state regulation.⁵⁴ Requiring OCS to provide due process required by state law hardly intrudes

⁵⁰ *Vecchione v. Wohlgemuth*, 426 F. Supp. 1297, 1304 & n.4 (E.D. Pa.), *aff'd*, 558 F.2d 150 (3d Cir. 1977).

⁵¹ *State v. Dupier*, 118 P.3d 1039, 1050 (Alaska 2005).

⁵² *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

⁵³ *Arizona v. United States*, 567 U.S. 387, 413 (2012).

⁵⁴ Amici's opening brief cites cases dating to 1984 that apply state remedies for aspects of the RP process. See Amicus Br. 35 n.81. For example, *Jordan v. Heckler*, 744 F.2d 1397 (10th Cir. 1984), recognized that common-law restitution "claims could however go against the representative as an individual with state law remedies available." *Id.* at 1399. Apart from adding federal remedies in 2004 for RP misuse of funds, which some courts

upon a highly regulated federal subject that intrinsically should be set by Congress, such as foreign policy, national security, or immigration.

C. *General problems with preemption.* OCS fails to appreciate the absurd overbreadth of its preemption argument. If federal law preempts state constitutional requirements for due process owed by a state agency, it will preempt any state law, regulation, or policy that directs a state agency to give notice to beneficiaries. OCS could not compel its own workers to advise a Foster Child about OCS’s appointment as RP. A state law requiring notice, like that in Maryland or new statutes in Illinois and Nebraska,⁵⁵ most likely would be preempted. Maryland and Illinois’s laws directing the state agency to place specified portions of its foster children’s benefits into special needs trusts or other protected accounts for the children’s use and benefit also might be preempted—even though the states themselves have established the programs.

SSA has never indicated that notice and other state measures like that in Maryland, Illinois, and Nebraska conflict with the federal program. It did not advise OCS that the Social Security Act prohibits notice by a state-agency RP, nor did it object to the language ultimately used in the Superior Court’s modified injunction order. SSA has never advised

construe as preempting state-law remedies for misuse, Congress has not taken *any* steps to preempt state law. The legislative history to the Social Security Protection Act of 2004, P.L. 108-203 (2004), is silent: it does not indicate any intent to preempt rights or remedies, nor does it address *Jordan* or other cases. The title of P.L. 108-203 (“An act to amend the Social Security Act ... to *provide additional safeguards for Social Security and Supplemental Security Income beneficiaries with representative payees*, to enhance program protections, and for other purposes.”) (emphasis added) shows Congress’ intent to enact *broader* protections with *additional* safeguards, not to curtail constitutional rights.

⁵⁵ See SB 3470 (Ill.) (enacted May 27, 2022); LB 1173 (Neb.) (enacted Apr 19, 2022). The new Illinois law follows Maryland and requires the state agency to save for future use increasing proportions of foster youth’s benefits.

Maryland that its notice requirement conflicts with or is otherwise preempted by federal law, even though it weighed on specific questions, much like it did below. SSA's failure to assert any superior federal interests that supersede state law is tacit acquiescence to the validity of state law imposing a notice requirement on state-agency RPs like OCS.

CONCLUSION

For the foregoing reasons, the Superior Court's judgment and order requiring OCS to provide notice to the Foster Children should be affirmed.

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CERTIFICATE REQUIRED BY APPELLATE RULE 513.5(c)(2)

Undersigned counsel certifies that the typeface used in this brief is 13-point (proportionally spaced) Times New Roman.

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