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 Trial Court Case No. 3AN-14-07961 CI	Supreme Court Nos. S-18249/S-18259

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

CROSS-APPELLANTS' REPLY BRIEF

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Filed in the Alaska Supreme Court
this 25th day of October, 2022.

Meredith Montgomery, Clerk

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42 U.S.C. § 405(j). Evidence, procedure, and certification for payments.

(j) Representative payees.

(1)

(A) If the Commissioner of Social Security determines that the interest of any individual under this title [42 USCS §§ 401 et seq.] would be served thereby, certification of payment of such individual's benefit under this title [42 USCS §§ 401 et seq.] 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 807 or 1631(a)(2) [42 USCS § 1007 or 1383(a)(2)], 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 title [42 USCS §§ 401 et seq.] would be served thereby, to the individual.

(B) In the case of an individual entitled to benefits based on disability, the payment of such benefits shall be made to a representative payee if the Commissioner of Social Security determines that such payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as determined by the Commissioner) and the individual is incapable of managing such benefits.

(C)

(i) An individual who is entitled to or is an applicant for a benefit under this title, title VIII, or title XVI [42 USCS §§ 401 et seq., 1001 et seq., or 1381 et seq.], who has attained 18 years of age or is an emancipated minor, may, at any time, designate one or more other individuals to serve as a representative payee for such individual in the event that the Commissioner of Social Security determines under subparagraph (A) that the interest of such individual would be served by certification for payment of such benefits to which the individual is entitled to a representative payee. If the Commissioner of Social Security makes such a determination with respect to such individual at any time after such designation has been made, the Commissioner shall—

(I) certify payment of such benefits to the designated individual, subject to the requirements of paragraph (2); or

(II) if the Commissioner determines that certification for payment of such benefits to the designated individual would not satisfy the requirements of paragraph (2), that the designated individual is unwilling or unable to serve as representative payee, or that other good cause exists, certify payment of such benefits to another individual or organization, in accordance with paragraph (1).

(ii) An organization may not be designated to serve as a representative payee under this subparagraph.

* * * *

(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 title [42 USCS §§ 401 et seq.], title VIII [42 USCS §§ 1001 et seq.], title XVI [42 USCS §§ 1381 et seq.], or any combination of such titles;

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.

* * * *

(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 title [42 USCS §§ 401 et seq.] 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.

42 U.S.C. § 407. Assignment of benefits.

(a) In general. The right of any person to any future payment under this title [42 USCS §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title [42 USCS §§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) Amendment of section. No other provision of law, enacted before, on, or after the date of the enactment of this section [enacted April 20, 1983], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

(c) Withholding of taxes. Nothing in this section shall be construed to prohibit withholding taxes from any benefit under this title, if such withholding is done pursuant to a request made in accordance with section 3402(p)(1) of the Internal Revenue Code of 1986 [26 USCS § 3402(p)(1)] by the person entitled to such benefit or such person's representative payee.

20 C.F.R. § 404.2035. 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(a)(1). 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 costs incurred in obtaining food, shelter, clothing, medical care and personal comfort items.

Example: A Supplemental Security Income beneficiary is entitled to a monthly benefit of $ 264. The beneficiary's son, who is the representative payee, disburses the benefits in the following manner:

Rent and Utilities	$200
Medical	$25
Food	$60
Clothing (coat)	$55
Savings	$30
Miscellaneous	$30

The above expenditures would represent proper disbursements on behalf of the beneficiary.

20 C.F.R. § 404.2045. Conservation and investment of benefit payments.

(a) General. After the representative payee has used benefit payments consistent with the guidelines in this subpart (see § 404.2040 regarding use of benefits), any remaining amount shall be conserved or invested on behalf of the beneficiary. Conserved funds should be invested in accordance with the rules followed by trustees. Any investment must show clearly that the payee holds the property in trust for the beneficiary.

Example: A State institution for children with intellectual disability, which is receiving Medicaid funds, is representative payee for several Social Security beneficiaries. The checks the payee receives are deposited into one account which shows that the benefits are held in trust for the beneficiaries. The institution has supporting records which show the share each individual has in the account. Funds from this account are disbursed fairly quickly after receipt for the current support and maintenance of the beneficiaries as well as for miscellaneous needs the beneficiaries may have. Several of the beneficiaries have significant accumulated resources in this account. For those beneficiaries whose benefits have accumulated over $150, the funds should be deposited in an interest-bearing account or invested relatively free of risk on behalf of the beneficiaries.

(b) Preferred investments. Preferred investments for excess funds are U.S. Savings Bonds and deposits in an interest or dividend paying account in a bank, trust company, credit union, or savings and loan association which is insured under either Federal or State law. The account must be in a form which shows clearly that the representative payee has only a fiduciary and not a personal interest in the funds. If the payee is the legally appointed guardian or fiduciary of the beneficiary, the account may be established to indicate this relationship. If the payee is not the legally appointed guardian or fiduciary, the accounts may be established as follows:

(1) For U.S. Savings Bonds—

——— (Name of beneficiary) ——— (Social Security Number), for whom —- (Name of payee) is representative payee for Social Security benefits;

(2) For interest or dividend paying accounts—

——— (Name of beneficiary) by ——— (Name of payee), representative payee.

(c) Interest and dividend payments. The interest and dividends which result from an investment are the property of the beneficiary and may not be considered to be the property of the payee.

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;

(f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities; and

(g) Ensure that you are receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits (see § 416.994a(i)) if you are under age 18 (including cases in which your low birth weight is a contributing factor material to our determination that you are disabled).

20 C.F.R. § 416.640(a). Use of benefit payments.

(a) Current maintenance. 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 costs incurred in obtaining food, shelter, clothing, medical care and personal comfort items.

Example: A Supplemental Security Income beneficiary is entitled to a monthly benefit of $ 264. The beneficiary's son, who is the representative payee, disburses the benefits in the following manner:

Rent and Utilities	$166
Medical	$20
Food	$60

Clothing	$10
Miscellaneous	$8

The above expenditures would represent proper disbursements on behalf of the beneficiary.

20 C.F.R. § 416.645. Conservation and investment of benefit payments.

(a) General. If payments are not needed for the beneficiary's current maintenance or reasonably foreseeable needs, they shall be conserved or invested on behalf of the beneficiary. Conserved funds should be invested in accordance with the rules followed by trustees. Any investment must show clearly that the payee holds the property in trust for the beneficiary.

Example: A State institution for children with intellectual disability, which is receiving Medicaid funds, is representative payee for several beneficiaries. The checks the payee receives are deposited into one account which shows that the benefits are held in trust for the beneficiaries. The institution has supporting records which show the share each individual has in the account. Funds from this account are disbursed fairly quickly after receipt for the personal needs of the beneficiaries. However, not all those funds were disbursed for this purpose. As a result, several of the beneficiaries have significant accumulated resources in this account. For those beneficiaries whose benefits have accumulated over $ 150, the funds should be deposited in an interest-bearing account or invested relatively free of risk on behalf of the beneficiaries.

(b) Preferred investments. Preferred investments for excess funds are U.S. Savings Bonds and deposits in an interest or dividend paying account in a bank, trust company, credit union, or savings and loan association which is insured under either Federal or State law. The account must be in a form which shows clearly that the representative payee has only a fiduciary and not a personal interest in the funds. If the payee is the legally appointed guardian or fiduciary of the beneficiary, the account may be established to indicate this relationship. If the payee is not the legally appointed guardian or fiduciary, the accounts may be established as follows:

(1) For U.S. Savings Bonds—

——— (Name of beneficiary) —- (Social Security Number), for whom ——— (Name of payee) is representative payee for Supplemental Security Income benefits;

(2) For interest or dividend paying accounts—

——- (Name of beneficiary) by ——— (Name of payee), representative payee.

(c) Interest and dividend payments. The interest and dividends which result from an investment are the property of the beneficiary and may not be considered to be the property of the payee.

INTRODUCTION

When the Office of Children's Services ("OCS") was deposed in this case, it freely admitted that, while many Alaskan foster children might have assets and resources that could be used to reimburse OCS for the costs of foster care, only one group of foster children are actually conscripted to pay for their care: those foster children receiving Social Security benefits, i.e., the class members. [Exc. 410-11] In an effort at alchemy, OCS now denies that it treats the class members any differently than other foster children with the financial means to pay for their care. But OCS's prior admissions doom this effort at creating a new factual narrative.

Nor is this case an effort "to use the Alaska Constitution to change federal law" based on "policy objections." [Cr. Ae. Br. 1] There is nothing in federal law that mandates OCS's discriminatory practice, or graces OCS with the power to ignore Alaska's equal protection clause with impunity. While federal law allows for OCS to take over the management of foster children's Social Security benefits as a representative payee of last resort, there is nothing that requires OCS to become the payee when a foster child already has a suitable payee. There is nothing that requires OCS, once appointed as payee, to use the foster children's Social Security monies for self-reimbursement. And there is certainly nothing in federal law that prevents OCS from charging other foster children who are not Social Security beneficiaries for their care, thus ensuring the equal treatment of all Alaskan foster children.

It is essential that Alaska's equal protection clause retain some teeth. Allowing the relevant test to become wholly circular – i.e., if the government classifies two groups

differently, they are no longer similarly situated and therefore equal protection does not apply – will mean that a successful equal protection challenge in Alaska becomes impossible. Here, OCS has created two classes of foster children: those who may have assets and income streams that could be used to reimburse OCS for foster care costs and are never made to do so, and those who receive Social Security benefits and are always made to do so. This unfair and unequal classification violates basic equal protection.

ARGUMENT

I. OCS's Disparate Treatment of Foster Children Who Are Social Security Beneficiaries Violates Alaska's Equal Protection Clause.

A. OCS Charges the Class Members, and *Only* the Class Members, for Their Own Care.

OCS tells this Court that it "does not require foster children with Social Security benefits to pay for their foster care." [Cr. Ae. Br. 21] This assertion is simply false and at odds with the record. The undisputed facts show that OCS has been taking money that OCS *admits* belongs to the class members, and has been using that money "to pay for the foster care system as a whole." [Exc. 595] Indeed, the trial court found that it was "undoubtedly true" that "OCS is *intentionally* becoming the representative payee in order to gain access to the foster child's Social Security benefits *for its own coffers*." [Exc. 595 (emphasis added)] By taking these foster children's Social Security funds "to reimburse [the] costs of [their] maintenance," which they have no legal obligation to pay for, OCS is effectively charging them for their own care.[1] [Exc. 191, 395, 572]

OCS's contrary statements to this Court are simply at odds with the record facts

[1] For example, OCS admitted that "[a] total of $12,822 [of the original plaintiff's Social Security benefits] was retained [by OCS] for cost of care." [R. 298]

and OCS's prior admissions. Despite previously admitting that "a portion of foster children's Social Security monies is being used to pay for a child's cost of care," [Exc. 401; *see also* Exc. 412] OCS now reverses course and tells this Court that "[i]t is no more accurate to say that the State requires children with Social Security benefits to pay for their own foster care than it is to say that parents of children with Social Security benefits require their children to support themselves." [Cr. Ae. Br. 21 n.71] First, OCS is stuck with its prior admission. Second, OCS's comparison is completely off-base. Only state actors (like OCS) have to comply with the equal protection clause of the Alaska Constitution; parents do not.[2] There is no law that requires natural parents to treat their children equally; the opposite is true for OCS. Last, when parents use a child's Social Security funds to pay for household expenses, that improves the overall quality of life for all members of the household, including the child. By contrast, when OCS takes a child's Social Security monies for self-reimbursement, OCS admits that the child receives **no improvement** in "income, resources, or opportunities." [R. 656]

Citing *Keffeler II*,[3] OCS also argues that the "Supreme Court has rejected the argument that applying children's Social Security benefits to the cost of their care equates to requiring them to pay for their care[.]" [Cr. Ae. Br. 21] The Supreme Court did nothing of the sort in *Keffeler II*. Instead, *Keffeler II* only decided a narrow question of statutory interpretation, holding that the Social Security Act's anti-attachment provision, 42 U.S.C.

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[2] *See, e.g., Belluomini v. Fred Meyer of Alaska, Inc.*, 993 P.2d 1009, 1015 (Alaska 1999) ("[T]he constitution protects individuals from state action but not from similar deprivations by private actors.").

[3] *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler* ("*Keffeler II*"), 537 U.S. 371 (2003).

§ 407(a), does not prohibit "the State's use of Social Security benefits to reimburse itself for some of its initial [foster care] expenditures . . . ."[4] The Supreme Court did not reach any constitutional issues in *Keffeler II*,[5] including the foster children's equal protection claim.[6]

B. The Class Members Are Similarly Situated to the Foster Children Who Are Not Being Charged for Their Care.

"A person or group asserting an equal protection violation must demonstrate that the challenged law [or practice] treats similarly situated persons differently."[7] Here, OCS argues that Z.C.'s equal protection claim fails because she "has not identified two similarly situated groups of foster children that the State treats differently . . . ." [Cr. Ae. Br. 20] According to OCS, the class members are unlike other foster children because they "are subject to a complex and detailed array of federal law and regulation that does not apply to foster children without those benefits." [*Id.*]

OCS's argument suffers from the exact same analytical flaw as the trial court's ruling on this issue: It points in circular fashion to the classification itself as the basis for finding dissimilarity. But "[t]he goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination,"[8] and to determine

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4 *Id.* at 375.

5 *See id.* at 389 n.12.

6 *Guardianship Estate of Keffeler v. Dep't of Soc. & Health Servs.*, 88 P.3d 949, 950-51 (Wash. 2004) ("*Keffeler III*").

7 *Alaska Civ. Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005).

8 *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995).

whether the "control group" is "equivalent in all respects *other than the isolated factor*."[9] In other words, OCS cannot point to the isolated factor – here, the class members' eligibility for Social Security benefits – as the very reason why the class members are not similarly situated to other Alaskan foster children.

Several courts have expressly recognized that circular arguments of the sort that OCS is making here would effectively immunize *all* equal protection violations at the very first step of the analysis. For example, in *Donaldson v. State*, the Montana Supreme Court explained:

> [A] fallacy in the State's argument is the mistaken perception that "similarly situated" means "similar in the possession of the classifying trait." When the government creates a particular classification, there of course will be some who fall within that class and some who fall outside of it. It is incorrect to say, however, as the State does here, that these two groups are not "similarly situated" *because of the classification itself*. Such circular reasoning would effectively immunize every classification against equal protection challenge.[10]

The Iowa Supreme Court has made the same point:

> In considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait. The equal protection clause does not merely ensure the challenged statute applies equally to all people in the legislative classification. "Similarly situated" cannot mean simply "similar in the possession of the classifying trait." All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test. In the same way, the similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every

[9] *Hensley v. Mont. State Fund*, 477 P.3d 1065, 1074 (Mont. 2020) (emphasis added).

[10] 292 P.3d 364, 398 (Mont. 2012).

> way to people treated more favorably by the law. No two people or groups of people are the same in every way, and nearly every equal protection claim could be run aground onto the shoals of a threshold analysis if the two groups needed to be a mirror image of one another. Such a threshold analysis would hollow out the constitution's promise of equal protection.[11]

In arguing here that the class members are not similarly situated to other Alaskan foster children, OCS cites to *Brandon v. Correction Corp. of America*.[12] [Cr. Ae. Br. 20 n.70] But *Brandon* is actually a good example of this Court correctly analyzing the "similarly situated" question by focusing on characteristics other than the isolated factor. In *Brandon*, a prisoner challenged an Alaska statute which requires indigent prisoners to pay a filing fee for commencing a civil action, whereas indigent non-prisoners are eligible for a full waiver of the filing fee.[13] Thus, the isolated factor in *Brandon* was an individual's status as a prisoner. This Court concluded that the plaintiff in *Brandon* and other indigent prisoners were not similarly situated to indigent non-prisoners, based on *other characteristics* that were relevant to their ability to pay a filing fee.[14] This Court explained that "[i]ndigent prisoners do not have to pay rent, buy groceries, or hold down a job; and their basic needs are met by the state," and thus "basic life necessities are not jeopardized" by an indigent prisoner's decision to commence a lawsuit.[15]

Here, OCS does not identify *any* differences, much less any material

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11 *Varnum v. Brien*, 763 N.W.2d 862, 882-83 (Iowa 2009).

12 28 P.3d 269 (Alaska 2001).

13 *See id.* at 273-76.

14 *See id.* at 275-76.

15 *See id.*

differences,[16] between the class members and other Alaskan foster children as to their ability or obligation to pay for their own care. Neither did the trial court. [Exc. 606-08] Nor could they, given the undisputed record evidence that (1) *all* Alaskan foster children have the same fiduciary relationship with OCS and are entitled to receive the same level of care; (2) *all* Alaskan foster children are "entitled to the financial support of the State while in foster care"; (3) *no* Alaskan foster children are legally obligated to pay for their own care while they are in the State's legal custody; and (4) other Alaskan foster children have income streams that *could* also be used to help pay for their cost of care. [Exc. 116, 290-92, 395, 410-11, 572, 608] Thus, with regard to the specific practice at issue – i.e., OCS's practice of requiring the class members, and *only* the class members, to use their own funds to help pay for the cost of their care – this Court should hold that the class members are similarly situated to the other Alaskan foster children who are not being charged for their own care.

Finally, OCS argues that it "differentiates between classes of *funds*, not groups of *children*." [Cr. Ae. Br. 21] This is yet another circular argument by OCS, because Social Security benefits are the *only* type of income that is subject to special treatment by OCS, and the class members are the *only* group of foster children who receive that type of income. [Exc. 410-11] OCS's argument is reminiscent of the debunked claim that

[16] *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are *in all relevant respects* alike.") (emphasis added); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) ("The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy.").

discrimination on the basis of pregnancy did not constitute sex-based discrimination.[17] Because pregnancy "is a condition unique to women," courts had little difficulty concluding that "differential treatment of pregnancy constitutes sex discrimination."[18]

Similarly, OCS's differential treatment of a particular type of income amounts in reality to discrimination against a discrete and identifiable class of foster children, and must be analyzed in relation to OCS's proffered reasons for the disparate treatment.[19] This is not one of the "exceedingly clear" cases where this Court can "summarily conclude that two classes are not similarly situated" using only a "shorthand analysis."[20]

C. OCS's Disparate Treatment of the Class Members Is Irrational.

OCS's practice of singling out the class members to pay for their foster care violates equal protection.[21] Indeed, several courts have held, even under the less

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[17] *See Bankers Life & Casualty Co. v. Peterson*, 866 P.2d 241, 243 (Mont. 1993) (noting that "the majority of state courts" had rejected the notion that pregnancy-related distinctions do not constitute sex discrimination).

[18] *Id.* at 243-44 (citations omitted).

[19] *See Pub. Emps. Ret. Sys. v. Gallant*, 153 P.3d 346, 349 (Alaska 2007) (holding that a court must "look to the state's reasons for treating the groups differently" in determining whether the groups are similarly situated); *Shepherd v. State*, 897 P.2d 33, 46 (Alaska 1995) (explaining that, in all but the most obvious cases, determination of whether classes are similarly situated "simply begs the question of whether the classification itself is reasonable and whether it justifies the disparate treatment.") (Rabinowitz, J., concurring).

[20] *Dennis O. v. Stephanie O.*, 393 P.3d 401, 411 (Alaska 2017); *see also, e.g., Lauth v. Dep't of Health & Soc. Servs.*, 12 P.3d 181, 187 (Alaska 2000) (stating that the "shorthand" or "abbreviated" analysis for determining whether two classes are similarly situated is only used "in clear cases").

[21] *See In re Jerald C.*, 678 P.2d 917, 919 (Cal. 1984) ("To charge the cost of operation of state functions conducted for public benefit to one class of society is arbitrary and violates the basic constitutional guarantee of equal protection of the law.").

protective equal protection clause of the federal constitution, that the government's charging of *some* citizens for their care and not others – without regard to their financial resources, ability to pay, and need for care – does not survive rational basis review.

For example, in *State v. Reed*,[22] a prisoner challenged on equal protection grounds a Connecticut statute that charged those who were "confined after an acquittal by reason of insanity . . . for hospital care expenses while other persons similarly deprived of their liberty, such as prison inmates serving sentences, [were] not required to pay for such care."[23] The Connecticut Supreme Court, in striking down the statute, acknowledged that there were "significant differences" between the comparator groups.[24] But the court concluded that these differences did not justify the government's disparate treatment in charging only *some* prisoners for their care:

> These differences . . . have no particular relevance to the propriety of requiring an insanity acquittee to pay for the same services which are provided to an ordinary prisoner without charge, because they are not related to comparative financial ability or need for treatment. . . . Neither can we perceive any difference in the relative need for mental treatment between acquittees and other prisoners who have been transferred to an institution for such treatment. In sum, both classes of hospital inmates are being deprived of their liberty primarily for the protection of society; both have the same financial resources; and both have the same need for treatment. We are unable, therefore, to find any reasonable ground to support the imposition of charges for hospital services on one group of prisoners . . . while another group is excused from such payment . . . .[25]

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22 473 A.2d 775 (Conn. 1984).

23 *Id.* at 776.

24 *Id.* at 779.

25 *Id.*

In *Vecchione v. Wohlgemuth*,[26] a three-judge panel struck down a Pennsylvania statute that established "two classes of civilly admitted or committed mental patients. The first consists of all patients adjudged incompetent by a court of appropriate jurisdiction. The second class consists of all patients not adjudged incompetent."[27] The patients in the first group were afforded prior notice and a hearing before the state seized control of their property and "appropriate[d] part of the patient's property in satisfaction of the cost of care and maintenance"; the patients in the second group were not given these fundamental safeguards before the state reimbursed itself.[28] The court held that the classification "fail[ed] to meet th[e] minimal rationality standard of equal protection."[29] Among other irrational aspects of the statute, the court found that the classification was "counter-productive" because it was not tailored to a patient's ability to pay for care.[30]

Similarly, this Court should hold that OCS's disparate treatment of the class members is irrational because it is not related to a foster child's need for care or ability to pay. OCS has *never* claimed, much less proffered any evidence, that the class members have greater care needs than other Alaskan foster children. [Exc. 481-509] Nor has OCS argued that its disparate treatment of the class members is based on having a greater ability to pay for their care. [*Id.*] To the contrary, OCS concedes that there are other

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[26] 377 F. Supp. 1361 (E.D. Pa. 1974).

[27] *Id.* at 1368.

[28] *Id.* at 1362-63.

[29] *Id.* at 1368.

[30] *Id.* ("More affluent incompetent mental patients would presumably be better able to afford the costs . . . .").

foster children who also have financial resources – such as an inheritance or trust, employment income, or tribal dividends – that *could* be used to pay for their care. [Exc. 410-11] And yet, *only* the class members are being charged for their care, and are being asked to subsidize "the foster care system as a whole." [Exc. 595] This violates equal protection.

D. OCS's Disparate Treatment of the Class Members Is Not Substantially Related to the Sole Purpose Identified by OCS.

OCS argues that its practice of diverting foster children's Social Security benefits "is substantially related to its legitimate interest in meeting its federally mandated obligations as a representative payee."[31] [Cr. Ae. Br. 23-24] However, OCS's proffered reason for the disparate treatment of the class members is entirely pretextual. When the totality of the record evidence is considered – including the fact that OCS admittedly seeks to become a foster child's payee even when a child already has a perfectly suitable payee and the fact that OCS conceals the identities of other potential payees with a closer connection to the child [Exc. 379-80, 385; R. 734-961] – the *real* reason for OCS's discriminatory practice becomes clear. As the trial court found, "OCS is intentionally becoming the representative payee in order to gain access to the foster child's Social Security benefits *for its own coffers*." [Exc. 595 (emphasis added)]

This enables OCS "to replace state funds used to support foster children with

[31] This is the *only* purpose that OCS has ever identified. [Exc. 411-13, 504-07, 575-76] And thus it is the *only* purpose that can be considered by this Court. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

federal funds, thereby saving state resources for other purposes."[32] But this Court has "repeatedly explained that cost savings alone are not sufficient government objectives under our equal protection analysis. The government can adequately protect its tax base and minimize cost without discriminating between similarly situated classes."[33] This is likely why OCS points to pretextual reasons for its disparate treatment of the class.

OCS claims that its "practice of applying foster children's Social Security benefits to the cost of their foster care complies with federal law," and that any "[a]ctions that comply with federal law are undeniably substantially related to furthering the State's legitimate interest in complying with federal law." [Cr. Ae. Br. 22-23] This argument sweeps too broadly; only compliance with a federal *mandate* is a legitimate state interest justifying unequal treatment. For example, in *Malabed v. North Slope Borough*,[34] this Court rejected the borough's reliance on a federal law, namely "the Civil Rights Act's 703(i) exception,"[35] as a legitimate interest for enacting "a hiring preference favoring one class of citizens at the expense of others."[36] This Court explained that "[t]he borough's position that the 703(i) exception *is* its legitimate interest strains too hard to extract an

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[32] Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1806 (Feb. 2006).

[33] *State v. Schmidt*, 323 P.3d 647, 663 (Alaska 2014) (citations and internal quotation marks omitted).

[34] 70 P.3d 416 (Alaska 2003).

[35] This statute, codified at 42 U.S.C.S. § 2000e-2(i), creates an exemption from the Civil Rights Act for "preferential treatment . . . given to any individual because he is an Indian living on or near a reservation."

[36] *Malabed*, 70 P.3d at 418, 423-24.

affirmative mandate from a law that simply creates an exception."[37]

Similarly, in the case at bar, OCS's reliance on federal law does not justify its discriminatory treatment of the class members. As detailed in Z.C.'s opening brief and the amicus brief, [Cr. At. Br. 26-29; Am. Br. 14-17] federal law simply does not *mandate* OCS's challenged practice of taking foster children's Social Security monies for self-reimbursement. OCS would still be fully compliant with federal law if it used the Social Security monies to purchase additional food, clothing, services, and personal comfort items for the class members, supplementing the level of care they otherwise receive with their basic foster care stipend.[38] Or it could save the money for when they age out of

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[37] *Id.* at 424. This Court explained that the section 703(i) exception "does not create a hiring program; it does not mandate that any preferences be granted; it does not require any particular action or specify negative consequences for any inaction; and it does not purport to endorse – nor does it imply endorsement of -- any particular preference by any particular employer in any particular location." *Id.*

[38] OCS tells this Court that "[i]t is not clear . . . that OCS could remain in compliance with federal law if it were prohibited from using Social Security funds for foster care payments." [Cr. Ae. Br. 23 n.79] But there is no ambiguity in federal law: A payee must spend Social Security funds for the "use and benefit" of the beneficiary. 20 C.F.R. §§ 404.2035(a), 416.635(a). Any money spent on "current maintenance" is *one type* of permissible use of the funds. *See* 20 C.F.R. §§ 404.2040(a), 416.640(a). And reimbursement of foster care payments is just *one type* of "current maintenance." *See Keffeler II*, 537 U.S. at 386-87. There is nothing in federal law that *requires* OCS to take foster children's Social Security funds for self-reimbursement. "[A]n unending list of possible [alternative] uses is not difficult to contemplate – uses that provide a direct benefit to the disabled foster children as opposed to simply handing over the money to the state to reimburse costs for which the children have no legal obligation." Hatcher, *supra*, 27 Cardozo L. Rev. at 1820. And, indeed, per the Congressional report cited in OCS's brief, [Cr. Ae. Br. 6 n.11] *not all states* use "SSI/Social Security benefits received on behalf of children in foster care to offset child welfare agency foster care costs." Congressional Research Service, *Children in Foster Care and Social Security Administration Benefits: Frequently Asked Questions* (Nov. 23, 2021) at 1, available at: https://crsreports.congress.gov/product/pdf/R/R46975 (visited Oct. 4, 2022).

foster care.[39] Because there is no federal mandate, OCS's practice does not even pass the lowest level of equal protection scrutiny.

E. Federal Law Does Not Preempt the Equal Protection Claim.

OCS argues that the doctrines of field preemption and/or conflict preemption bar Z.C.'s equal protection claim under the Alaska Constitution. [Cr. Ae. Br. 13-18] According to OCS, federal law occupies the entire field of "how a representative payee may use Social Security funds on behalf of a beneficiary, and there is no room for state law to add or subtract authorized uses." [Cr. Ae. Br. 14] OCS also argues that "Z.C.'s equal protection claim directly conflicts with federal law by seeking to take away authority the SSA has conferred on OCS." [Cr. Ae. Br. 15] OCS is wrong.

Z.C. has previously briefed the relevant standards for field preemption and conflict preemption, and why neither doctrine applies to the constitutional claims in this case. [Cr. At. Br. 30-35; Ae. Br. 17-28] Those arguments will not be repeated here. But it must also be said that OCS's latest briefing on preemption is premised on a gross mischaracterization of Z.C.'s equal protection claim and the relief that the class members are seeking from this Court.

At its most basic level, Alaska's equal protection clause protects "those similarly situated from disparate treatment" by the government.[40] The disparate treatment here is that OCS requires *only* the class members, who are Social Security beneficiaries, to use their own funds to pay for a portion of their foster care expenses. Other foster children

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[39] *See* 20 C.F.R. §§ 404.2045, 416.645.

[40] *Premera Blue Cross v. State*, 171 P.3d 1110, 1121 (Alaska 2007).

who have the ability to pay – because, for example, they have a trust fund or employment income or receive tribal dividends – do not have to spend their own funds on their care. [Exc. 410-11] Z.C.'s equal protection claim is not asking this Court to "change federal law," "limit the discretion that the SSA confers on OCS," or "add or subtract authorized uses" of Social Security funds. [Cr. Ae. Br. 1-2, 14] Z.C. is merely seeking an order enjoining OCS's discriminatory practice. [Exc. 466] How OCS goes about complying with that order, and equal protection law, is entirely up to OCS and does not require the changing of federal law. For example, OCS could still exercise its discretion under *Keffeler II* to use the class members' Social Security monies for self-reimbursement, *if* it starts treating all similarly situated foster children equally, i.e., by requiring other foster children with financial means to also contribute to the cost of their care. Thus, Z.C.'s equal protection claim is not incompatible with federal law.

On the other hand, OCS's preemption argument, if taken to its logical conclusion, would insulate any and all actions that OCS takes in its capacity as representative payee from compliance with state constitutional duties. For example, to borrow an example from the dissenting Justice in *Keffeler III*, OCS could have a policy that it will always spend a white foster child's Social Security funds to purchase brand-name items, like Nikes, and always purchase "knock-off sneakers" for Alaska Native children.[41] Both purchases would be an "authorized use" of Social Security benefits under federal law.[42]

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41 *Cf. Keffeler III*, 88 P.3d at 952 (Sanders, J., dissenting).

42 20 C.F.R. §§ 404.2040(a)(1), 416.640(a).

Under OCS's logic, such a policy whereby OCS exercises its discretion as representative payee in a facially discriminatory way would not be actionable under the Alaska Constitution. Furthermore, the affected foster children would not be able to bring their constitutional claim in any other forum, because of the Eleventh Amendment,[43] and because the policy would not qualify as a "misuse" of benefits, triggering the Social Security Act's administrative remedies.[44] Thus, the foster children would have no ability to vindicate their state constitutional rights, leaving OCS wholly unaccountable.

II. The Class Members Are Entitled to Restitution as a Result of OCS's Taking of Millions of Dollars of Their Social Security Monies Without Due Process.

Z.C. and the class members seek the equitable remedy of disgorgement of all Social Security benefits taken by OCS without due process. [Exc. 37] In response, OCS makes three arguments: "OCS has not been unjustly enriched, as Z.C. would have to show to support a disgorgement remedy; the remedy, like everything else in this case, is preempted; and such an award would be indistinguishable from money damages, which are not available for constitutional violations under Alaska law." [Cr. Ae. Br. 2] The trial court agreed with the first of these arguments, holding that it could not "find that this

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[43] *See, e.g., Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 604 (2d Cir. 1988) (holding that Eleventh Amendment precluded federal court from adjudicating claims under New York's constitution).

[44] A "misuse" of benefits under the Social Security Act occurs if "the representative payee receives payment . . . 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." 42 U.S.C. § 405(j)(9). This definition does not encompass due process or equal protection violations by a governmental payee.

systemic lawful use of federal funds is inequitable such that disgorgement or an equivalent remedy is required." [Exc. 595-96] As shown below, all three of OCS's arguments against a disgorgement remedy are meritless, so this Court should reverse.

A. OCS Will Be Unjustly Enriched If Allowed to Retain the Social Security Monies Taken from the Class.

A party seeking the equitable remedy of disgorgement must show that "the defendant – absent liability in restitution – would be unjustly enriched."[45] This, in turn, requires a showing that it would be "inequitable" for the defendant to retain the ill-begotten property "without paying the value thereof."[46] OCS argues, and the trial court agreed, that its "use" of the foster children's Social Security benefits was not inequitable because it "complies with federal law." [Cr. Ae. Br. 25; Exc. 586-87]

But the inequity here does not stem from OCS's "use" of the money; it stems from the manner in which OCS *obtained* the money from the class members, without due process.[47] OCS acted surreptitiously,[48] and in violation of its fiduciary duty to the class

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[45] *Restatement (Third) of Restitution & Unjust Enrichment* § 44 cmt. d.

[46] *Ware v. Ware*, 161 P.3d 1188, 1197 (Alaska 2007).

[47] As the trial court recognized, the "precise conduct by the State" at issue in this case "was *not* the use of the benefits," but "the failure to give notice" to the class members before taking their Social Security monies. [Exc. 594-95 (emphasis added)].

[48] OCS argues that "there was nothing 'surreptitious'" about its conduct because "this Court noted [in *C.G.A.*] that the State can serve as a representative payee for a foster child and use the funds to pay for his foster care." [Cr. Ae. Br. 6-7] But the critical point is not whether lawyers reading this Court's opinions in 1992 were aware of the practice, but whether the individual foster children were aware that OCS was siphoning their money. They clearly were not. *See* Eli Hager and Joseph Shapiro, *Foster Care Agencies Take Millions of Dollars Owed to Kids. Most Children Have No Idea*, available at: https://www.themarshallproject.org/2021/04/22/foster-care-agencies-take-thousands-of-dollars-owed-to-kids-most-children-have-no-idea (visited Sep. 28, 2022) (stating that "youths typically don't find out about their cash until it is already gone.").

members.[49] [Exc. 115-19, 190-92; R. 21-22, 60, 641] And, if that were not enough, OCS also concealed the identities of relatives and close friends, who are preferred payees under federal law,[50] and would have spent the money to benefit the foster children, instead of simply turning it over to the State.[51] [R. 734-961] OCS thus engineered its own appointment as the class members' payee in order to gain access to a funding stream of millions of dollars "for its own coffers." [Exc. 296, 595] This Court should hold that OCS's conduct *was* inequitable under the *Ware* test.

B. The Class Members Are Seeking Equitable Relief, Not Damages.

As an alternative grounds for affirming the trial court's ruling on disgorgement, OCS argues that "[m]onetary damages are not available as a direct remedy for most violations of the Alaska Constitution, including the due process clause." [Cr. Ae. Br. 30] OCS's argument is a non sequitur because, as the trial court noted when rejecting this argument, the class members are seeking equitable remedies, *not* an award of "monetary damages." [Exc. 592]

This Court has made very clear that a claim seeking "restitutionary relief" is equitable, and not a legal claim for damages, even if it results in the payment of money

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[49] *See Dapo v. State*, 454 P.3d 171, 180 (Alaska 2019) ("We conclude, therefore, that the relationship between OCS and children in its legal custody pursuant to AS 47.10.084 is a fiduciary relationship . . . ."); *Henash v. Ipalook*, 985 P.2d 442, 446 (Alaska 1999) (holding that fiduciary must "fully disclose information which might affect the other person's rights and influence his action."); *Restatement (Third) of Restitution & Unjust Enrichment* § 43(a), (b) (stating that restitution is appropriate where the defendant obtains a benefit "in breach of a fiduciary duty" or "in breach of an equivalent duty imposed by a relation of trust and confidence.").

[50] *See* 20 C.F.R. §§ 404.2040(a)(1), 416.640(a).

[51] OCS tells this Court that Z.C. never raised this issue of concealment below. [Cr. Ae. Br. 8 n.19] That is not true. [Exc. 136]

by the defendant to the plaintiff.[52] What matters is the "nature of the claims" pled in the complaint.[53] Here, Z.C.'s complaint sought only injunctive relief and disgorgement, which are *equitable* remedies.[54] [Exc. 36-37] Z.C.'s complaint did *not* seek any damages.

Thus, OCS's reliance on *Dick Fischer* is misplaced.[55] In *Dick Fischer*, this Court declined to recognize a *Bivens* "claim for damages except in cases of flagrant constitutional violations where little or no alternative remedies are available."[56] There, the plaintiff was suing for inchoate *tort* damages for the denial of due process.[57] In contrast, the class members here are not seeking any *tort* damages,[58] but only equitable remedies that would restore the status quo ante. The trial court correctly held that "Plaintiffs' attempt to pursue equitable remedies cannot be barred by OCS's attempt to reframe the Plaintiffs' complaint or requested remedy." [Exc. 592]

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52 *State v. First Nat'l Bank*, 660 P.2d 406, 423-24 (Alaska 1982).

53 *Young v. Embley*, 143 P.3d 936, 948 (Alaska 2006).

54 *Peter v. Progressive Corp.*, 2006 Alaska LEXIS 27, at *23 (Alaska Feb. 22, 2006) (explaining that disgorgement is "an equitable remedy").

55 Cr. Ae. Br. 30 n.105 (citing *Dick Fischer Dev. No. 2, Inc. v. Dep't of Admin.*, 838 P.2d 263, 268 (Alaska 1992)).

56 *Dick Fischer*, 838 P.2d at 268 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-90 (1971)).

57 *See id.* at 265-66.

58 *Compare Bivens*, 403 U.S. at 389-90 (seeking damages for "humiliation, embarrassment, and mental suffering" as a result of an illegal search and arrest).

C. The Trial Court Correctly Held that the Class Members' Claim for Restitution Is *Not* Preempted.

Finally, citing this Court's decision in *C.G.A. v. State*,[59] OCS argues that "a state court cannot order a representative payee to turn benefits over to the beneficiary." [Cr. Ae. Br. 28] OCS misreads the holding of *C.G.A.* There, this Court held that 42 U.S.C. § 407(a) bars a state court from ordering a representative payee to turn benefits over to *a creditor*.[60] This Court's holding makes perfect sense, as it is well settled that "the purpose of section 407(a) is to protect social security beneficiaries and their dependents from the claims of creditors."[61] *C.G.A.* never held that §407(a) also bars state courts from ordering the refund of misappropriated benefits to the victimized *beneficiary*. Such an interpretation of § 407(a) has been rejected by other courts, because it "takes the statute out of context and is an improper attempt to fashion a shield into a sword to be used against the intended beneficiary of the law."[62]

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's rulings on equal protection and disgorgement.

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[59] 824 P.2d 1364 (Alaska 1992).

[60] *See id.* at 1367.

[61] *Fetterusso v. New York*, 898 F.2d 322, 327 (2d Cir. 1990) (emphasis added) (citations omitted); *see also Rowan v. Morgan,* 747 F.2d 1052, 1055 (6th Cir. 1984) (noting that the anti-attachment statute "speaks throughout in terms of the rights of social security *recipients* . . . and the protection of their *benefits* from *the reach of creditors*.") (third emphasis added); *Metz v. Metz,* 101 P.3d 779, 784 (Nev. 2004) ("Under 42 U.S.C. § 407, Congress has expressly exempted all Social Security benefits from legal process *brought by any creditor* . . . .") (emphasis added).

[62] *In re J.G.*, 652 S.E.2d 266, 274 (N.C. App. 2007).

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