

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Family)
and Community Services, Kim Kovol)
in her official capacity as)
Commissioner of the Department,)
Office of Children’s Services, Kim)
Guay, in her official capacity as)
Director of Office of Children’s)
Services,) Supreme Court No. **S-18249**
))
Appellants/Cross-Appellees,)
))
v.)
))
Z.C.,)
))
Appellee/Cross-Appellant.)
Trial Court Case No. **3AN-14-07961 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE WILLIAM F. MORSE

**REPLY BRIEF OF APPELLANT
THE STATE OF ALASKA**

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AUTHORITIES PRINCIPALLY RELIED UPON

FEDERAL STATUTES:

42 U.S.C. § 405(j), Representative Payees

(1)(A) If the Commissioner of Social Security determines that the interest of any individual under this subchapter would be served thereby, certification of payment of such individual's benefit under this subchapter may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization, with respect to whom the requirements of paragraph (2) have been met (hereinafter in this subsection referred to as the individual's "representative payee"). If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit paid to such representative payee pursuant to this subsection or section 1007 or 1383(a)(2) of this title, the Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee pursuant to this subsection and certify payment to an alternative representative payee or, if the interest of the individual under this subchapter would be served thereby, to the individual.

...

(2)(A) Any certification made under paragraph (1) for payment of benefits to an individual's representative payee shall be made on the basis of--

- (i) an investigation by the Commissioner of Social Security of the person to serve as representative payee, which shall be conducted in advance of such certification and shall, to the extent practicable, include a face-to-face interview with such person, and
- (ii) adequate evidence that such certification is in the interest of such individual (as determined by the Commissioner of Social Security in regulations).

...

(E)(i) Any individual who is dissatisfied with a determination by the Commissioner of Social Security to certify payment of such individual's benefit to a representative payee under paragraph (1) or with the designation of a particular person to serve as representative payee shall be entitled to a hearing by the Commissioner of Social Security to the same extent as is provided in subsection (b), and to judicial review of the Commissioner's final decision as is provided in subsection (g).

(ii) In advance of the certification of payment of an individual's benefit to a representative payee under paragraph (1), the Commissioner of Social Security shall provide written notice of the Commissioner's initial determination to certify such payment. Such notice shall be provided to such individual, except that, if such individual-

(I) is under the age of 15,

- (II) is an unemancipated minor under the age of 18, or
- (III) is legally incompetent,

then such notice shall be provided solely to the legal guardian or legal representative of such individual.

(iii) Any notice described in clause (ii) shall be clearly written in language that is easily understandable to the reader, shall identify the person to be designated as such individual's representative payee, and shall explain to the reader the right under clause (i) of such individual or of such individual's legal guardian or legal representative--

- (I) to appeal a determination that a representative payee is necessary for such individual,
- (II) to appeal the designation of a particular person to serve as the representative payee of such individual, and
- (III) to review the evidence upon which such designation is based and submit additional evidence.

(3)(A) In any case where payment under this subchapter is made to a person other than the individual entitled to such payment, the Commissioner of Social Security shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Commissioner of Social Security shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(B) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Commissioner of Social Security shall establish a system of accountability monitoring for institutions in each State.

...

(E) Notwithstanding subparagraphs (A), (B), (C), and (D), the Commissioner of Social Security may require a report at any time from any person receiving payments on behalf of another, if the Commissioner of Social Security has reason to believe that the person receiving such payments is misusing such payments.

...

(G) The Commissioner of Social Security shall maintain a centralized file, which shall be updated periodically and which shall be in a form which will be readily retrievable by each servicing office of the Social Security Administration, of--

- (i) the address and the social security account number (or employer identification number) of each representative payee who is receiving benefit payments pursuant to this subsection, section 1007 of this title, or section 1383(a)(2) of this title, and
- (ii) the address and social security account number of each individual for whom each representative payee is reported to be providing services as representative payee pursuant to this subsection, section 1007 of this title, or section 1383(a)(2) of this title.

(H) Each servicing office of the Administration shall maintain a list, which shall be updated periodically, of public agencies and certified community-based nonprofit social

service agencies (as defined in paragraph (10)) which are qualified to serve as representative payees pursuant to this subsection or section 1007 or 1383(a)(2) of this title and which are located in the area served by such servicing office.

...

(5) In cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits. In any case in which a representative payee that--

(A) is not an individual (regardless of whether it is a "qualified organization" within the meaning of paragraph (4)(B)); or

(B) is an individual who, for any month during a period when misuse occurs, serves 15 or more individuals who are beneficiaries under this subchapter, subchapter VIII, subchapter XVI, or any combination of such subchapters;

misuses all or part of an individual's benefit paid to such representative payee, the Commissioner of Social Security shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to the amount of such benefit so misused. The provisions of this paragraph are subject to the limitations of paragraph (7)(B). The Commissioner of Social Security shall make a good faith effort to obtain restitution from the terminated representative payee.

...

(6) In addition to such other reviews of representative payees as the Commissioner of Social Security may otherwise conduct, the Commissioner shall provide for the periodic onsite review of any person or agency located in the United States that receives the benefits payable under this subchapter (alone or in combination with benefits payable under subchapter VIII or subchapter XVI) to another individual pursuant to the appointment of such person or agency as a representative payee under this subsection, section 1007 of this title, or section 1383(a)(2) of this title in any case in which--

(i) the representative payee is a person who serves in that capacity with respect to 15 or more such individuals;

(ii) the representative payee is a certified community-based nonprofit social service agency (as defined in paragraph (10) of this subsection or section 1383(a)(2)(I) of this title);

(iii) the representative payee is an agency (other than an agency described in clause (ii)) that serves in that capacity with respect to 50 or more such individuals; or

(iv) the representative payee collects a fee for its services.

The Commissioner shall also conduct periodic onsite reviews of individual and organizational payees, including payees who are related to the beneficiary and primarily

reside in the same household, selected on the basis of risk-factors for potential misuse or unsuitability associated with such payees or beneficiaries.

...

(9) For purposes of this subsection, misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment under this subchapter for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person. The Commissioner of Social Security may prescribe by regulation the meaning of the term “use and benefit” for purposes of this paragraph.

...

(11)(A) The Commissioner of Social Security shall--

(i) enter into agreements with each State with a plan approved under part E of subchapter IV for the purpose of sharing and matching data, on an automated monthly basis, in the system of records of the Social Security Administration with each Statewide and Tribal Automated Child Welfare Information System to identify represented minor beneficiaries who are in foster care under the responsibility of the State for such month; and

(ii) in any case in which a represented minor beneficiary has entered or exited foster care or changed foster care placement in such month, redetermine the appropriate representative payee for such individual.

(B) For purposes of this paragraph--

(i) the term “State” has the meaning given such term for purposes of part E of subchapter IV;

(ii) the term “Statewide and Tribal Automated Child Welfare Information System” means a statewide mechanized data collection and information retrieval system described in section 674(a)(3)(C) of this title; and

(iii) the term “represented minor beneficiary”, with respect to an individual for a month, means a child (as defined for purposes of section 675(8) of this title) entitled to benefits under this subchapter for such month whose benefits are certified for payment to a representative payee.

FEDERAL REGULATIONS:

20 C.F.R. § 404.2020 [20 C.F.R. § 416.620]. Information considered in selecting a representative payee.

In selecting a payee we try to select the person, agency, organization or institution that will best serve the interest of the beneficiary. In making our selection we consider—

- (a) The relationship of the person to the beneficiary;
- (b) The amount of interest that the person shows in the beneficiary;
- (c) Any legal authority the person, agency, organization or institution has to act on behalf of the beneficiary;
- (d) Whether the potential payee has custody of the beneficiary;
- (e) Whether the potential payee is in a position to know of and look after the needs of the beneficiary;
- (f) The potential payee's criminal history; and
- (g) Whether the beneficiary made an advance designation (see § 404.2018).

20 C.F.R. § 404.2035 [20 C.F.R. § 416.635]. What are the responsibilities of your representative payee?

A representative payee has a responsibility to—

- (a) Use the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in your best interests;
- (b) Keep any benefits received on your behalf separate from his or her own funds and show your ownership of these benefits unless he or she is your spouse or natural or adoptive parent or stepparent and lives in the same household with you or is a State or local government agency for whom we have granted an exception to this requirement;
- (c) Treat any interest earned on the benefits as your property;
- (d) Notify us of any event or change in your circumstances that will affect the amount of benefits you receive, your right to receive benefits, or how you receive them;
- (e) Submit to us, upon our request, a written report accounting for the benefits received on your behalf, and make all supporting records available for review if requested by us; and
- (f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities.

20 C.F.R. § 404.2040 [416.640] Use of benefit payments.

(a) Current maintenance.

(1) We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

...

INTRODUCTION

OCS preserved its argument that federal preemption principles bar Z.C.'s claim for additional, OCS-provided notice in a field controlled by federal law. The argument appears throughout the summary judgment briefing below, and the superior court made a specific ruling rejecting it. This Court can review that ruling.

And when this Court considers federal preemption, it should find that Z.C.'s due-process claim for notice from OCS is barred. Representative payee selection for Social Security beneficiaries is a comprehensively and exclusively occupied federal field. Congress tailored a due-process protective notice specific to child beneficiaries, and any constitutional inadequacy in that notice must be remedied via federal law. The superior court's contradictory notice order conflicts with Congress's choice. It is preempted.

Finally, even if room existed for state-law supplementation to this comprehensive, purely federal program, the superior court's due process analysis does not hold together on its merits. Constitutional procedural protections attach only to rights the law recognizes. Z.C. seeks to protect a financial interest in having a representative payee with no overlapping support obligation, an interest federal law expressly does *not* recognize. Because of that problem, the superior court tied its newly created notice obligation to a different interest—the benefits themselves. But foster children are not deprived of benefits by virtue of having OCS as their representative payee.

ARGUMENT

I. OCS preserved its argument that federal law preempts the due process claim.

OCS argues that federal law preempts Z.C.’s claim that the Alaska constitution requires OCS-provided notice beyond what the SSA already provides. [At. Br. 24-32] Z.C. contends that this is a new issue raised for the first time on appeal and asks this Court to deem it waived. [Ae. Br. 14-15] She says that, in the trial court, OCS argued that preemption foreclosed only her equal protection claim and disgorgement remedy, not her due process claim. [Ae. Br. 11 n.26] But preemption arguments permeated the trial court briefing on both of Z.C.’s claims, and the superior court specifically ruled that the SSA does not “fully and exclusively occupy the field of notice to a Social Security beneficiary” and that “federal law does not preempt state constitutional concepts of notice” [Exc. 591] This Court can review that incorrect conclusion.

To preserve an issue for review in this Court, an appellant “must have ‘raised the issue below’” and “specified [the] grounds for doing so.”¹ The preservation rule is “not absolute,” and analysis of whether an issue has been preserved considers the “important judicial policies” underlying the rule.² Those considerations are (1) whether the trial court has made “a ruling . . . that [can] be reviewed on appeal,” (2) whether the trial court has had “opportunity to correct an alleged error,” and (3) whether “a sufficient factual

¹ *Ivy v. Calais Co., Inc.*, 397 P.3d 267, 276 (Alaska 2017) (quoting *Stadnicky v. Southpark Terrace Homeowner’s Ass’n, Inc.*, 939 P.2d 403, 405 (Alaska 1997)).

² *Id.* (quoting *Johnson v. State*, 328 P.3d 77, 82 (Alaska 2014)).

record” ensures that “appellate courts do not decide issues of law in a factual vacuum.”³

Applying those principles confirms that OCS preserved its argument that a due-process-based claim for additional notice is preempted. As far back as 2015 and 2016, when the parties twice cross-moved for summary judgment on Z.C.’s due process claim, OCS argued that the Supremacy Clause of the United States Constitution barred one of the remedies sought on *both* the equal protection and due process claims, relying on *C.G.A. v. State*. [Exc. 13, 21-22, 62, 68⁴] OCS argued that the SSA had exclusive control over the representative payee selection process and associated notice, and that Z.C.’s request for additional notice “conflicts” with the federal limitations on the content and recipients of representative payee selection notices. [Exc. 68, 73]

In response, Z.C. argued that federal law does not preempt the question of “whether the Alaska Constitution requires the State to provide notice when it seeks to become a foster youth’s representative payee.” [Exc. 89-90] And she argued broadly that this Court’s precedent “did not bar any type of relief” on the due process claim “pursuant to the Supremacy Clause.” [Exc. 90] OCS responded that “Z.C. seeks additional notice . . . beyond what is required by federal law and policy and seeks remedies that are only available from the SSA.” [Exc. 101] These early summary judgment arguments encapsulate the same preemption arguments that OCS has further developed on appeal.

In its first order requiring additional notice on the due process claim, the superior

³ *Id.*

⁴ Citing *C.G.A. v. State*, 824 P.2d 1364, 1367 (Alaska 1992).

court did not address preemption. [See Exc. 183] After that notice ruling, the parties briefed the law of preemption in further detail in their cross-motions for summary judgment on Z.C.’s claim for repayment of benefits [Exc. 218-24, 242-52, 279-87] and the equal protection claim [Exc. 493-99, 518-20, 544-52]. OCS argued at this stage that federal law “exclusively governs . . . appointment of representative payees [and] duties of representative payees” [Exc. 279-80] In its order on those motions, the superior court specifically ruled that “federal law does not preempt state constitutional concepts of notice” to Social Security beneficiaries.⁵ [Exc. 591]

On appeal, OCS has developed that argument. But adding detail to an argument does not make it “new,” such that this Court cannot review it. Moreover, this Court considers even “new” arguments to have been preserved if they “do not depend on new or controverted facts,” are “closely related to” the arguments below, and “could have been gleaned from the pleadings.”⁶ An argument “not inherently inconsistent with” and “grounded in the basic elements of an argument originally made” is adequately

⁵ OCS raised federal preemption of the due process claim for notice again in its Rule 60(b) Motion for Relief from the trial court’s notice orders and renewed Motion for Summary Judgment on the due process claim, focusing on additional conflict preemption arising from the SSA’s response to the trial court’s orders. [Exc. 612-28] That argument addressed the SSA’s instruction that OCS not comply with the superior court’s original notice order because doing so would violate OCS’s obligations under federal privacy law. The preemption argument based on federal privacy law was new, but preemption was not. By that stage, the parties had already briefed preemption and the superior court had ruled that the due process claim for notice was not preempted. [Exc. 591]

⁶ *Ivy*, 397 P.3d at 276 n.30 (quoting *Krossa v. All Alaskan Seafoods, Inc.*, 37 P.3d 411, 418-19 (Alaska 2001)); *Gavora, Inc. v. City of Fairbanks*, 502 P.3d 410, 421 (Alaska 2021) (citing *Pitka v. Interior Reg’l Hous. Auth.*, 54 P.3d 785, 788 (Alaska 2002)).

preserved.⁷ Here, OCS’s preemption argument is not new, but even if it were, it is consistent with and grounded in the preemption arguments and themes of federal law and policy that run through the extensive briefing below.⁸

In sum, the superior court considered and ruled on the question of whether federal law can be supplemented with additional notice requirements as a matter of state constitutional due process. [Exc. 591] This Court can review that ruling.

II. Federal law occupies the field of representative payee selection and covers the subject of the associated notice in ways that conflict with the state court’s order, and thus, preempts Z.C.’s due process claim.

When this Court reviews the superior court’s preemption ruling about Z.C.’s due process claim, it should reverse. Representative payee selection, including the due-process-based notice rights associated with the process, is a field governed exclusively by federal law. And the court’s order conflicts with the federal law occupying that field.

A. The presumption against preemption does not apply to state attempts to regulate in purely federal territory, and Social Security representative payee appointments are purely federal.

Z.C. invokes the presumption against federal preemption. [Ae. Br. 19] But that presumption has little relevance to a field like representative payee appointment, which is a creation of federal law.⁹ She insists that the superior court “did not purport to enter the

⁷ *Gavora*, 502 P.3d at 421 n.42 (quoting *Coster v. Piekarski*, 3 P.3d 333, 336 (Alaska 2000)).

⁸ *See* Ae. Br. 17 (arguing that “the same analysis” of preemption applies to both of Z.C.’s claims).

⁹ *See Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001) (rejecting the presumption against preemption of state-law fraud claims premised on alleged fraudulent statements made to the FDA because “the relationship between a federal

field of the representative payee selection program” [Ae. Br. 19] and seeks to redefine the relevant field as “child welfare” or the “best interests of children” in OCS custody, in general. [Ae. Br. 20-21]

This rebranding of the superior court’s order lacks plausibility. OCS accurately identified the field in which the state court’s order sought to regulate: the SSA’s representative payee selection program and the associated notice. This is the sole subject of the notice the court crafted. The court instructed OCS to provide a notice in every child protection case stating that “if the child . . . is or becomes eligible for [Social Security] benefits, then OCS will apply to the SSA [to] become the child’s representative payee.” [Exc. 711] OCS is to inform the parties to CINA cases that “the child or another on the child’s behalf may propose an alternative representative payee to the SSA,” and that there are “financial consequences of OCS, rather than a private person, becoming the representative payee.” [Exc. 711]¹⁰

The entire program is indisputably federal territory. Congress created and funded Social Security benefit programs,¹¹ Congress gave the SSA exclusive authority to administer and regulate them,¹² Congress and the SSA require nearly all children to

agency and the entity it regulates . . . originates from, is governed by, and terminates according to federal law”).

¹⁰ The court elsewhere characterized the “financial consequences” as a lost opportunity to have a private payee who might use the funds to “supplement rather than reimburse the separate obligation that the State has to pay for foster care.” [Exc. 585]

¹¹ 42 U.S.C. §§ 402(d) (OASDI), 1382 (SSI).

¹² See statutes and cases cited in the Appellants’ Brief at n.14.

receive their benefits through representative payees,¹³ and the SSA alone has the authority to determine who “will best serve the interests of the beneficiary” as representative payee.¹⁴ Comprehensive federal regulations and policies contain the criteria for that selection, the policies and goals driving the choice,¹⁵ and the mechanism by which the SSA must affirmatively seek out the best representative payee for foster children in particular.¹⁶ Simply put, the “best interests” of a beneficiary, with respect to representative payee appointment¹⁷ and payee responsibilities,¹⁸ has a specific meaning found in federal law. Neither the selection of representative payees nor the guidelines for payees’ conduct are by any stretch of the imagination “historically . . . the province of state judges.” [Ae. Br. 20]¹⁹

¹³ 42 U.S.C. §§ 405(j), 1383(a)(2)(A)(ii)(I); 20 C.F.R. §§ 404.2010(b), 416.610(b).

¹⁴ 20 C.F.R. §§ 404.2020, 416.620.

¹⁵ 20 C.F.R. §§ 404.2020, 404.2021, 416.620, 416.621.

¹⁶ POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502100>; POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

¹⁷ 20 C.F.R. §§ 404.2020, 416.620.

¹⁸ 20 C.F.R. §§ 404.2035, 416.635, 404.2040(a), 416.640(a). Z.C. also proposes the fiduciary relationship between OCS and foster children might be the relevant “field.” [Ae. Br. 20] But the notice is not directed at the fiduciary relationship between OCS and children any more than it is directed at “best interests” generally. OCS’s obligations as a representative payee are found in federal law.

¹⁹ *Wash. State Dep’t of Soc. & Health Servs. v. Guard. Est. of Keffeler*, 537 U.S. 371, 386, 390 (2003) (“*Keffeler II*”) (rejecting argument that children’s “best interests” require foster care agencies to use benefits to supplement state-funded care because federal regulations “specify that payments made for a beneficiary’s ‘current maintenance’ are deemed to be ‘for the use and benefit of the beneficiary’” and “the [SSA] has read the ‘interest’ of the beneficiary in light of the basic objectives of the Act”).

B. The superior court’s notice requirement has no place in the purely federal field of representative payees’ appointment and conduct.

Social Security representative payee appointment—like alien registration—is a field in which federal law “provide[s] a full set of standards,” “designed as a harmonious whole,” “mak[ing] a single sovereign responsible for maintaining a comprehensive and unified system.”²⁰ In *Arizona v. United States*, the United States Supreme Court held that Arizona’s attempt to impose different criminal penalties than the federal ones for failure to comply with federal registration requirements was preempted.²¹ The Court explained that allowing states “to impose . . . penalties for the federal [registration] offenses . . . would conflict with the careful framework Congress adopted” in that area.²² A contrary result, the Court said, would give state courts the power to penalize conduct “even in circumstances where [the] federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies” or where the federal government would respond differently to the same conduct.²³

Federal law covers the subject of notice within the field, and “conflict[s] between state and federal law . . . underscore the reason for field preemption.”²⁴ Congress decided exactly when to provide notice to protect due process rights, what to include in that

²⁰ *Arizona v. United States*, 567 U.S. 387, 401 (2012) (internal quotation marks and citations omitted).

²¹ *Id.* at 400.

²² *Id.* at 402.

²³ *Id.*

²⁴ *Id.* at 403. Field preemption and conflict preemption are not distinct concepts. *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

notice, and to whom to send it.²⁵ For child beneficiaries, Congress instructed that the representative payee selection notice be sent “*solely*” to “the beneficiary’s legal guardian or legal representative.”²⁶ Because Congress covered the subject, any state-imposed notice is preempted. And here, the state-court-ordered notice reaches much farther than the narrow, expressly limited notice Congress tailored for child beneficiaries’ representative payee selection.

Despite the differences between the federal notice requirement and the superior court’s, Z.C. argues that the superior court’s notice does not conflict with the one Congress prescribed because it furthers a federal goal—seeking out the best payee for each beneficiary foster child.²⁷ [Ae. Br. 24-25] But placing more obligations on potential

²⁵ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii); 20 C.F.R. §§ 404.2030(a), 416.630(a). POMS at GN 00502.159 (“Advance Notice - Due Process: It is a legal requirement that we provide advance notice about the payee appointment to the proper persons. The parents (or legal guardian) of a child in foster care must be provided advance notice of the appointment unless their parental rights were terminated by a court.”).

²⁶ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii) (emphasis added). Z.C. protests that this notice is ineffective because it goes only to OCS as the child’s legal guardian. [Ae. Br. 22] But foster children are no different from other children in this regard, because a child’s legal guardian is usually appointed representative payee. *See* 20 C.F.R. §§ 404.2020, 416.620. In any event, that is a challenge to be made to the SSA, not to OCS. The constitutionality of the SSA’s notice is an issue of federal not state law. *See* Brief for the Amicus Curiae Jo Anne B. Barnhart, Commissioner of the SSA in *Keffeler III*, 2003 WL 24161716 at *11-12 (Sept. 29, 2003). (arguing that the federal notice comports with due process).

²⁷ Z.C. also disputes OCS’s assertion that Congress’s treatment of the overlap between Title IV-E funding and SSI benefits is additional evidence of conflict between Congress’s policy objectives and the superior court’s. She suggests that children *can* receive benefits from both programs. [Ae. Br. 25-27] This is wrong. Money from the Title IV-E program reimburses the State for foster care payments for needy children. *See* 42 U.S.C. § 672(a)(3). However, when the child also receives SSI, the SSI benefits are

representative payees proves the order is preempted. *No* notice requirements are delegated to any payee applicants (including foster care agencies). Instead, Congress specified who would provide notice (SSA), the content that notice would include (the identity of the representative payee and the rights to appeal the determination and review evidence upon which it was based), and who would get that notice (“solely” the child’s legal guardian or legal representative and no others).²⁸ Congress also placed the obligation to seek out payee applicants on the SSA, not applicants themselves.²⁹

These specific Congressional choices balance procedural rights with privacy rights, and the superior court’s order upsets that balance. “Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.”³⁰ In *Arizona*, the state criminalized “unauthorized alien[s]” under federal law applying for work—conduct federal law did not criminalize—and the

reduced by the amount of foster care payments eligible for Title IV-E reimbursement. *See* At. Br. 14-15, 28 & n.95, POMS at SI 00830.170 Income Based on Need (IBON). This is because the SSI benefits are intended to cover basic needs, which have already been covered by the IV-E reimbursed foster care payment. *Id.* (defining “income based on need” to include “funds [] provided specifically for a formalized program whose general purpose is similar to that of the SSI program”). Congress here reaffirmed its policy that SSI benefits are intended to cover a child’s basic needs, not to be used for other purposes or conserved. The superior court’s policy goal is not a federal policy goal.

²⁸ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii); 20 C.F.R. §§ 404.2030, 416.630.

²⁹ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii); POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502100>

³⁰ *Arizona*, 567 U.S. at 406-07 (quoting *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

Court invalidated Arizona’s law.³¹ State law cannot impose different—or even simply additional—procedures or enforcement mechanisms than those Congress chose in a field occupied by federal law. But that is precisely what the superior court did here.

Preemption in this area is further confirmed by the reality that state courts cannot affect the representative payee selection process. Typically, the remedy for a procedural due process violation lies against *the decision maker*.³² But OCS’s appointments as representative payee are valid under federal law whether or not OCS provides the state-ordered notice; the SSA would not revisit them on grounds of a supposed state constitutional violation.³³ Beneficiaries have no *federal* right to the notice the state court ordered, and payee applicants like OCS have no *federal* obligation to provide it.

³¹ *Id.*

³² *See, e.g., Whitesides v. State, Dep’t of Public Safety, Div. of Motor Vehicles*, 20 P.3d 1130, 1139 (Alaska 2001) (where Division of Motor Vehicles denied driver’s procedural due process right to an in-person hearing before revoking his driver’s license, Court vacated Division’s decision and remanded matter to Division for in-person hearing); *Baker v. State, Dep’t. of Health & Soc. Servs.*, 191 P.3d 1005 (Alaska 2008) (requiring Department of Health and Social Services to provide additional process before terminating state-administered public benefits).

³³ Z.C. argues that the field of payee selection is not preempted because in her view, state and federal courts have concurrent jurisdiction over claims of payee misuse of benefits. [Ae. Br. 21] This is both irrelevant and incorrect. Nothing in 42 U.S.C. § 405(j)(1)(A) or the cases Z.C. cites in support of this assertion suggests that the representative payee selection process has room for state law supplementation.

Moreover, the cases Z.C. cites pre-date amendments to 42 U.S.C. § 405(j) that expanded and solidified SSA control over benefit misuse claims. *In Re Ryan W.*, 76 A.3d 1049, 1061-62 (Md. 2013) (discussing amendments to 42 U.S.C. § 405 and cases cited at Ae. Br. 21 n.51) Those cases also conflict with this Court’s 1994 ruling in *C.G.A. v. State*, 824 P.2d 1364, 1367 (Alaska 1992), which held that federal law preempts state court participation in claims of representative payee misuse of funds. The superior court correctly rejected this argument below. [Exc. 590]

In short, the superior court here created a right to notice (in beneficiaries) and an obligation (in OCS as representative payee applicant) that state courts cannot effectuate; only the SSA has control over the decision the additional notice is supposed to support. “[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity,”³⁴ the activity here being OCS’s application to become payee without giving notice. Here, as in *Arizona*, “Congress intended to preclude States from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.’”³⁵ That intent is apparent from Congress having given the SSA—and only the SSA—power over representative payee selection. Congress left no room for the superior court’s attempt to supplement that field.

As OCS has argued since the outset of this case, “Z.C. seeks additional notice . . . beyond what is required by federal law and policy and seeks remedies that are only available from the SSA.” [Exc. 101] The field of representative payee selection and associated notice is fully occupied by federal law, and the notice order is preempted.³⁶

³⁴ *Arizona*, 567 U.S. at 403 (quoting *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 288-89 (1986)).

³⁵ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)).

³⁶ Z.C. argues that other courts have decided similar due process claims on their merits, not on preemption grounds. [Ae. Br. 18] But only two courts have addressed claims for additional notice regarding payee selection, and the states in those two cases—Maryland and Washington—did not raise preemption arguments. *Guardianship Est. of Keffeler ex rel. Pierce v. State*, 88 P.3d 949, 343-46 (Wash. 2004) (“*Keffeler III*”) (rejecting claim for additional notice on the ground that the SSA’s statutorily required notice before representative payee appointment satisfies due process); *Ryan W.*, 76 A.3d at 1067-70 (holding that due process requires notice to a child’s CINA attorney of the foster care agency’s application for representative payee appointment).

III. The superior court’s due process analysis incorrectly attached constitutional due process protections to an interest in a payee with no overlapping support obligation, but federal law rejects that interest.

A successful due process claim requires a plaintiff to show, in the first two factors of the *Mathews v. Eldridge* test, some risk of deprivation of a protected interest.³⁷ Z.C.’s claim attempts to pair a recognized interest (as to which she cannot allege deprivation) with a “deprivation” of a different interest (that the law does not recognize). The fact that foster children have an interest in something the law protects—benefits—does not mean the constitution guards against deprivation of something else—a different representative payee—to which they have no right. Procedural measures protect against deprivation of only *recognized* interests.³⁸

Z.C., like the superior court, begins by identifying the benefits themselves as the interest worthy of procedural protection. [Ae. Br. 29-30; Exc. 193-95] Beneficiary children, like all Social Security beneficiaries, have a right to their benefits, and due process protections from the government entity *administering the benefit* attach to that

³⁷ *Dennis O. v. Stephanie O.*, 393 P.3d 401, 406 (Alaska 2017) (“A valid constitutional challenge based on due process requires ‘state action and the deprivation of an individual interest of sufficient importance to warrant constitutional protection.’” (quoting *Ostrow v. Higgins*, 722 P.2d 936, 942 (Alaska 1986))).

³⁸ *E.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”); *Hornaday v. Rowland*, 674 P.2d 1333, 1344 (Alaska 1983) (dismissing a due process claim because “the asserted interest does not merit constitutional protection”).

right.³⁹ Z.C. has alleged no deprivation of *benefits*. Throughout this case, she conceded—and the superior court recognized—that OCS is the duly appointed representative payee for many foster children, that the SSA issues those children’s benefits through OCS, and that OCS follows federal law when it spends the money on “foster care room and board, clothing, travel, medical expenses,” and other basic needs. [Ae. Br. 30-31]⁴⁰

Yet Z.C. portrays OCS’s expenditures on children’s basic needs as “taking [children’s] Social Security money,” a “total loss,” “diverting . . . monies,” “self-help,” “deprivation of . . . property,” and “taking” benefits, among other hyperbolic mischaracterizations.⁴¹ [Ae. Br. 28-42] This rhetoric, designed to conjure wrongdoing where none exists, is inaccurate as a matter of law and logic. *Spending* benefits on a child is not the same as *taking* benefits. Z.C. has no real answer to the obvious difference beyond pretending not to understand it. [Ae. Br. 28, 30] OCS no more deprives children

³⁹ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (evaluating the adequacy of the SSA’s procedural protections to benefits eligibility determination)

⁴⁰ *E.g.*, “The Plaintiffs are not directly challenging the State’s use of the child’s benefits to offset their cost of foster care.” [Exc. 192]; “Plaintiffs do not claim that OCS violated the Social Security Act [or] that OCS misused the Social Security benefits that it received on behalf of the Plaintiffs.” [Exc. 586-87]; “Plaintiffs have expressly stated that they are not alleging that OCS has misused their Social Security benefits.” [Exc. 601] The superior court cited *Keffeler II* in support of each of these sentences.

⁴¹ Z.C., following the amici, even goes so far as to accuse OCS of intentionally concealing from the SSA the identities of other people who could serve as representative payees for children. [Ae. Br. 40; Am. Br. 8, 19, 25] The lengthy portion of the record Z.C. cites for this factual assertion is a series of OCS’s representative payee applications on which OCS did not list possible alternative payees. [R. 734-961] The assumption that OCS actually knew of suitable alternative candidates lacks any basis, especially given that in all of these cases, the SSA’s own investigation turned up no one else to serve. Nothing in the record suggests that OCS actually knew of any alternate payee candidates for those children and failed to name them on the form.

of money when it spends benefits on food and housing than non-OCS payees, like parents, deprive children of money by doing the same.⁴² All representative payees, including foster care agencies, are subject to the same instruction that spending children's benefits on basic needs is proper and in their best interests.⁴³

The deprivation with which Z.C. and the superior court are actually concerned is not deprivation of *benefits*. Rather, the court sought to protect against theoretical "deprivation" the potential financial advantage of having a representative payee with no separate obligation to support the child.⁴⁴ The superior court was swayed by Z.C.'s policy argument that appointing payees who would use benefits to supplement the child's state support or conserve them would be good for children in a general sense.⁴⁵

The merits of this policy view aside,⁴⁶ the *Keffeler II* decision makes clear that there is no *right* to have benefits conserved or used to supplement rather than reimburse

⁴² See *Keffeler II*, 537 U.S. at 388 n.11 (pointing out that a foster care agency payee's overlapping obligation to provide support is no different than that of a parent payee; both use benefits in the best interests of children as defined by federal law when spending them on current maintenance).

⁴³ 20 C.F.R. §§ 404.2040(a), 416.640(a) (defining "current maintenance" to include "food, shelter, clothing, medical care, and personal comfort items").

⁴⁴ The court described the interest it targeted as "having a representative payee other than OCS" which could lead to "having the Social Security benefits supplement the State's payment of foster care costs." [Exc. 594]

⁴⁵ [Exc. 594] See *Keffeler II*, 537 U.S. at 389, ("At bottom, respondents' position and the State Supreme Court's holding reflect a view that allowing a state agency to reimburse itself for the costs of foster care is antithetical to the best interest of the beneficiary foster child.").

⁴⁶ The U.S. Supreme Court expressed skepticism that such payees are available for children, and explained practical reasons why requiring foster care agencies to use

state-funded foster care.⁴⁷ Federal law promises beneficiaries a payee who will “serve[] the beneficiary’s interest by seeing that basic needs are met.”⁴⁸ But beneficiaries do not have a right to a payee who will supplement those needs or “maximize[e] a trust fund attributable to fortuitously overlapping state and federal grants.”⁴⁹ The SSA made its policy crystal clear in its amicus briefs to the U.S. Supreme Court in *Keffeler II*.⁵⁰ The Commissioner confirmed that “focus on whether the State would otherwise bear the full cost of foster care is incorrect and irreconcilable with congressional purpose.”⁵¹ And in its brief to the Washington Supreme Court in *Keffeler III*, the SSA argued strongly against recognizing a due process claim for notice in order to circumvent Congress’s determination that “the child’s best interest is first, food, clothing, and shelter.”⁵²

Z.C. criticizes OCS’s reliance on *Keffeler II* because the case did not address a constitutional claim sounding in due process. [Ae. Br. 34] But *Keffeler II*’s significance is that it forecloses the existence of a right that could support the first prong of such a claim

benefits to supplement state-funded care would likely lead to worse outcomes for children. *Id.* at 390-91.

⁴⁷ *Keffeler II*, 537 U.S. at 390.

⁴⁸ *Id.*

⁴⁹ *Id.* The point of OCS’s Title IV-E argument, as to both preemption and due process, is simply that the reduction of SSI benefits dollar-for-dollar when beneficiaries are eligible for both underscores this conclusion. Congress does not intend two overlapping programs to cover basic needs for the same child. [At. Br. 15, 28, 37 n.129]

⁵⁰ Brief for the United States as Amicus Curiae Supporting Petitioners in *Keffeler II*, 2002 WL 1836735 at *12 (Aug. 2, 2002).

⁵¹ *Id.*

⁵² Brief for the Amicus Curiae Jo Anne B. Barnhart, Commissioner of the SSA in *Keffeler III*, 2003 WL 24161716 at *3 (Sept. 29, 2003).

under *Mathews v. Eldridge*. That prong of the analysis asks whether foster children have a legally cognizable right to a payee with no separate obligation to support them.⁵³ The answer is no. Though a child might prefer a non-OCS payee, federal law creates no right to have one.⁵⁴ Congress has not heeded requests to implement such a policy.⁵⁵ No due process protections can attach to a preference that is not a right.⁵⁶

The only case Z.C. cites that supports her claim is *Ryan W.*, the Maryland decision holding that due process demands that a foster care provider inform a child’s attorney⁵⁷ of

⁵³ *Mathews*, 424 U.S. at 335; *see also Roth*, 408 U.S. at 577 (only recognized interests merit due process protection).

⁵⁴ Many children might like to have a relative spend their benefits on electronics or save them for the child’s future wants and needs. But *Keffeler II* made clear that there is no right to a representative payee who lacks the overlapping obligation to support the beneficiary. 537 U.S. at 390 (rejecting the contention that “the appointment of a self-reimbursing representative payee [is] at odds with . . . a beneficiary’s interest”).

⁵⁵ *See* H.R. 5737, “Protecting Foster Youth Resources to Promote Self-Sufficiency Act” (114th Congress 2015-2016) (available at <https://www.congress.gov/bill/114th-congress/house-bill/5737/text>).

⁵⁶ Other federal cases confirm OCS’s analysis. Lawful expenditure of benefits is not “deprivation.” *Mason v. Sybinski*, 280 F.3d 788, 794 (7th Cir. 2002) (rejecting argument that due process requires a state hospital serving as representative payee to provide the beneficiary with notice that it spends the money on her care, because that lawful use of benefits “do[es] not constitute a[] . . . deprivation of a protected property interest). And federal law contains no right to have benefits supplement the care provided by a state institutional payee. *Gean v. Hattaway*, 330 F.3d 758, 779-70 (6th Cir. 2003) (rejecting Fifth and Fourteenth-amendment based “takings” claim because federal law permits state institutions acting as representative payees to “reimburse[] [them]selves for the cost of caring for beneficiaries] and thus there is no “established Fifth or Fourteenth Amendment right” to have the money used differently).

⁵⁷ *Ryan W.* required the state agency to “notify a [child in need of aid], through his or her legal counsel, contemporaneously with its application to be appointed as the child’s representative payee, that it has so applied.” 76 A.3d at 1069-70. The Maryland court did not mandate notice to the broader array of recipients the superior court included here.

its representative payee application.⁵⁸ Z.C. has no real answer to OCS’s criticism of that case, except her claim to perceive no difference between an interest in benefits and an interest in “free use” of benefits—the “right” to which the Maryland court and the superior court here attached procedural protections. [Ae. Br. 29; Exc. 194-95]

The distinction is not “difficult to follow.” [Ae. Br. 29] Beneficiaries without a representative payee have “free use” of their benefits.⁵⁹ They can spend them as they wish. But a person the SSA determines must receive benefits through a representative payee rather than directly has no “free use” interest.⁶⁰ And in any event, the Tenth Circuit held that the “free use” interest is *not* strong enough to support a requirement of

⁵⁸ In *Keffeler III*, the only other decision addressing a claim like this one, the Washington Supreme Court reached the opposite conclusion. 88 P.3d at 343-46. The other cases Z.C. and amici cite about due process protections against “taking” money are not relevant. In those cases, courts held that the government defendants must provide due process before taking action to direct individuals’ money to certain uses. [Ae. Br. 31-32; Am. Br. 12] None of these cases added obligations to *representative payees*. Federal law is the source of both the money and representative payees’ authority and discretion to spend it on the beneficiaries. *C.G.A.*, 824 P.2d at 1369 (“The regulations do not require that the representative payee consult with the beneficiary before spending the funds.”)

⁵⁹ 20 C.F.R. § 404.2001 (“Our policy is that every beneficiary has the right to manage his or her own benefits. However, some beneficiaries due to a mental or physical condition or due to their youth may be unable to do so. Under these circumstances, we may determine that the interests of the beneficiary would be better served if we certified benefit payments to another person as a representative payee.”); *McGrath v. Weinberger*, 541 F.2d 249, 253 (10th Cir. 1976) (distinguishing between “termination of benefits,” and “deprivation of free use of benefits” resulting from the appointment of a representative payee who wished to receive benefits directly).

⁶⁰ *McGrath*, 541 F.2d at 253. With only a few exceptions not relevant to foster children, Congress requires children to have payees. 42 U.S.C. §§ 405(j), 1383(a)(2)(A)(ii)(I); 20 C.F.R. §§ 404.2010(b), 416.610(b) (“Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee.”) POMS, *Policy for Determining Capability in Children*, at GN 00502.070, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502070>.

additional notice before the interest is curtailed by an SSA decision to pay benefits through a payee.⁶¹

The Maryland court's mistake was the same as the superior court's here. Due process attaches only to recognized rights. And the law does not recognize an interest in "free use" of benefits or in having a payee who has no overlapping support obligation.⁶²

The final significant question posed by the procedural due process test is whether there is any "probable value" to the additional procedural measures sought.⁶³ Procedural protections aim to improve the outcomes reached by the entity making the decision.⁶⁴ Here, the superior court ordered OCS to provide notice, but OCS does not appoint the payee.⁶⁵ Because federal law requires a pre-appointment search for payee leads and creates no right to a representative payee who supplements foster care, the superior court

⁶¹ *Id.* ("[C]urtailment of the [adult] plaintiff's right to manage his own benefits is not such a grievous loss that it outweighs the governmental interest involved and thus mandates prior notice and an opportunity to be heard.").

⁶² Z.C. faults OCS for applying to be representative payee without "investigat[ing] whether the existing payee is doing an acceptable job, or whether there is another person with a higher preference who is available to serve as a child's payee." [Ae. Br. 39-40] But the SSA, not OCS as an applicant, is tasked with seeking out and evaluating payee candidates.

⁶³ *Mathews*, 424 U.S. at 334-35.

⁶⁴ *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (explaining that due process attaches where "termination [of welfare benefits] involves state action *that adjudicates* important rights" and that "the procedures due process may require under any given set of circumstances must begin with a determination of the precise *nature of the government function involved* as well as of the private interest that has been *affected by governmental action*) (emphasis added).

⁶⁵ Other than *Ryan W.*, 76 A.3d at 1067-70, OCS has identified no due process case about government benefits in which the defendant was not the decision maker controlling access to the benefit.

cannot increase the likelihood of that outcome using a state notice obligation decoupled from the SSA's decision.

Experience bears this out. During the year OCS sent the targeted notices originally ordered, no foster child's payee appointment changed. [Exc. 633] Given the SSA's obligation to seek out and consider alternatives before appointing OCS,⁶⁶ this outcome is not surprising. The Alaska Constitution cannot alter the outcomes of SSA decisions, which are driven by Congressional policy, not Z.C.'s alternative policy preference.

CONCLUSION

For these reasons, the Court should reverse the judgment of the superior court on Z.C.'s due process claim.

⁶⁶ POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502100>; POMS GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.