IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ADAM CRUM, in his official capacity as Commissioner of the Department, OFFICE OF CHILDREN'S SERVICES, and KIM GUAY, in her official capacity as Director of OCS, Appellants/Cross-Appellees, v. Z.C., through his next friend, LORENZ KAUFMAN, on behalf of himself and those similarly situated, Appellees/Cross-Appellants	Supreme Court Nos. S-18249/S-18259

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

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

CROSS-APPELLANTS' OPENING BRIEF

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Filed in the Alaska Supreme Court
this 26th day of May, 2022.

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42 U.S.C. § 402(d). Old-age and survivors insurance benefit payments

(d)Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C)was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D)the month in which such child dies, or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F)if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

> **(i)** the first month during no part of which he is a full-time elementary or secondary school student, or
>
> **(ii)** the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month;

(G)if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22—

> **(i)** the termination month, subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

> **(ii)** the first month during no part of which he is a full-time elementary or secondary school student, or
>
> **(iii)** the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(H) if the benefits under this subsection are based on the wages and self-employment income of a stepparent who is subsequently divorced from

such child's natural parent, the month after the month in which such divorce becomes final.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

(2) Such child's insurance benefit for each month shall, if the individual on the basis of whose wages and self-employment income the child is entitled to such benefit has not died prior to the end of such month, be equal to one-half of the primary insurance amount of such individual for such month. Such child's insurance benefit for each month shall, if such individual has died in or prior to such month, be equal to three-fourths of the primary insurance amount of such individual.

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) of this subsection if, at such time, the child was receiving at least one-half of his support from such stepfather or stepmother.

(5) In the case of a child who has attained the age of eighteen and who marries—

(A) an individual entitled to benefits under subsection (a), (b), (c), (e), (f), (g), or (h) of this section or under section 423(a) of this title, or

(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,

such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) but subject to subsection (s), not be terminated by reason of such marriage.

(6)A child whose entitlement to child's insurance benefits on the basis of the wages and self-employment income of an insured individual terminated with the month preceding the month in which such child attained the age of 18, or with a subsequent month, may again become entitled to such benefits (provided no event specified in paragraph (1)(D) has occurred) beginning with the first month thereafter in which he—

> **(A)** (i) is a full-time elementary or secondary school student and has not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) and has not attained the age of 22, or
>
> **(B)** is under a disability (as so defined) which began (i) before the close of the 84th month following the month in which his most recent entitlement to child's insurance benefits terminated because he ceased to be under such disability, or (ii) after the close of the 84th month following the month in which his most recent entitlement to child's insurance benefits terminated because he ceased to be under such disability due to performance of substantial gainful activity,

but only if he has filed application for such reentitlement. Such reentitlement shall end with the month preceding whichever of the following first occurs:

> **(C)** the first month in which an event specified in paragraph (1)(D) occurs;
>
> **(D)** the earlier of (i) the first month during no part of which he is a full-time elementary or secondary school student or (ii) the month in which he attains the age of 19, but only if he is not under a disability (as so defined) in such earlier month; or
>
> **(E)** if he was under a disability (as so defined), the termination month (as defined in paragraph (1)(G)(i)), subject to section 423(e) of this title, or (if later) the earlier of—
>
> > **(i)** the first month during no part of which he is a full-time elementary or secondary school student, or
> >
> > **(ii)** the month in which he attains the age of 19.

(7) For the purposes of this subsection—

> **(A)** A "full-time elementary or secondary school student" is an individual who is in full-time attendance as a student at an elementary or secondary school, as determined by the Commissioner of Social Security (in accordance with regulations prescribed by the Commissioner) in the light of the standards and practices of the schools involved, except that no

individual shall be considered a "full-time elementary or secondary school student" if he is paid by his employer while attending an elementary or secondary school at the request, or pursuant to a requirement, of his employer. An individual shall not be considered a "full-time elementary or secondary school student" for the purpose of this section while that individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense (committed after the effective date of this sentence) which constituted a felony under applicable law. An individual who is determined to be a full-time elementary or secondary school student shall be deemed to be such a student throughout the month with respect to which such determination is made.

(B) Except to the extent provided in such regulations, an individual shall be deemed to be a full-time elementary or secondary school student during any period of nonattendance at an elementary or secondary school at which he has been in full-time attendance if (i) such period is 4 calendar months or less, and (ii) he shows to the satisfaction of the Commissioner of Social Security that he intends to continue to be in full-time attendance at an elementary or secondary school immediately following such period. An individual who does not meet the requirement of clause (ii) with respect to such period of nonattendance shall be deemed to have met such requirement (as of the beginning of such period) if he is in full-time attendance at an elementary or secondary school immediately following such period.

(C)

(i) An "elementary or secondary school" is a school which provides elementary or secondary education, respectively, as determined under the law of the State or other jurisdiction in which it is located.

(ii) For the purpose of determining whether a child is a "full-time elementary or secondary school student" or "intends to continue to be in full-time attendance at an elementary or secondary school", within the meaning of this subsection, there shall be disregarded any education provided, or to be provided, beyond grade 12.

(D) A child who attains age 19 at a time when he is a full-time elementary or secondary school student (as defined in subparagraph (A) of this paragraph and without application of subparagraph (B) of such paragraph) but has not (at such time) completed the requirements for, or received, a diploma or equivalent certificate from a secondary school (as defined in subparagraph (C)(i)) shall be deemed (for purposes of determining whether his entitlement to benefits under this subsection has terminated under paragraph (1)(F) and for purposes of determining his initial entitlement to

such benefits under clause (i) of paragraph (1)(B)) not to have attained such age until the first day of the first month following the end of the quarter or semester in which he is enrolled at such time (or, if the elementary or secondary school (as defined in this paragraph) in which he is enrolled is not operated on a quarter or semester system, until the first day of the first month following the completion of the course in which he is so enrolled or until the first day of the third month beginning after such time, whichever first occurs).

(8) In the case of—

(A) an individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B)), or

(B) an individual entitled to disability insurance benefits, or an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits,

a child of such individual adopted after such individual became entitled to such old-age or disability insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(C) unless such child—

(C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or

(D)

(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States, and

(ii) in the case of a child who attained the age of 18 prior to the commencement of proceedings for adoption, the child was living with or receiving at least one-half of the child's support from such individual for the year immediately preceding the month in which the adoption is decreed.

(9)

(A) A child who is a child of an individual under clause (3) of the first sentence of section 416(e) of this title and is not a child of such individual under clause (1) or (2) of such first sentence shall be deemed not to be dependent on such individual at the time specified in subparagraph (1)(C) of this subsection unless (i) such child was living with such individual in the United States and receiving at least one-half of his support from such individual (I) for the year immediately before the month in which such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (II) if such individual had a period of disability which continued until he had become entitled to old-age

insurance benefits, or disability insurance benefits, or died, for the year immediately before the month in which such period of disability began, and (ii) the period during which such child was living with such individual began before the child attained age 18.

(B) In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child has lived with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of such child's birth.

(10) For purposes of paragraph (1)(H)—

(A) each stepparent shall notify the Commissioner of Social Security of any divorce upon such divorce becoming final; and

(B) the Commissioner shall annually notify any stepparent of the rule for termination described in paragraph (1)(H) and of the requirement described in subparagraph (A).

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

(g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia]. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social

Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

*** * * ***

(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.

42 U.S.C. § 1383(a)(1)-(2). Procedure for payment of benefits.

(a) Time, manner, form, and duration of payments; representative payees; promulgation of regulations.

(1) Benefits under this title [42 USCS §§ 1381 et seq.] shall be paid at such time or times and (subject to paragraph (10)) in such installments as will best effectuate the purposes of this title [42 USCS §§ 1381 et seq.], as

determined under regulations (and may in any case be paid less frequently than monthly where the amount of the monthly benefit would not exceed $10).

(2)

(A)

(i) Payments of the benefit of any individual may be made to any such individual or to the eligible spouse (if any) of such individual or partly to each.

(ii)

(I) Upon a determination by the Commissioner of Social Security that the interest of such individual would be served thereby, such payments shall be made, regardless of the legal competency or incompetency of the individual or eligible spouse, to another individual, or an organization, with respect to whom the requirements of subparagraph (B) have been met (in this paragraph referred to as such individual's "representative payee") for the use and benefit of the individual or eligible spouse.

(II) In the case of an individual eligible for benefits under this title [42 USCS §§ 1381 et seq.] by reason of 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.

(iii) If the Commissioner of Social Security or a court of competent jurisdiction determines that the representative payee of an individual or eligible spouse has misused any benefits which have been paid to the representative payee pursuant to clause (ii) or section 205(j)(1) or 807 [42 USCS § 405(j)(1) or 1007]. the Commissioner of Social Security shall promptly terminate payment of benefits to the representative payee pursuant to this subparagraph, and provide for payment of benefits to an alternative representative payee of the individual or eligible spouse or, if the interest of the individual under this title [42 USCS §§ 1381 et seq.] would be served thereby, to the individual or eligible spouse.

> **(iv)** For purposes of this paragraph, misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment under this title [42 USCS §§ 1381 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 clause.

Federal Regulations

20 C.F.R. § 404.204. Methods of computing primary insurance amounts — general.

(a) General. We compute most workers' primary insurance amounts under one of two major methods. There are, in addition, several special methods of computing primary insurance amounts which we apply to some workers. Your primary insurance amount is the highest of all those computed under the methods for which you are eligible.

(b) Major methods.

(1) If after 1978 you reach age 62, or become disabled or die before age 62, we compute your primary insurance amount under what we call the average-indexed-monthly-earnings method, which is described in §§ 404.210 through 404.212. The earliest of the three dates determines the computation method we use.

(2) If before 1979 you reached age 62, became disabled, or died, we compute your primary insurance amount under what we call the average-monthly-wage method, described in §§ 404.220 through 404.222.

(c) Special methods.

(1) Your primary insurance amount, computed under any of the special methods for which you are eligible as described in this paragraph, may be substituted for your primary insurance amount computed under either major method described in paragraph (b) of this section.

(2) If you reach age 62 during the period 1979-1983, your primary insurance amount is guaranteed to be the highest of—

(i) The primary insurance amount we compute for you under the average-indexed-monthly-earnings method;

(ii) The primary insurance amount we compute for you under the average-monthly-wage method, as modified by the rules described in §§ 404.230 through 404.233; or

(iii) The primary insurance amount computed under what we call the old-start method; as described in §§ 404.240 through 404.242.

(3) If you had all or substantially all of your social security earnings before 1951, we will also compute your primary insurance amount under what we call the old-start method.

(4) We compute your primary insurance amount under the rules in §§ 404.250 through 404.252, if—

(i) You were disabled and received social security disability insurance benefits sometime in your life;

(ii) Your disability insurance benefits were terminated because of your recovery or because you engaged in substantial gainful activity; and

(iii) You are, after 1978, re-entitled to disability insurance benefits, or entitled to old-age insurance benefits, or have died.

(5) In some situations, we use what we call a special minimum computation, described in §§ 404.260 through 404.261, to find your primary insurance amount. Computations under this method reflect long-term, low-wage attachment to covered work.

20 C.F.R. § 404.353. Child's benefit amounts.

(a) General. Your child's monthly benefit is equal to one-half of the insured person's primary insurance amount if he or she is alive and three-fourths of the primary insurance amount if he or she has died. The amount of your monthly benefit may change as explained in § 404.304.

(b) Entitlement to more than one benefit. If you are entitled to a child's benefit on more than one person's earnings record, you will ordinarily receive only the benefit payable on the record with the highest primary insurance amount. If your benefit before any reduction would be larger on an earnings record with a lower primary insurance amount and no other person entitled to benefits on any earnings record would receive a smaller benefit as a result of your receiving benefits on the record with the lower primary insurance amount, you will receive benefits on that record. See § 404.407(d) for a further explanation. If you are entitled to a child's benefit and to other dependent's or survivor's benefits, you can receive only the highest of the benefits.

20 C.F.R. § 404.2001. Introduction.

(a) Explanation of representative payment. This subpart explains the principles and procedures that we follow in determining whether to make representative payment and in selecting a representative payee. It also explains the responsibilities that a representative payee has concerning the use of the funds he or she receives on behalf of a beneficiary. A representative payee may be either a person or an organization selected by us to receive benefits on behalf of a beneficiary. A representative payee will be selected if we believe that the interest of a beneficiary will be served by representative payment rather than direct payment of benefits. Generally, we appoint a representative payee if we have

determined that the beneficiary is not able to manage or direct the management of benefit payments in his or her interest.

(b) Policy used to determine whether to make representative payment.

(1) 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.

(2) If we determine that representative payment is in the interest of a beneficiary, we will appoint a representative payee. We may appoint a representative payee even if the beneficiary is a legally competent individual. If the beneficiary is a legally incompetent individual, we may appoint the legal guardian or some other person as a representative payee.

(3) If payment is being made directly to a beneficiary and a question arises concerning his or her ability to manage or direct the management of benefit payments, we will, if the beneficiary is 18 years old or older and has not been adjudged legally incompetent, continue to pay the beneficiary until we make a determination about his or her ability to manage or direct the management of benefit payments and the selection of a representative payee.

20 C.F.R. § 404.2010 When payment will be made to representative payee.

(a) We pay benefits to a representative payee on behalf of a beneficiary 18 years old or older when it appears to us that this method of payment will be in the interest of the beneficiary. We do this if we have information that the beneficiary is—

(1) Legally incompetent or mentally incapable of managing benefit payments; or

(2) Physically incapable of managing or directing the management of his or her benefit payments.

(b) Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee. However, in certain situations, we will make direct payments to a beneficiary under age 18 who shows the ability to manage the benefits. For example, we make direct payments to a beneficiary under age 18 if the beneficiary is—

(1) Receiving disability insurance benefits on his or her own Social Security earnings record; or

(2) Serving in the military services; or

(3) Living alone and supporting himself or herself; or

(4) A parent and files for himself or herself and/or his or her child and he or she has experience in handling his or her own finances; or

(5) Capable of using the benefits to provide for his or her current needs and no qualified payee is available; or

(6) Within 7 months of attaining age 18 and is initially filing an application for benefits.

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. § 416.601. Introduction.

(a) Explanation of representative payment. This subpart explains the principles and procedures that we follow in determining whether to make representative payment and in selecting a representative payee. It also explains the responsibilities that a representative payee has concerning the use of the funds he or she receives on behalf of a beneficiary. A representative payee may be either a person or an organization selected by us to receive benefits on behalf of a beneficiary. A representative payee will be selected if we believe that the interest of a beneficiary will be served by representative payment rather than direct payment of benefits. Generally, we appoint a representative payee if we have determined that the beneficiary is not able to manage or direct the management of benefit payments in his or her own interest.

(b) Policy used to determine whether to make representative payment.

(1) 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. However, we must select a representative payee for an individual who is eligible for benefits solely on the basis of disability if drug addiction or alcoholism is a contributing factor material to the determination of disability.

(2) If we determine that representative payment is in the interest of a beneficiary, we will appoint a representative payee. We may appoint a representative payee even if the beneficiary is a legally competent individual. If the beneficiary is a legally incompetent individual, we may appoint the legal guardian or some other person as a representative payee.

(3) If payment is being made directly to a beneficiary and a question arises concerning his or her ability to manage or direct the management of benefit payments, we will, if the beneficiary is 18 years old or older and has not been adjudged legally incompetent, continue to pay the beneficiary until we make a determination about his or her ability to manage or direct the management of benefit payments and the selection of a representative payee.

20 C.F.R. § 416.610 When payment will be made to a representative payee.

(a) We pay benefits to a representative payee on behalf of a beneficiary 18 years old or older when it appears to us that this method of payment will be in the interest of the beneficiary. We do this if we have information that the beneficiary is —

(1) Legally incompetent or mentally incapable of managing benefit payments; or

(2) Physically incapable of managing or directing the management of his or her benefit payments; or

(3) Eligible for benefits solely on the basis of disability and drug addiction or alcoholism is a contributing factor material to the determination of disability.

(b) Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee. However, in certain situations, we will make direct payments to a beneficiary under age 18 who shows the ability to manage the benefits. For example, we make direct payment to a beneficiary under age 18 if the beneficiary is —

(1) A parent and files for himself or herself and/or his or her child and he or she has experience in handling his or her own finances; or

(2) Capable of using the benefits to provide for his or her current needs and no qualified payee is available; or

(3) Within 7 months of attaining age 18 and is initially filing an application for benefits.

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.

20 C.F.R. § 416.1205. Limitation on resources.

(a) Individual with no eligible spouse. An aged, blind, or disabled individual with no spouse is eligible for benefits under title XVI of the Act if his or her nonexcludable resources do not exceed $ 1,500 prior to January 1, 1985, and all other eligibility requirements are met. An individual who is living with an ineligible spouse is eligible for benefits under title XVI of the Act if his or her nonexcludable resources, including the resources of the spouse, do not exceed $ 2,250 prior to January 1, 1985, and all other eligibility requirements are met.

(b) Individual with an eligible spouse. An aged, blind, or disabled individual who has an eligible spouse is eligible for benefits under title XVI of the Act if their nonexcludable resources do not exceed $ 2,250 prior to January 1, 1985, and all other eligibility requirements are met.

(c) Effective January 1, 1985 and later. The resources limits and effective dates for January 1, 1985 and later are as follows:

Effective date	**Individual**	**Individual and Spouse**
Jan. 1, 1985	$1,600	$2,400
Jan. 1, 1986	$1,700	$2,550
Jan. 1, 1987	$1,800	$2,700
Jan. 1, 1988	$1,900	$2,850
Jan. 1, 1989	$2,000	$3,000

20 C.F.R. § 416.1210. Exclusions from resources; general.

In determining the resources of an individual (and spouse, if any), the following items shall be excluded:

(a) The home (including the land appertaining thereto) to the extent its value does not exceed the amount set forth in § 416.1212;

(b) Household goods and personal effects as defined in § 416.1216;

(c) An automobile, if used for transportation, as provided in § 416.1218;

(d) Property of a trade or business which is essential to the means of self-support as provided in § 416.1222;

(e) Nonbusiness property which is essential to the means of self-support as provided in § 416.1224;

(f) Resources of a blind or disabled individual which are necessary to fulfill an approved plan for achieving self-support as provided in § 416.1226;

(g) Stock in regional or village corporations held by natives of Alaska during the twenty-year period in which the stock is inalienable pursuant to the Alaska Native Claims Settlement Act (see § 416.1228);

(h) Life insurance owned by an individual (and spouse, if any) to the extent provided in § 416.1230;

(i) Restricted allotted Indian lands as provided in § 416.1234;

(j) Payments or benefits provided under a Federal statute other than title XVI of the Social Security Act where exclusion is required by such statute;

(k) Disaster relief assistance as provided in § 416.1237;

(l) Burial spaces and certain funds up to $ 1,500 for burial expenses as provided in § 416.1231;

(m) Title XVI or title II retroactive payments as provided in § 416.1233;

(n) Housing assistance as provided in § 416.1238;

(o) Refunds of Federal income taxes and advances made by an employer relating to an earned income tax credit, as provided in § 416.1235;

(p) Payments received as compensation for expenses incurred or losses suffered as a result of a crime as provided in § 416.1229;

(q) Relocation assistance from a State or local government as provided in § 416.1239;

(r) Dedicated financial institution accounts as provided in § 416.1247;

(s) Gifts to children under age 18 with life-threatening conditions as provided in § 416.1248;

(t) Restitution of title II, title VIII or title XVI benefits because of misuse by certain representative payees as provided in § 416.1249;

(u) Any portion of a grant, scholarship, fellowship, or gift used or set aside for paying tuition, fees, or other necessary educational expenses as provided in § 416.1250;

(v) Payment of a refundable child tax credit, as provided in § 416.1235; and

(w) Any annuity paid by a State to a person (or his or her spouse) based on the State's determination that the person is:

(1) A veteran (as defined in 38 U.S.C. 101); and

(2) Blind, disabled, or aged.

State Statutes

AS 47.14.100(a)-(b). Powers and duties of department over care of child.

(a) Subject to (e), (f), and (i) — (m) of this section, the department shall arrange for the care of every child committed to its custody by placing the child in a foster home or in the care of an agency or institution providing care for children inside or outside the state. The department may place a child in a suitable family home, with or without compensation, and may place a child released to it, in writing verified by the parent, or guardian or other person having legal custody, for adoptive purposes, in a home for adoption in accordance with existing law. For a child 16 years of age or older, the department may authorize another transitional living arrangement, including student dormitory residence at a postsecondary educational institution, that adequately meets the child's needs and is designed to assist the child's transition to independent living.

(b) The department may pay the costs of maintenance that are necessary to assure adequate care of the child, and may accept funds from the federal government that are granted to assist in carrying out the purposes of this chapter, or that are paid under contract entered into with a federal department or agency. A child under the care of the department may not be placed in a family home or institution that does not maintain adequate standards of care.

State Regulations

7 AAC 53.020. Payment rates.

(a) Subject to appropriation, and unless another source of payment is available from or through the department for the child's care, the department will provide payment for a child

(1) placed in foster care by the department under AS 47.14.100 — 47.14.130; or

(2) for whom state custody has been resumed under AS 47.10.080(v).

(b) The department will periodically review and establish foster care maintenance payment rates for foster care under this chapter. The department will set rates to cover the costs of caring for a foster child as set out in 7 AAC 53.030, 7 AAC 53.040, and 7 AAC 53.060 — 7 AAC 53.062. To the extent that the state does not otherwise cover those costs, foster care maintenance payment rates cover the cost of, and the cost of providing,

(1) food;

(2) clothing;

(3) shelter;

(4) daily supervision;

(5) school supplies;

(6) a child's personal incidentals;

(7) reasonable travel to the child's home for visitation; and

(8) reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.

(c) Daily payment rates are established for each child, as follows:

(1) each child in foster care receives a base foster care payment rate;

(2) a child who qualifies for a difficulty-of-care augmented rate under 7 AAC 53.060 or intensive augmented rate under 7 AAC 53.061 receives the total of the base rate and either the approved difficulty-of-care augmented rate or the approved intensive augmented rate for the daily payment rate.

(d) For a child placed in foster care by a tribal entity that has a tribal Title IV-E pass-through maintenance agreement approved by the department, the agreement governs the actual rates that are reimbursed to the tribal entity for the child's foster care.

INTRODUCTION

The State of Alaska has been surreptitiously diverting Social Security benefits, from disabled and orphaned foster children into its own coffers, to offset the costs of foster care for these children. It has done so in partnership with for-profit companies that help states around the country do the same. It has done so without ever notifying the affected foster children or their families, their guardians ad litem and attorneys, or the judges presiding over their Child in Need of Aid ("CINA") cases. And it has done so in spite of the fact that foster children have no legal obligation whatsoever to help pay for their own care while they are in the State's legal custody.

The State does not make any other foster children contribute any money towards their foster care. Instead, the *only* group of foster children in Alaska who are being singled out and forced to effectively help pay for their own care is the class of children now before this Court.

The State's actions violate due process and equal protection. After many years of litigation, the trial court agreed that the State's practice of diverting foster children's Social Security benefits without notice violates the due process clause of the Alaska Constitution. This Court should affirm that ruling.[1]

Unfortunately, the trial court misapplied this Court's jurisprudence on equal protection and ruled against the foster children on that claim. The trial court also refused

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[1] The State has filed its own appeal from the trial court's rulings on the due process claim. Pursuant to Alaska Appellate Rules 210(c)(1)(C) and 212(c)(6)(A), Z.C. will be filing *separate* cross-appellant and appellee's briefs in this matter. The due process issue will be briefed in much greater detail in Z.C.'s appellees' brief.

to order the disgorgement of millions of dollars in Social Security monies wrongfully taken by the State from these foster children in violation of their constitutional rights.

It is time for this Court to put an end to the State's unconstitutional practice of diverting foster children's Social Security benefits, and order the return of the State's ill-gotten gains to the victimized foster children. This Court should reverse the trial court's rulings on equal protection and disgorgement.

JURISDICTIONAL STATEMENT/PARTIES TO THE CASE

This is an appeal from a final judgment entered by Superior Court Judge William F. Morse on October 22, 2021. [Exc. 713-14] Jurisdiction lies with this Court pursuant to AS 22.05.010 and Alaska Appellate Rule 202(a). The appellant is a former foster youth, "Z.C.,"[2] on behalf of herself and a certified class of similarly situated foster children.[3] The appellees are the State of Alaska, Department of Health and Social Services, Adam Crum in his official capacity as Commissioner of the Department, the Office of

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[2] The claims at issue in this appeal arose when Z.C. was a foster youth in the legal custody of the Office of Children's Services. Z.C.'s initials are used herein to protect her privacy. *Cf.* AS 47.10.090(d) ("The name or picture of a child under the jurisdiction of the court may not be made public in connection with the child's status as a child in need of aid unless authorized by order of the court or unless to implement the permanency plan for a child after all parental rights of custody have been terminated."). Z.C. was represented by a next friend, Lorenz Kaufman, in the trial court. Because this case took more than seven years in the trial court, Z.C. is no longer a minor and she no longer needs a next friend. *See* Alaska R. Civ. P. 17(c).

[3] The class is defined as "all foster children for whom the State was appointed a representative payee for Old-Age, Survivors, and Disability Insurance benefits or Social Security Supplemental Income benefits between 10 July 2012 and 22 October 2021." [Exc. 713]

Children's Services, and Kim Guay in her official capacity as Director of OCS.[4] The appellees are collectively referred to as "OCS" in this brief.

ISSUES PRESENTED FOR REVIEW

1. Is OCS violating the equal protection clause of the Alaska Constitution by requiring foster children who are Social Security beneficiaries, and *only* this class of foster children, to contribute to the costs of their foster care?

2. Did the trial court err in holding that federal law preempted the foster children's equal protection claim under the Alaska Constitution?

3. Did the trial court err by failing to order OCS to return to the affected foster children the Social Security monies that OCS took from them?

STATEMENT OF THE CASE

A. Social Security Benefits Available for Children.

Children may be eligible to receive money from the federal government under two programs created under the Social Security Act. The first, called the Old-Age, Survivor's, and Disability Insurance ("OASDI") program,[5] provides a monthly cash benefit when a wage earner parent dies.[6] A child's eligibility for OASDI is not predicated on need, but on whether the deceased parent paid sufficient payroll taxes before death.[7]

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[4] Adam Crum and Kim Guay were substituted for their predecessors, Valerie Davidson and Christy Lawton, pursuant to Alaska Appellate Rule 517(b).

[5] 42 U.S.C. §§ 401 *et seq.*

[6] *See* 42 U.S.C. §402(d); *Astrue v. Capato*, 566 U.S. 541, 547 (2012); *Mathews v. Lucas*, 427 U.S. 495, 507 (1976).

[7] *See* 20 C.F.R. §§ 404.204 (governing computation of primary insurance amounts,

The second program, called Supplemental Security Income ("SSI"), provides monthly benefits payments to disabled, indigent minors.[8] SSI's purpose is "to provide a minimum level of income to children who would not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level."[9]

Unless otherwise noted, there is no material difference between OASDI and SSI benefits for purposes of the issues in this appeal. These benefits are collectively referred to as "Social Security benefits."[10]

B. The Representative Payee Program.

Social Security benefits are normally paid directly to the beneficiary.[11] However, when the beneficiary is a minor, the Social Security Administration ("SSA") typically pays the benefits to a "representative payee,"[12] who serves in a fiduciary capacity for the

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which is generally based on wages earned by insured), 404.353(a) (child's monthly benefit equals three-fourths of the primary insurance amount of the deceased parent).

[8] *See* 42 U.S.C. §§ 1381 *et seq.*

[9] *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390 (2003) ("*Keffeler II*") (internal citations and quotation marks omitted). The amount of the SSI benefit is adjusted annually by the Social Security Administration ("SSA") based on changes in the cost of living; it is currently $841 per month. Cost-of-Living Increase and Other Determinations for 2022, 86 Fed. Reg. 58,715 (Oct. 22, 2021).

[10] *See Guardianship Estate of Keffeler v. Dep't of Social & Health Servs.*, 88 P.3d 949, 952 (Wash. 2004) ("*Keffeler III*") ("Although the two types of benefits are separate and distinct programs, we agree . . . that for the purpose of this litigation and the issues raised, they are comparable.").

[11] The SSA's official policy is that "every beneficiary has the right to manage his or her own benefits." 20 C.F.R. §§ 404.2001(b)(1), 416.601(b)(1).

[12] *See id.* A representative payee is appointed if the SSA determines that such an appointment is in "the interest of" the beneficiary. *See* 42 U.S.C. §§ 405(j)(1)(A)

child beneficiary,[13] and is responsible for managing and accounting for the use of the child's benefits.[14]

Once appointed by the SSA, a representative payee may only spend Social Security funds for the "use and benefit" of the beneficiary.[15] Any payments made for "current maintenance" – which is defined to include "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items" – are deemed to "have been used for the use and benefit of the beneficiary."[16] After a child's basic needs are met, a representative payee can use the benefits "to improve the beneficiary's daily living conditions."[17] This includes using "the money to arrange for the beneficiary to go to school or get special training," "spend[ing] some of the money for the beneficiary's recreation, such as movies, concerts, or magazine subscriptions," and making "special purchases," like a car, a home, home improvements, furniture.[18]

(OASDI benefits), 1383(a)(2)(A)(ii)(I) (SSI benefits); *see also* 20 C.F.R. §§ 404.2010(b), 416.610(b). The SSA's regulations list various individuals and agencies that can seek to become a payee for a disabled child. *See* 20 C.F.R. §§ 404.2021(c), 416.621(c).

[13] 20 C.F.R. §§ 404.2035(a), 416.635(a); *see also C.G.A. v. State*, 824 P.2d 1364, 1367 (Alaska 1992) (recognizing that a representative payee owes a fiduciary duty to the beneficiary under federal law).

[14] According to OCS's Child Protective Services Manual, a representative payee "is required to ensure the physical, mental and emotional well-being of the beneficiary in a manner which both preserves dignity and protects basic rights." [R. 372]

[15] 20 C.F.R. §§ 404.2035(a), 416.635(a).

[16] 20 C.F.R. §§ 404.2040(a), 416.640(a).

[17] Social Security Administration, *A Guide for Representative Payees* at 4, available at: https://www.ssa.gov/pubs/EN-05-10076.pdf (visited Mar. 8, 2022).

[18] *Id.* at 4-5.

A payee may also conserve any remaining funds on the child's behalf.[19] The only limitation is that an SSI recipient may not accumulate more than $2,000 in "countable resources,"[20] subject to a long list of excluded assets.[21] No such asset limit applies under the OASDI program.[22]

C. OCS's Duty to Financially Support Foster Children.

OCS is the state agency responsible for caring for all of Alaska's foster children.[23] State law mandates that OCS pay for the cost of care for all of the foster children in its custody.[24] OCS meets this legal requirement by making monthly "foster care maintenance payments" to a child's foster parents.[25] These payments are intended to cover the cost of a foster child's food, clothing, shelter, daily supervision, school supplies, personal incidentals, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.[26] No Alaskan foster child has any legal obligation to ever reimburse

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19 20 C.F.R. §§ 404.2045, 416.645.

20 20 C.F.R. § 416.1205(c).

21 20 C.F.R. §§ 416.1210 *et seq.*

22 *See* Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1819 n.134 (Feb. 2006).

23 *See* AS 47.14.100.

24 *See* AS 47.14.100(b).

25 AS 47.14.100(b); 7 AAC 53.020.

26 *See* 7 AAC 53.030(b).

OCS for any of these foster care payments.[27] [Exc. 395, 572]

D. OCS's Surreptitious Scheme of Taking Foster Children's Social Security Benefits to Pay for Their Cost of Care.

Many states around the country have found themselves facing budget deficits and have come up with various creative ways to finance their underfunded child welfare systems without the need to increase taxes on their voters.[28] One of those creative ways is to secretly obtain and divert Social Security benefits from unknowing, and mostly disabled, foster children.[29] Indeed, various for-profit companies have sprung up to assist states in this "revenue maximization" effort.[30] Professor Hatcher has summarized the current state of affairs as follows:

> Across the country, tens of thousands of children who have suffered a level of abuse and neglect requiring removal from the family home are being forced to pay for their own foster care.
>
> As a part of revenue maximization strategies often developed through

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[27] *Keffeler II*, 537 U.S. at 382 ("No law provides that [foster children] are liable to repay the department for the costs of their care . . . .").

[28] *See* Hatcher, *supra*, 27 Cardozo L. Rev. at 1807; *see also, e.g., UAW Int'l Union v. Fortuno*, 633 F.3d 37, 43 (1st Cir. 2011) ("[I]n today's fiscal environment . . . many states face daunting budget deficits . . . ."); Michal Gilad, et al., *The Snowball Effect of Crime and Violence: Measuring the Triple-C Impact*, 46 Fordham Urb. L. J. 1, 67 (Feb. 2019) (explaining that "states' revenues are already stretched to their limit, as many states are facing severe budget deficits that amount to a serious fiscal crisis, and every dollar counts.").

[29] *See* Hatcher, *supra*, 27 Cardozo L. Rev. at 1806 ("[S]tates have a strong incentive to seek out the children's Social Security benefits. The benefits are fully federally funded and enable states to replace state funds used to support foster children with federal funds, thereby saving state resources for other purposes.").

[30] *See id.* at 1808-09; *see also generally* Joseph Shapiro, *Consultants Help States Find and Keep Money that Should Go to Foster Kids*, Nat'l Pub. Radio (Apr. 28, 2021), available at: https://www.npr.org/2021/04/28/991503850/consultants-help-states-find-and-keep-money-that-should-go-to-foster-kids (last visited Mar. 15, 2022).

> contracts with private companies such as MAXIMUS, Inc., foster care agencies are engaged in the systemic practice of converting foster children's Social Security benefits into a source of state funds. The agencies identify foster children who are disabled or have deceased or disabled parents, apply for Social Security benefits on the children's behalf, and then take the children's benefits to reimburse foster care costs for which the children have no legal obligation. The states are using the Social Security benefits as a funding stream in order to reduce state expenditures rather than as a resource to address the children's unmet needs . . . . Furthermore, the benefits are not being conserved to aid the children in their forthcoming and difficult transitions from foster care to independence.[31]

OCS implemented this scheme in Alaska. Since 2003, OCS has contracted with for-profit companies "to review case files to determine if a child may qualify" for Social Security benefits. [R. 224, 356; Exc. 293] If so, OCS applies for Social Security benefits on behalf of the child, and if the child is qualified by the SSA, OCS becomes the child's payee. [Exc. 294, 585, 700] It then diverts the child's Social Security benefits into its own coffers to reimburse itself for the child's cost of care. [Exc. 191, 401, 585, 701; R. 301]

If a child already has Social Security benefits when he or she enters OCS's custody, OCS moves to replace the child's payee, and thereupon diverts the child's benefits into self-reimbursement for the child's foster care expenses. [Exc. 190-91, 294, 375-76, 585, 701; R. 355] OCS *always* applies to be the payee, even if the child already has a perfectly suitable payee. [Exc. 190, 294, 379-80, 385, 422]

Either way, as OCS admitted, "[i]t is the practice of OCS to apply to become the

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[31] Hatcher, *supra*, 27 Cardozo L. Rev. at 1798-99. OCS used to contract with Maximus, but has been using another private contractor called Public Consulting Group since July 1, 2013. [Exc. 420]

representative payee for *any child* in state custody that is receiving a social security benefit." [Exc. 294 (emphasis added)] And there is no real mystery as to OCS's motivations. As the trial court found, it is "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]

OCS's practice means one thing: the class of foster children before this Court – the majority of whom are indigent and disabled [Exc. 293] – are being forced to effectively contribute towards the cost of their own foster care.

The number of foster children affected by this scheme is not de minimis. As of January 2020, there were 259 foster children in Alaska that were being victimized in this fashion. [Exc. 293] And there is a considerable amount of money being diverted. In the aggregate, OCS took nearly $1,800,000 of the foster children's money in fiscal year 2019 alone. [Exc. 296]

For purposes of the equal protection claim, there is one critical fact to note: No other foster children in Alaska, regardless of whether or not they have a large inheritance, a trust fund, a wage-paying job, high-earning biological parents, or sizeable Native stock dividends, ever have to contribute *any money* towards their foster care. [Exc. 410-12; R. 2098]

That OCS's scheme is shameful is manifest. What makes it worse is that it all occurred surreptitiously and behind the backs of the affected foster children and the adults who are duty-bound to protect their best interests, such as the CINA judges, guardians ad litem, and the foster children's parents and attorneys. Until the trial court's

injunction in this case, OCS never provided any notice to *anyone* when it applied for these children's benefits, when it applied to become their representative payee, and when diverting their monies to the State. [Exc. 115-19, 190-92, 585, 700; R. 21-22, 60, 641] None of these parties (i.e., the CINA judges, the foster children, or their GALs and attorneys) were ever told by OCS that the affected foster children could appeal the appointment of OCS as their representative payee or seek the appointment of another caring adult in their lives (e.g., someone with a higher preference under federal law). [*Id.*] Nor were they given any means by which to challenge OCS's use of their Social Security monies.[32] Indeed, OCS admitted that it does not even provide accountings to foster children of "how benefits have been used while they were in state custody." [R. 727-28]

Finally, OCS's practice has a real-world impact on these foster children. As the trial court recognized: "If a child in foster care had a representative payee other than OCS, then that payee is obligated to use those funds for the child's care. But those funds *supplement* rather than reimburse the separate obligation that the State has to pay for foster care." [Exc. 701 (emphasis added)]. Thus, if these children had a private payee,

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[32] Indeed, as reported by The Marshall Project and National Public Radio, "youths typically don't find out about their cash until it is already gone. This is often just a few months before they exit foster care, when they start talking to a social worker about applying for benefits as an adult. Some said they didn't figure it out until they applied for food stamps or other federal assistance — and were told they already should have been receiving Social Security." 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 Apr. 6, 2022). Tristen Hunter, a class member who was interviewed for the story, said: "I'm not even really sure where the money is now except that I don't have it." *Id.* Another class member, Malerie Shockley, similarly stated: "I didn't realize I was basically paying for my own foster care — until some friends were like, guys, they've been taking our money." *Id.*

instead of OCS as their payee, the private payee could have used the Social Security monies to provide the children with various items, services, therapies, or educational opportunities they might otherwise not receive as foster children being supported by a poverty-level subsidy.[33] A private payee could also conserve any excess benefits for future use when these children age out of the foster care system.[34] But since OCS acted to become the children's payee, the *entire* amount of these children's Social Security benefits was simply diverted to OCS, with *zero* benefit to the children.[35] [Exc. 190-91, 585, 701; R. 656]

E. The Supreme Court's Decision in Keffeler II

The practice of foster care agencies taking foster children's Social Security benefits to pay for their cost of care was considered by the United States Supreme Court in *Washington State Department of Social & Health Services. v. Guardianship Estate of Keffeler* ("*Keffeler II*").[36] However, *Keffeler II* considered a very narrow question of

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[33] Alaska's foster care rates vary by community and age of a child. *See* 7 AAC 53.030. The current rate for a foster child who is between 6 and 11 years old and lives in Anchorage is $29.86 per day, or $10,898.90 per year. *See* State of Alaska – Department of Health and Social Services ORCA Foster Care Rate Schedule By Community (effective Jul. 1, 2018), available at: https://dhss.alaska.gov/ocs/Documents/FosterCare/fostercarerates.pdf (last visited Mar. 15, 2022). By contrast, the current federal poverty threshold for one person in Alaska is $16,990. *See* Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315, 3316 (Jan. 1, 2022).

[34] 20 C.F.R. §§ 404.2045, 416.645.

[35] OCS produced accounting reports for 50 of the class members. [R. 1728-1868] For every single one of these foster children, the report showed a negative balance at the end of the accounting period, which means that the child was left with no Social Security benefits after the State reimbursed itself for maintenance costs. [*Id.*]

[36] 537 U.S. 371 (2003).

statutory interpretation:

> The question here is whether the State's use of Social Security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from "execution, levy, attachment, garnishment, or other legal process." We hold that it does not.[37]

The Supreme Court held that the State of Washington's "effort to become a representative payee," and its subsequent taking of foster children's Social Security benefits to reimburse itself for their cost of care, did not violate the Social Security Act's anti-attachment provision, 42 U.S.C. § 407(a),[38] because it did not involve any "judicial authorization" or "legal process."[39] That was the full extent of the holding of *Keffeler II*.

Notably, the Supreme Court did not decide any constitutional issues in *Keffeler II*,[40] including the foster children's claim that the State of Washington "violated the equal protection clause of the fourteenth amendment to the United States Constitution by misusing funds and refusing to exercise discretion in social security fund disbursement, causing foster children with the State as a representative payee to be treated differently

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[37] *Id.* at 375 (citations omitted).

[38] This statute provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

[39] *Keffeler II*, 537 U.S. at 382-86.

[40] *See id.* at 389 n.12; *see also Keffeler III*, 88 P.3d at 951 ("Because the United States Supreme Court decided the case on a statutory basis, it did not address the constitutional claims.").

from children with a private representative payee."[41] Nor did the Supreme Court decide the claim that "the State is required to provide notice prior to appointment of a representative payee . . . to satisfy procedural due process."[42] Thus, the constitutional issues raised in this case are *not* controlled by *Keffeler II*.

F. Procedural History

OCS applied for SSI benefits on behalf of Z.C. in 2013, and requested to become her representative payee. [R. 88, 641] The SSA determined that Z.C. was eligible for benefits effective June 2013 and appointed OCS as her payee. [R. 88] During the time that OCS served as payee, OCS received $4,445 in SSI benefits for Z.C. [R. 655, 1476-77] *All* of this money was taken by OCS to reimburse itself for the costs of Z.C.'s foster care. [*Id.*]

This lawsuit was originally filed in July 2014. [R. 2624-30] Z.C. was substituted as the class representative in January 2016, after the original plaintiff aged out of foster care. [Exc. 31-37] In the operative complaint, Z.C. asserted two claims against OCS. First, Z.C. alleged that OCS was violating the due process clause of the Alaska Constitution by failing to give foster children (and their parents and representatives) any notice when applying to become their representative payee. [Exc. 35] Second, Z.C. alleged that OCS's practice of requiring foster children who are Social Security beneficiaries to effectively contribute to their cost of care violated the equal protection clause of the Alaska Constitution. [Exc. 35-36] Z.C. sought to represent a class

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41 *Keffeler III*, 88 P.3d at 950.

42 *Id.*

comprised of: "all foster children for whom [OCS] was appointed representative payee since July 10, 2012." [Exc. 34] Z.C. sought declaratory and injunctive relief, including an order prohibiting OCS "from applying for Social Security benefits on a foster child's behalf or attempting to be appointed representative payee for a foster child without first providing the affected foster child with a due process compliant notice," and disgorgement of any Social Security benefits taken by OCS from the class members without due process. [Exc. 36-37]

After extended motion practice, the trial court issued its first dispositive order on September 4, 2019, granting Z.C.'s motion for partial summary judgment on the due process claim. [Exc. 183-205] The trial court held that OCS was violating foster children's "state constitutional due process rights by not giving them any or inadequate notice about the possibility of obtaining a representative payee other than OCS." [Exc. 701] As a prospective remedy, the trial court ordered OCS to start providing notice of its application to become representative payee. [Exc. 203-04, 468-69, 698] OCS started providing the court-ordered notice in April 2020. [Exc. 474-75]

Meanwhile, the parties continued to litigate the equal protection claim, and whether Z.C. and the class members were entitled to additional equitable relief – such as disgorgement or a constructive trust – to remedy the past violations of their due process rights. [Exc. 212-467, 481-582] They sought "the repayment of the Social Security benefits that OCS received and used to reimburse itself for the partial costs of foster care." [Exc. 586] The trial court resolved these remaining issues in a summary judgment order issued on January 19, 2021. [Exc. 583-611]

With regard to the claims seeking the repayment of Social Security benefits taken without due process, the trial court granted partial summary judgment to OCS. [Exc. 586-97, 610] The trial court held:

> The Court appreciates and somewhat shares the Plaintiffs' objection to the use of some foster children's Social Security benefits to pay for the foster care system as a whole. But the Court cannot find that this systemic lawful use of federal funds is inequitable such that disgorgement or an equivalent remedy is required.

[Exc. 595-96] However, the court *sua sponte* raised the issue of whether Z.C. and the class members might be entitled to nominal damages and requested supplemental briefing from the parties. [Exc. 596-97]

The trial court also granted summary judgment to OCS on the equal protection claim. [Exc. 597-610] The court first held that the equal protection claim was preempted by federal law. [Exc. 600-05] In the alternative, the trial court held that OCS was not violating equal protection because it was merely complying with the SSA's rules governing a representative payee's use of Social Security benefits when diverting the foster children's benefits into the State's coffers for self-reimbursement of the children's foster care costs. [Exc. 605-10]

On October 22, 2021, after seven years of litigation and after denying multiple requests by OCS to reconsider or vacate its due process ruling, the trial court finally entered a final judgment. [Exc. 211, 473, 698-714] The final judgment certified a class under Alaska Civil Rule 23(b)(2) "consisting of all foster children for whom the State was appointed a representative payee for Old-Age, Survivors, and Disability Insurance benefits or Social Security Supplemental Income benefits between 10 July 2012 and 22

October 2021." [Exc. 713] The judgment awarded nominal damages of $30 for each class member "to whom the State did not provide notice equivalent to that required by the Order of 3 September 2019 as modified by the Order of 22 October 2021." [Exc. 713-14] The judgment permanently enjoined OCS "from violating the state due process rights of foster children in the custody of the State for whom the State applies to be the representative payee for Old-Age, Survivors, and Disability Insurance benefits or Social Security Supplemental Income benefits without the notice" required by the court. [Exc. 714] Finally, the court entered judgment in favor of OCS on the equal protection claim. [Exc. 714]

The parties have filed cross-appeals from the final judgment.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, exercising its independent judgment to determine "whether the parties genuinely dispute any material facts and, if not, whether the undisputed facts entitle the moving party to judgment as a matter of law."[43] This Court also applies its independent judgment to questions of constitutional law,[44] such as equal protection claims,[45] and when deciding questions of federal preemption of state law.[46] This Court reviews a trial court's decision on equitable

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[43] *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 908 (Alaska 2001) (citation omitted).

[44] *Id.*

[45] *Watson v. State*, 487 P.3d 568, 670 (Alaska 2021).

[46] *See Andrews v. Alaska Operating Eng'rs-Emp'rs Training Tr. Fund*, 871 P.2d

remedies for an abuse of discretion, but reviews de novo any underlying questions of law and the application of law to facts.[47]

ARGUMENT

I. OCS's Practice Violates Alaska's Equal Protection Clause.

Alaska's equal protection clause protects "those similarly situated from disparate treatment" by the State.[48] Here, OCS violated Alaska's equal protection clause by making foster children who are Social Security beneficiaries, and only these foster children, effectively contribute towards their cost of care. [Exc. 410-11, 585, 608] Indeed, OCS *admits* that no other foster children in Alaska, regardless of their income, resources, or ability to pay, ever have to pay anything towards their cost of care. [Exc. 410-11] Because this classification is not substantially related to the single governmental objective proffered by OCS (i.e., compliance with the federal regulations governing payees), it violates the equal protection clause of the Alaska Constitution.

Instead of accepting this straightforward conclusion, the trial court engaged in circular logic. The trial court held that because OCS had become the foster children's payee, it had a duty to comply "with the federal law about how a representative payee must use Social Security benefits . . . ." [Exc. 609] And because federal law permits a

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1142, 1144 (Alaska 1994).

[47] *In re Estate of Fields*, 219 P.3d 995, 1002 (Alaska 2009) (citing *Riddell v. Edwards*, 76 P.3d 847, 852 (Alaska 2003)).

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

payee to use a child's Social Security money for "current maintenance,"[49] OCS's diversion of the children's money was a "permitted use of the benefits" in furtherance of a "legitimate governmental purpose," i.e., compliance with "the federal law governing all representative payees." [Exc. 609] To the trial court, this "legitimate governmental purpose" justified the distinction between the two classes of foster youth in Alaska, i.e., those who have to help pay for their foster care (the class members now before this Court) and those who do not. [Exc. 609]

But the trial court's circular analysis begs two questions. First, OCS did not need to become the foster children's payee, surreptitiously or otherwise. Instead, it could and should have, as these children's fiduciary,[50] and in accordance with established SSA policy,[51] assisted them in identifying a trusted adult who could serve as their payee. This alternative payee would then have used the Social Security money for the children's needs, above and beyond their foster care stipend.

Second, even if OCS were the only payee available for a child, there is nothing in federal law *mandating* that OCS divert the child's Social Security benefits for self-

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[49] 20 C.F.R. §§ 404.2040(a), 416.640(a).

[50] OCS admitted that it owes a fiduciary duty to these foster children. [Exc. 116] This fiduciary relationship generally requires OCS to act "in good faith and with due regard to the interests" of foster children. *Henash v. Ipalook*, 985 P.2d 442, 445 (Alaska 1999) (quoting *Paskvan v. Mesich*, 455 P.2d 229, 232 (Alaska 1969)) (internal quotation marks omitted). Fiduciaries have "'an obligation to refrain from self-interested behavior that constitutes a wrong to the beneficiary as a result of the fiduciary exercising discretion with respect to the beneficiary's critical resources.'" Hatcher, *supra*, 27 Cardozo L. Rev. at 1827 (quoting D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1407 (2002)).

[51] *See* 20 C.F.R. §§ 404.2021(c), 416.621(c).

reimbursement after it becomes the payee. Instead, and consistent with its duties under federal law, OCS could have considered the unique needs and circumstances of each child and used the money to provide them with needed items and services not available from OCS, or conserved the money for the child's future use.[52] Nothing in federal law suggests that OCS was required to pocket the money.

As Washington Supreme Court Justice Richard B. Sanders explained in his dissenting opinion in *Keffeler III,* on remand from the Supreme Court:

> Both grandma, as the private representative payee, and [the Department of Social and Health Services], as the representative payee for the less fortunate, must use the OASDI and SSI benefits "only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines [specific to each type of payment], to be in the best interests of the beneficiary." 20 C.F.R. §§ 404.2035(a) (OASDI benefits), 416.635(a) (SSI benefits). Grandma and DSHS satisfy this requirement as a matter of law if the benefits are used for "current maintenance," which includes "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." *Id.*§§ 404.2040(a), 416.640(a).
>
> The federal statute (42 U.S.C. § 407(a)) is not violated if the State reimburses itself. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 386-87 (2003). Likewise the statute neither requires reimbursement by the private representative payee nor allows the State to compel it. *The ultimate issue is the disparate treatment that results.*[53]

But OCS elected neither of these options. Instead, it acted to become these foster children's payee for the purpose of diverting all of their money into the State's general fund, to reimburse itself for their foster care costs and "to pay for the foster care system

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[52] *See supra* nn. 15-21.

[53] *See Keffeler III*, 88 P.3d at 957 (Sanders, J., dissenting) (emphasis added).

as a whole." [Exc. 595] But OCS has never taken any similar actions for any other foster children who might have other financial resources or assets. [Exc. 410-11] *That* is the equal protection violation.

A. Alaska's Equal Protection Standard.

Article I, section 1 of the Alaska Constitution, which is Alaska's equal protection clause, provides that "all persons are . . . entitled to equal rights, opportunities, and protection under the law." This Court has "long recognized that the Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."[54]

To implement Alaska's more stringent equal protection standard, this Court has adopted "a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake."[55] Under Alaska's three-step equal protection analysis, this Court first considers the weight of the individual interest impaired by the classification, which determines the appropriate level of review.[56] Second, the Court examines the objectives underlying the State's classification.[57] "Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at

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54 *Malabed v. N. Slope Borough,* 70 P.3d 416, 420 (Alaska 2003).

55 *Id.* at 420-21.

56 *See Jones v. State*, 441 P.3d 966, 978 (Alaska 2019) (citation omitted).

57 *See id.*

the high end of the scale, that the legislation was motivated by a compelling state interest."[58] Third, the Court must "evaluate the means employed to further those goals to determine the closeness of the means-to-end fit."[59]

B. OCS Singles Out Foster Children Who Receive Social Security Benefits for Disparate Treatment.

A threshold question in deciding any equal protection claim is whether "similarly situated groups are being treated differently" by the government.[60] "[W]here there is no unequal treatment, there can be no violation of the right to equal protection of law," and the court "need not subject the challenged laws to sliding scale scrutiny."[61] Therefore, a court deciding an equal protection claim must first "decide which classes are to be compared and determine whether those classes are similarly situated or whether differences between the classes justify different treatment."[62]

Here, the undisputed facts show that OCS treats two separate classes of foster children in its care very differently. For one group of foster children, i.e., those who are eligible to receive Social Security benefits, OCS takes various steps to effectively make them pay for their own care. That is, OCS diverts Social Security money belonging to

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58 *Id.* (citation omitted).

59 *Malabed*, 70 P.3d at 421.

60 *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 966 (Alaska 2005).

61 *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 397 (Alaska 1997); *see also Alaska Inter-Tribal Council*, 110 P.3d at 967 ("If it is clear that two classes are not similarly situated, this conclusion necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes.") (citation and internal quotation marks omitted).

62 *State v. Schmidt*, 323 P.3d 647, 660 (Alaska 2014).

these foster children and uses it to repay itself for the cost of their care. [Exc. 191, 585, 701] For the rest of Alaska's foster children, OCS does not act to charge them for their own care, regardless of their wealth or ability to pay. [Exc. 410-11]

The following exchange at the deposition of OCS illustrates this disparate treatment:

> **Q** So other than using Social Security funds to reimburse the State for the cost of care, are there any other examples of money or resources belonging to a child that are used to reimburse OCS for the cost of care?
>
> **A** No. Other funding sources that our children may have had, whether it be employment income, tribal funds, PFD, whatever, those don't come with the federal regulations that require – that the Social Security funding requires.
>
> **Q** So let me try to drill down on that a little bit and make sure I understand you correctly. So there are foster children who have – who are in OCS legal custody who have income or resources available to them, right?
>
> **A** Correct.
>
> **Q** And you mentioned some examples. I think you said employment income is one?
>
> **A** Sure, yes.
>
> **Q** Native dividends?
>
> **A** Correct, yes.
>
> **Q** Permanent fund dividends?
>
> **A** Yes.
>
> **Q** Inheritances from family members?
>
> **A** Yes. We have had some children with those funds.
>
> **Q** And none of those other of types of income or resources are used

to reimburse OCS for the cost of care; right?

A Correct. . . .

[Exc. 410-11]

The trial court recognized OCS's disparate treatment of Social Security beneficiaries, stating OCS "does not require a foster child to use any other income or assets that she may have to meet her basic needs." [Exc. 608] Nevertheless, the trial court held that "the two classes defined by the Plaintiff are not similarly situated," because "[t]he eligibility for Social Security benefits distinguishes the two classes in a way that is not amenable to equal protection comparison."[63] [Exc. 607] This was simply circular reasoning.

"The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group."[64] "If the two groups are equivalent in all respects *other than the isolated factor*, then they are similarly situated."[65]

Here, the trial court correctly isolated the factor causing OCS's disparate treatment

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[63] In a footnote, the trial court suggested that "the more nuanced definitions of the two classes compared would be foster children with private representative payees and foster children with OCS as the representative payee." [Exc. 607] However, OCS admitted at its deposition that that it was unable to identify *any* foster children in Alaska who are receiving Social Security benefits and have a private payee. [Exc. 338] Thus, the more nuanced classification envisioned by the trial court does not appear to exist in on the ground in Alaska.

[64] *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (citation omitted).

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

of foster children – i.e., "eligibility for Social Security benefits" – but then failed to consider whether the two groups of foster children were similar in all *other* relevant ways. Instead, the trial court pointed to this isolated factor as the same reason why the two groups were not similarly situated: "The very fact that some foster children are eligible for Social Security benefits distinguishes them from foster children not eligible for the benefits." [Exc. 608]

In fact, *all* foster children – regardless of their eligibility for Social Security benefits – have the same fiduciary relationship with OCS and are entitled to receive the same level of care. [Exc. 116, 258, 290-92] OCS has admitted that it "provides all foster children with the same level of care regardless of whether or not they are Social Security beneficiaries." [Exc. 487] And the trial court correctly found that "both classes of foster children . . . are entitled to the financial support of the State while in foster care," and the "fact that one set of foster children are eligible for Social Security benefits does not change the State's obligation to the foster child by virtue of being a foster child . . . ." [Exc. 608] These findings cannot be squared with the trial court's conclusion that the two groups of foster children are not similarly situated.

Finally, this Court has repeatedly emphasized that the determination of whether two groups are similarly situated cannot be made in a vacuum; the court must "look to the state's reasons for treating the groups differently."[66] This Court has only authorized the

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[66] *Pub. Emps. Ret. Sys. v. Gallant*, 153 P.3d 346, 349 (Alaska 2007); *see also Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1136 (Alaska 2016) (holding that question of whether classes are similarly situated depends on whether, under the applicable scrutiny level, the "stated rationales" for the classification "justify

use of a "shorthand analysis" in "exceedingly clear" cases to "summarily conclude that two classes are not similarly situated."[67] But, as Justice Rabinowitz observed many years ago, in all but the most obvious cases, the 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."[68]

Here, the trial court erroneously employed the "shorthand analysis" to summarily conclude that "the two classes defined by the Plaintiff are not similarly situated." [Exc. 607] The trial court then compounded its error by concluding that OCS's stated rationale of compliance with federal law justified its disparate treatment of Z.C. and the class. [Exc. 609-10]

C. OCS's Disparate Treatment of Foster Children Does Not Survive Even the Lowest Level of Scrutiny.

While the Social Security benefits at issue in this case are considered an economic interest,[69] thus arguably justifying a lower level of scrutiny by this Court,[70]

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discriminating" between the classes).

[67] *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").

[68] *Shepherd v. State*, 897 P.2d 33, 46 (Alaska 1995) (Rabinowitz, J., concurring).

[69] *Cf. Ranney v. Whitewater Eng'g*, 122 P.3d 214, 223 (Alaska 2005) (holding that worker's compensation benefits are an economic interest) (citing *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 104 (Alaska 1995)).

[70] This lower standard is still "more demanding" than the "rational basis" test employed under federal equal protection jurisprudence and "close[s] the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry." *Isakson v. Rickey*, 550 P.2d 359, 362-63 (Alaska 1976); *see also Alaska Civ. Liberties Union v. State*, 122 P.3d 781, 791 (Alaska 2005)

OCS's disparate treatment of foster children still does not pass muster under Alaska's equal protection test because it does not bear "a fair and substantial relationship" to any legitimate governmental purpose.[71]

OCS has proffered only a *single* purpose behind its disparate treatment of foster children: compliance with federal regulations governing representative payees.[72] [Exc. 411-13, 504-07, 575-76] While compliance with a federal mandate may be considered a "legitimate" purpose, the fatal problem for OCS and the classification at issue is that it is based on a misreading of federal law. Federal law simply does *not* require OCS to divert foster children's Social Security benefits for self-reimbursement of foster care expenses. Rather, it requires representative payees to use the funds in the particular best interests of each individual child—*not* the State.[73]

OCS argues that Social Security regulations prevent OCS from saving a foster child's benefits, and that the money *must* be used to reimburse OCS for foster care maintenance payments. [Exc. 411] The first of these rationales is simply false; the second

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("Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial.") (citation omitted, emphasis in original).

[71] *See Alaska Civil Liberties Union*, 122 P.3d at 793-94 ("The governmental interests of cost control, administrative efficiency, and promotion of marriage are legitimate, but the absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests. . . . We therefore conclude, applying minimum scrutiny, that the challenged programs violate the individual plaintiffs' right to equal protection of the law.").

[72] This Court must analyze OCS's *actual* purpose and should not "hypothesize facts" or consider other "conceivable" purposes that OCS has not proffered. *Isakson*, 550 P.2d at 362.

[73] *See* 20 C.F.R. §§ 404.2035(a), 416.635(a).

one does not remotely justify OCS's discriminatory practice of *taking* foster children's Social Security benefits for self-reimbursement and leaving these children with no marginal benefit from their eligibility for Social Security benefits (as opposed to using the money to *supplement* the basic level of support provided by OCS to all foster children).

With regard to OCS's ability to save a foster child's Social Security benefits, it must first be noted that the Social Security regulations do not impose *any resource limit* on recipients of OASDI benefits.[74] Thus, for OASDI recipients – which comprise approximately half of the class [Exc. 339] – federal law does *not* actually prevent OCS from conserving, rather than taking, their benefits. For these foster children who have suffered the death of a parent, OCS's discriminatory practice has *no* relationship, substantial or otherwise, to the sole objective identified by OCS.

With respect to the recipients of SSI benefits, it is true that the governing regulations generally impose a $2,000 "resource limit" for individual beneficiaries.[75] However, there are numerous exceptions to this general resource cap that the State could utilize as payee to meet foster children's special needs or to plan for future

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[74] Because OASDI is *not* a needs-based program, a child's eligibility is not based on income or assets but is contingent upon sufficient parent contributions through payroll taxes. *See* 42 U.S.C. §402(d); *see also generally Astrue*, 566 U.S. at 547. Thus, OCS has conceded that OASDI benefits "may accumulate without render[ing] the beneficiary ineligible for on-going benefits." [Exc. 70]

[75] *See* 20 C.F.R. § 416.1205(c).

independence.[76] For example, the benefits could be placed in a special needs trust,[77] or in an approved Plan for Achieving Self Support (PASS),[78] or could be used to purchase household items and personal effects,[79] an ownership interest in a home (including a mobile home),[80] or an automobile.[81] Any one of these options, among numerous others,[82] could be utilized to help foster children plan for their transition out of foster care, while avoiding the SSI program's $2,000 resource limit. And any one of these options would provide a direct benefit to the disabled foster children, as opposed to simply diverting the money to OCS to reimburse costs for which the children have no legal obligation.

Finally, with regard to OCS's spending (as opposed to the saving) of foster children's Social Security benefits, there is nothing in federal law that *requires* OCS to divert foster children's Social Security benefits for self-reimbursement. Federal law requires OCS, like all representative payees, to spend the benefits for the recipient's "use and benefit in a manner and for the purposes [the payee] determines . . . to be in [the

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[76] *See generally* Daniel L. Hatcher, *supra*, 27 Cardozo L. Rev. at 1819-21.

[77] *See* 42 U.S.C. § 1396p(d)(4)(A); *see also* Social Security Administration, *Spotlight on Trusts – 2021 Edition*, available at: https://www.ssa.gov/ssi/spotlights/spot-trusts.htm (visited Mar. 2, 2022).

[78] *See* 20 C.F.R. §§ 416.1225, 416.1226.

[79] 20 C.F.R. § 416.1216.

[80] 20 C.F.R. § 416.1212.

[81] 20 C.F.R. § 416.1218.

[82] 20 C.F.R. §§ 416.1210 *et seq.*

beneficiary's] best interests."[83] The SSA considers Social Security benefits to "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."[84]

In *Keffeler II*, the U.S. Supreme Court held that a state foster care agency is permitted, *but not required*, to use a child's Social Security benefits for reimbursement of foster care expenses.[85] Thus, OCS would be fully compliant with federal law if it used foster children's Social Security benefits to *supplement* the basic level of support provided by OCS to all foster children, by purchasing *additional* food, clothing, services, and personal comfort items, beyond what OCS provides to all children in its care.

In short, there is nothing in the Social Security regulations that requires OCS to single out certain foster children – those who receive Social Security benefits and have OCS as their payee – and divert their Social Security benefits to reimburse OCS for the cost of their own care. Thus, OCS's disparate treatment of these foster children does not have a substantial connection to OCS's proffered rationale of compliance with Social Security regulations. It is the unilateral and self-serving actions of OCS, rather than the actual requirements of federal law, which are the root cause of OCS's unequal, and unconstitutional, treatment of Z.C. and the class members. The trial court erred by holding otherwise.

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83 20 C.F.R. at §§ 404.2035(a), 416.635(a).

84 20 C.F.R. §§ 404.2040(a), 416.640(a).

85 *See Keffeler II*, 537 U.S. at 386-91.

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

The trial court also held that the equal protection claim against OCS was preempted by federal law. [Exc. 600-05] Under the Supremacy Clause, any state laws that interfere with federal laws are preempted and thus invalid.[86] "Federal laws can preempt state laws in the following three ways: (1) if Congress expressly declares that state law is preempted; (2) if Congress demonstrates an intent to occupy a field exclusively; and (3) if there is an actual conflict between federal and state law."[87]

Here, the trial court accepted OCS's argument of field preemption.[88] "Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law."[89] There is a strong presumption *against* federal preemption of state law,[90] and this Court must "'start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was

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[86] *See, e.g., State v. Dupier,* 118 P.3d 1039, 1049 (Alaska 2005).

[87] *Id.* (citing *Totemoff v. State*, 905 P.2d 954, 958 (Alaska 1995)); *see also Allen v. State, Dep't of Health & Soc. Servs.*, *Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009) (explaining that there are "three major types of federal preemption of state law: 'express,' 'field,' and 'conflict' preemption.").

[88] OCS argued that "[f]ederal law fully occupies the field of prioritizing uses of Social Security benefits, and [a state court] does not have the authority to re-prioritize them. If the plaintiff disagrees with how OCS as his representative payee is using his benefits, he must address that disagreement to the SSA. The Social Security Administration is the proper place to address these complaints." [Exc. 498-99]

[89] *Allen*, 203 P.3d at 1161.

[90] *Id.* at 1160.

the clear and manifest purpose of Congress.'"[91] Field preemption does not apply where, as here, "Congress has left some room for state involvement."[92] Furthermore, there is a "deeply rooted presumption in favor of *concurrent* state court jurisdiction,"[93] which can only "be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[94]

In applying these principles, the trial court found "the analysis of preemption in *In re Ryan W.* to be persuasive in the present context." [Exc. 602] In *Ryan W.*,[95] the court held that "the exercise of discretion by a representative payee in its use of a beneficiary's OASDI benefits is reviewable only in the federal administrative and judicial processes described in the applicable federal statute and regulations . . . ."[96] In reaching this conclusion, the *Ryan W.* court relied on two specific provisions of the Social Security Act. First, 42 U.S.C. § 405(g) requires an action challenging "any final decision of the Commissioner of Social Security" to be brought in "the district court of the United States . . . ." And second, the court relied on 2004 amendments to the Social Security Act,

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[91] *Dupier*, 118 P.3d at 1049 (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)).

[92] *Id.* at 1050.

[93] *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (emphasis added).

[94] *Id.* at 459-60 (quoting *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473, 478 (1981)).

[95] 76 A.3d 1049 (Md. 2013).

[96] *Id.* at 1062.

codified in 42 U.S.C. § 405(j), which provide for "more stringent monitoring of institutional representative payees' use of benefits, as well as broader avenues in which to seek remedy for misuse of benefits by such institutional payees."[97]

The *Ryan W.* court, and by extension the trial court which adopted its reasoning, erred in finding field preemption based on these provisions for two key reasons. First, the plaintiffs in this case and *Ryan W.* were neither challenging any action by the Commissioner of the SSA nor the "misuse" of benefits by OCS. A "misuse" of benefits is a term of art under the Social Security Act. It applies only 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."[98] This definition does not encompass constitutional violations committed by a governmental agency in the course of performing its duties as representative payee. In fact, the trial court recognized this when it held: "Even if the Social Security Act preempts state court jurisdiction over allegations of payee misuse of a child's benefits, [the plaintiffs] are not asserting such misuse. They are asserting (and the Court has found) a violation of due process rights guaranteed by Alaska's constitution." [Exc. 591] There is no reason why a different interpretation of "misuse of benefits" should apply to an equal protection claim versus a due process claim.[99]

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[97] *Id.* at 1061 (citing Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493 (2004)).

[98] 42 U.S.C. § 405(j)(9).

[99] The trial court accused the plaintiffs of taking "inconstant positions" in their

Second, to the extent an equal protection violation amounts to a "misuse of benefits" under the Social Security Act, 42 U.S.C. § 405(j)(1)(A) confers jurisdiction on either the SSA Commissioner *or* any "court of competent jurisdiction" to determine whether a representative payee "has misused any individual's benefit paid to such representative payee . . . ." The trial court held that "the reference to 'a court of competent jurisdiction' in section 405(j)(1)(A) probably refers to the appropriate federal district court" and does not "grant state courts jurisdiction over claims of misuse by state agencies of Social Security benefits when acting as representative payees." [Exc. 590-91] The trial court misconstrued the statute. When Congress intends to limit jurisdiction to "the appropriate federal district court," it knows exactly how to do so, as evidenced by the different language used in § 405(g). By using broader language in § 405(j), Congress specifically contemplated and conferred concurrent state court jurisdiction to adjudicate cases involving misconduct by payees.[100]

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briefing by "disavow[ing] any claim that OCS has misused the Social Security benefits" in addressing their due process claim, whereas "if OCS violated their equal protection rights by its use of the Social Security benefits, then surely that would be misuse." [Exc. 601] The trial court failed to appreciate that "misuse" is a defined term under the Social Security Act. In fact, the plaintiffs have been entirely consistent throughout this case that *neither* the due process nor the equal protection violations amount to a "misuse," as that term is defined under 42 U.S.C. § 405(j)(9).

[100] *See, e.g., In re J.G.*, 652 S.E.2d 266, 272-73 (N.C. App. 2007) (compiling cases and stating that "courts have held that state courts have concurrent jurisdiction to hear disputes between a representative payee and a beneficiary concerning the use of Social Security funds."); *Grace Thru Faith v. Caldwell*, 944 S.W.2d 607, 610-11 (Tenn. App. 1996) (holding that language used by Congress in 42 U.S.C. § 405(j)(1)(A) "clearly indicates that a claim of payee misuse of funds can be addressed outside the SSA's administrative procedures" and does not indicate any "intent to preempt state court jurisdiction."); *Jahnke v. Jahnke*, 526 N.W.2d 159, 163 (Iowa 1994); *Catlett v. Catlett***,** 561 N.E.2d 948, 953 (Ohio App. 1988); *In re Estate of Kummer***,** 461 N.Y.S.2d 845, 860-61 (N.Y. App. Div. 1983); *cf. State v. Wallace*, 828 N.E.2d 125, 129-30 (Ohio App.

Finally, this Court's decision in *C.G.A. v. State*[101] is not on point, and the trial court erred in holding that *C.G.A.* also "compel[s] the conclusion that federal law preempts the Plaintiffs' state equal protection claim."[102] [Exc. 605] *C.G.A.* involved consolidated appeals of various orders in a delinquency case which (1) authorized the State to apply to be appointed as the child's representative payee; (2) authorized the State to use the child's Social Security benefits "to pay for his institutional care and other care" at the McLaughlin Youth Center; and (3) ordered the child's mother, who was the child's payee at the time he was adjudicated as a delinquent, to "remit the funds she receives as representative payee to the [S]tate" until such time that the State was designated as the new payee.[103] It is the third of these orders that is relevant here.

The mother appealed, arguing that the trial court's third order violated the anti-attachment provision of 42 U.S.C. § 407(a).[104] This Court agreed, holding that § 407(a) prohibited "state interference with an appointed payee's decision to spend the social

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2005) (holding that state theft charges against a representative payee were not preempted by the Social Security Act); *Commonwealth v. Morris*, 575 A.2d 582, 192 (Pa. Super. Ct. 1990) ("We conclude that the Social Security Act itself as well as its legislative history make clear that the federal government did not intend to dominate the field of public welfare to the exclusion of the states. Hence, the argument that Congress intended to preclude state prosecutions for behavior under state criminal statutes constituting theft of Social Security benefits must fail.").

101 824 P.2d 1364 (Alaska 1992).

102 It is telling that the trial court did not cite *C.G.A.* until *after* its discussion of *Ryan W.* [Exc. 602-05] If the trial court truly believed that *C.G.A.* was on point and controlling, there would have been no reason to rely on out-of-state caselaw.

103 *See C.G.A.*, 824 P.2d at 1366-67.

104 *See id.* at 1367-68.

security benefits."[105] This Court's holding was not based on field preemption, but based on the irreconcilable conflict between the federal anti-attachment statute and the state court's order, which subjected the child's Social Security benefits to "legal process" *in favor of a creditor*.[106] This is exactly how the anti-attachment provision is supposed to work; it is a shield meant to *protect* the recipient and her benefits from the claims of a creditor, even if that creditor happens to be the state.

The trial court's reliance on *C.G.A.* to immunize OCS's equal protection violations turns the purpose of the anti-attachment provision on its head. Courts have uniformly recognized that "the purpose of section 407(a) is to protect social security beneficiaries and their dependents from the claims of creditors."[107] It is not meant to shield creditors and other malfeasors from valid claims brought by a beneficiary. The trial court's reading of *C.G.A.* "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."[108] This Court should not read *C.G.A.* to reach such an absurd result.

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105 *Id.* at 1367.

106 *See id.*

107 *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).

108 *In re J.G.*, 652 S.E.2d at 274.

II. The Trial Court Erred by Failing to Order the Disgorgement of Social Security Benefits Taken by OCS Without Due Process.

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[109] Here, the trial court correctly held that OCS violated the constitutional rights of Z.C. and more than 250 other Alaskan foster children by taking their Social Security benefits, without any notice whatsoever. [Exc. 192-204, 585-86] But the court then refused to order OCS to return the wrongfully-taken money, instead awarding a meager remedy of $30 in nominal damages for each class member. [Exc. 586-97, 713-14]

A. OCS Will Be Unjustly Enriched If Allowed to Retain the Social Security Monies Taken from the Class Without Due Process.

After the trial court held that OCS violated their state constitutional due process rights, Z.C. and the class requested an equitable remedy of "either the creation of a trust that should hold all of the Social Security funds received by OCS for a foster child for whom it was a representative payee or the disgorgement of those monies directly to each child." [Exc. 587] Disgorgement and constructive trust are alternative forms of equitable remedies which lead to the same result—i.e., an order requiring the defendant to restore "ill-begotten property" to the wronged plaintiff(s).[110] Where, as here, the "ill-begotten property" is money, there is no practical difference between these two restitutionary remedies.

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[109] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

[110] *See, e.g., Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co.*, 299 P.3d 148, 160 (Alaska 2012).

The principle underpinning both of these restitutionary remedies is unjust enrichment.[111] "Unjust enrichment exists where the defendant has received a benefit from the plaintiff and it would be inequitable for defendant to retain the benefit without compensating plaintiff for its value."[112] "The general principle of the doctrine of unjust enrichment is that 'one person should not be permitted unjustly to enrich himself at [the] expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated.'"[113]

According to the *Restatement (Third) of Restitution & Unjust Enrichment*,[114] "[a] person who obtains a benefit by conscious interference with a claimant's legally protected interests . . . is liable in restitution as necessary to prevent unjust enrichment, unless competing legal objectives make such liability inappropriate."[115] Such interference includes "conduct that is tortious, or that violates another legal duty or prohibition (other than a duty imposed by contract), if the conduct constitutes an actional wrong to the

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[111] *See Rausch v. Devine*, 80 P.3d 733, 744 (Alaska 2003) ("[C]onstructive trust expresses a right to restitution based on unjust enrichment."); *Peter v. Progressive Corp.*, 2006 Alaska LEXIS 27, at *23 (Alaska Feb. 22, 2006) (explaining that disgorgement is "an equitable remedy which requires a defendant to give up an amount of money equal to the defendant's unjust enrichment.").

[112] *Sparks v. Gustafson*, 750 P.2d 338, 342 (Alaska 1988).

[113] *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 107 (Alaska 2001) (quoting *Anderson v. Tuboscope Vetco, Inc.*, 9 P.3d 1013, 1019 (Alaska 2000)).

[114] This Court has followed the *Restatement (Third) of Restitution & Unjust Enrichment* (1991) when evaluating restitution claims. *See Moffitt v. Moffitt*, 341 P.3d 1102, 1105 n.19 (Alaska 2014).

[115] *Restatement (Third) of Restitution & Unjust Enrichment* § 44(1).

claimant."[116] Restitution is also appropriate where, as here, 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."[117]

In addition to proving an actionable wrong, "the claimant must also show that the defendant – absent liability in restitution – would be unjustly enriched."[118] "Unjust enrichment exists where the defendant has received a benefit from the plaintiff and it would be inequitable for defendant to retain the benefit without compensating plaintiff for its value."[119] "A party seeking to recover for unjust enrichment must show (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof."[120]

Here, OCS was unjustly enriched by its scheme to intercept foster children's Social Security benefits without due process. Indeed, OCS used these foster children to "convert their social security benefits into a state funding source."[121] Professor Hatcher

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116 *Id.* at § 44(2).

117 *Id.* at § 43(a), (b).

118 *Id.* at § 44 cmt. d.

119 *Sparks*, 750 P.2d at 342.

120 *Ware v. Ware*, 161 P.3d 1188, 1197 (Alaska 2007).

121 Hatcher, *supra*, 27 Cardozo L. Rev. at 1799; *see also id.* ("The states are using the Social Security benefits as a funding stream in order to reduce state expenditures rather than as a resource to address the children's unmet needs in the severely broken foster care

explains that "states have a strong incentive to seek out the children's Social Security benefits" because, unlike other funding sources for foster care (such as Title IV-E money from the federal government), the Social Security benefits taken from foster children "are *fully* federally funded and enable states to replace state funds used to support foster children with federal funds, thereby saving state resources for other purposes."[122] And, in fact, the trial court found 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," and was using "some foster children's Social Security benefits to pay for the foster care system as a whole." [Exc. 595]

There is also no question that OCS's intention was not to help foster children, but to maximize its own revenues. MAXIMUS, the private contractor that applied for Z.C.'s benefits, specifically pitched child welfare agencies across the country on the budgetary benefits of using Social Security monies, instead of Title IV-E to pay for foster care:

> We help agencies like yours access federal funding through SSI (Title XVI) and SSDI (Title II) to help offset the cost of these benefits. Today, a child welfare agency can leverage more than $8,088 in federal funds annually (without a state match) for every child who is eligible for SSI benefits.

[R. 2828] According to OCS, it received $1,792,078 in revenue in 2019 alone by taking foster children's Social Security monies. [Exc. 296] The *only* way that OCS was able to gain access to this significant revenue stream was by secretly acting to become the foster children's representative payee, in violation of their due process rights.

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system.").

[122] *Id.* at 1806 (emphasis added, citation omitted).

Perhaps the best evidence of unjust enrichment is OCS's admission that "[c]hildren in the custody of OCS and in foster care who receive SSI benefits do not receive any additional income, resources, or opportunities over those who do not receive these benefits." [R. 656] Thus, when OCS becomes the representative payee, the foster children do not receive *any* improvement in their quality of life, and the *entire* financial benefit accruing from the incoming Social Security benefits is transferred in a windfall to the State.

In applying the *Ware* test for unjust enrichment, the trial court assumed as to the first prong that "by allowing OCS to apply to be or to remain the representative payee, a foster child is conferring a benefit on OCS, that is, the use of those benefits to offset the cost of foster care." [Exc. 594] The trial court also assumed that "OCS understands that it has obtained a benefit by the offset." [Exc. 594] However, the court held that the foster children's claim for restitution failed the third element of the *Ware* test:

> The Court appreciates and somewhat shares the Plaintiffs' objection to the use of some foster children's Social Security benefits to pay for the foster care system as a whole. But the Court cannot find that this systemic lawful use of federal funds is inequitable such that disgorgement or an equivalent remedy is required.

[Exc. 595-96]

The trial court noted, as a basis for its ruling, that not all class members may have suffered an "actual deprivation" as a result of OCS's due process violation. [Exc. 594-95] The trial court speculated that "[t]here may be reasons why a particular child was tolerant of the consequences of OCS being a payee." [Exc. 595] Thus, the trial court decided the question of causation as a matter of law on summary judgment.

One problem is that OCS had not moved for summary judgment on the question of causation.[123] [Exc. 212-29] Nor did the trial court give any advance notice that it was going to decide this question *sua sponte* as a matter of law.[124] If the trial court had done so, Z.C. could have further developed the record by, for example, adducing evidence that Z.C. was not, in fact, "tolerant of the consequences" of OCS serving as her payee, and that her brother and next friend, Lorenz Kaufman, was ready and willing to serve as the payee.

Furthermore, because "unjust enrichment" is measured by "the defendant's wrongful gain," it "may potentially exceed any loss to the claimant."[125] Thus, contrary to the trial court's assumption, it was irrelevant whether and to what extent Z.C. or particular class members suffered an "actual deprivation" as a result of OCS's wrongful conduct. The trial court's focus should have been, instead, on the amount of the windfall to the State. Thus, the trial court's ruling on causation is also wrong on the law.

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[123] In its summary judgment motion on disgorgement, OCS made only three legal arguments: (1) the plaintiffs were seeking the state equivalent of *Bivens* damages, which were not available because OCS did not commit a "flagrant constitutional violation"; (2) the plaintiffs' repayment claims were preempted by federal law; (3) Z.C. could not "state a claim for repayment of benefits" because she was no longer eligible for Social Security benefits at the time of OCS's summary judgment motion. [Exc. 212-29]

[124] *See Griswold v. Homer Bd. of Adjustment*, 426 P.3d 1044, 1045-46 (Alaska 2018) (holding that litigant's due process rights were violated when superior court *sua sponte* dismissed administrative appeal for lack of standing, "because the issue of standing had never been raised until the dismissal order, and there had been no notice of the need to place any additional facts in the record to support his standing."); *cf. Childs v. Childs*, 310 P.3d 955, 960 (Alaska 2013) ("To comply with due process, notice must be given sufficiently in advance of scheduled court proceedings so that the parties have a reasonable opportunity to prepare.").

[125] *Restatement (Third) of Restitution & Unjust Enrichment* § 51 cmt. a.

B. Restoration of Wrongfully Taken Property Is a Standard Remedy for Due Process Violations.

The trial court's weighing of the equities was also at odds with well-settled law on the appropriate equitable remedy for property taken without due process. "The dominant understanding of remedies in American constitutional law, at least since the 1970's, has been that they should be designed to correct the harms that governmental actors have caused to citizens."[126] This is typically done by the court restoring the status quo ante, in order to achieve "full correction of the constitutional harms that the state has caused to its citizens."[127] For due process violations, this means a return of the money or the property that was wrongfully taken by the government.

It is well settled that due process requires "some form of notice and hearing" before a governmental deprivation of property takes effect, "at a time when deprivation can still be prevented."[128] Where, as here, the government violates a citizen's right to pre-deprivation due process, the cases are legion in which courts have ordered the

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[126] Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 Ariz. L. Rev. 859, 860 (1991).

[127] *Id.* at 859.

[128] *Etheredge v. Bradley*, 502 P.2d 146, 151 (Alaska 1972) (citations omitted). The only exceptions to pre-deprivation due process are in emergency situations or when "public health, safety, or welfare require[s] summary action." *Brandner v. Providence Health & Servs.*, 394 P.3d 581, 589 (Alaska 2017) (quoting *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981)). OCS cannot plausibly argue that there was any sort of emergency justifying its taking of the class members' Social Security benefits without notice. Nor did OCS provide the class members with any sort of post-deprivation notice and hearing.

government to restore the wrongfully taken property.[129]

For example, in the case of *Hicks v. Berryhill*,[130] the court considered the appropriate remedy for Social Security recipients whose benefits were terminated by the SSA without due process.[131] The court ordered "that the plaintiffs' benefits be reinstated and that the plaintiffs be returned to the status quo during continued redetermination proceedings."[132] The court explained that "it would be illogical for the Court of Appeals to grant summary judgment for the Plaintiffs based on a procedural-due-process violation but then allow the government to continue to deprive the Plaintiffs of a protected property interest while the Plaintiffs await the due process to which they are legally entitled."[133]

Another example is *Kennedy v. Bowen*,[134] which also involved the termination of Social Security benefits in violation of a disability claimant's right to procedural due process.[135] As a remedy, the Eleventh Circuit ordered that the claimant's "disability

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[129] *See, e.g., Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 440 (D.D.C. 2005) (compiling numerous cases where courts have ordered the reinstatement of benefits).

[130] 392 F. Supp. 3d 784 (E.D. Ky. 2019).

[131] *See id.* at 786-87. The Sixth Circuit had previously held, in *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 792 (6th Cir. 2018), that the recipients were entitled to summary judgment on their due process claim against the SSA.

[132] *Hicks*, 392 F. Supp. 3d at 789.

[133] *Id.* at 790.

[134] 814 F.2d 1523 (11th Cir. 1987).

[135] *See id.* at 1524-25.

benefits be reinstated as of the date of their termination."[136]

In *Ward v. Love County Board of Commissioners*,[137] the Supreme Court ordered a county in Oklahoma to refund taxes collected from "Indian allottees arbitrarily and without due process of law."[138] In *McKesson Corp. v. Division of Alcoholic Beverages. & Tobacco*,[139] the Supreme Court reaffirmed that "the Due Process Clause requires [a] State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional."[140] And in *Aileen H. Char Life Interest v. Maricopa County*,[141] the Arizona Supreme Court held that taxpayers who were assessed taxes in violation of the state constitution were entitled to a refund as a matter of due process.[142]

Here, the trial court ruled that OCS violated due process by failing to give the

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[136] *Id.* at 1529; *see also, e.g., Banks v. Trainor*, 525 F.2d 837, 841 (7th Cir. 1975) (affirming reinstatement of the food stamp benefits to members of a wide class of food stamp recipients in Illinois when their food stamps were reduced without proper due process); *Willis v. Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980) (restoring food stamp allotments to approximately 6000 households until defendants crafted acceptable notice that met the strictures of due process); *cf. Tracy v. Salamack*, 572 F.2d 393, 396 (2d Cir. 1978) (affirming reinstatement of a class of 77 prisoners who were removed from temporary release program without due process).

[137] 253 U.S. 17 (1920).

[138] *Id.* at 24.

[139] 496 U.S. 18 (1990).

[140] *Id.* at 22; *see also Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (holding that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.") (citation and internal quotation marks omitted).

[141] 93 P.3d 486 (Ariz. 2004).

[142] *See id.* at 497-98.

class members any pre-deprivation notice before applying to become their representative payee and thereafter taking millions of dollars of their Social Security monies for its own coffers. [Exc. 296, 586-97, 713-14] The obvious and constitutionally-required remedy is for this Court to order these funds fully restored to the class.

CONCLUSION

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

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