

IN THE SUPREME COURT OF 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, Kim Guay, in her official)
capacity as Director of Office of)
Children’s Services,)

) Supreme Court No. S-18249

) Appellants/Cross-Appellees,)

v.)

Z.C.,)

) Appellee/Cross-Appellant.)

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

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

**BRIEF OF APPELLANT
THE STATE OF ALASKA**

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FEDERAL STATUTES:

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

(j)(1)(A) If the Commissioner of Social Security determines that the interest of any individual under this title would be served thereby, certification of payment of such individual's benefit under this title 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), 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 would be served thereby, to the individual.

...

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

(i) an investigation by the Commissioner of Social Security of the person to serve as representative payee, which shall be conducted in advance of such certification and shall, to the extent practicable, include a face-to-face interview with such person, and

(ii) adequate evidence that such certification is in the interest of such individual (as determined by the Commissioner of Social Security in regulations).

...

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

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

(I) is under the age of 15,

(II) is an unemancipated minor under the age of 18, or

(III) is legally incompetent,

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

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

(I) to appeal a determination that a representative payee is necessary for such individual,

(II) to appeal the designation of a particular person to serve as the representative payee of such individual, and

(III) to review the evidence upon which such designation is based and submit additional evidence.

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

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

...

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

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

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

(B) For purposes of this paragraph—

(i) the term "State" has the meaning given such term for purposes of part E of title IV;

(ii) the term “Statewide and Tribal Automated Child Welfare Information System” means a statewide mechanized data collection and information retrieval system described in section 474(a)(3)(C); and

(iii) the term “represented minor beneficiary”, with respect to an individual for a month, means a child (as defined for purposes of section 475(8)) entitled to benefits under this title for such month whose benefits are certified for payment to a representative payee.

...

42 U.S.C. § 1383(a) Payment of Benefits (SSI)

...

(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.

...

(B)(i) Any determination made under subparagraph (A) for payment of benefits to the representative payee of an individual or eligible spouse shall be made on the basis of—

(I) an investigation by the Commissioner of Social Security of the person to serve as representative payee, which shall be conducted in advance of such payment, and shall, to the extent practicable, include a face-to-face interview with such person; and

(II) adequate evidence that such payment is in the interest of the individual or eligible spouse (as determined by the Commissioner of Social Security in regulations).

...

(xi) Any individual who is dissatisfied with a determination by the Commissioner of Social Security to pay such individual’s benefits to a representative payee under this title, or with the designation of a particular person to serve as representative payee, shall be entitled to a hearing by the Commissioner of Social Security, and to judicial review of the Commissioner’s final decision, to the same extent as is provided in subsection (c).

(xii) In advance of the first payment of an individual’s benefit to a representative payee under subparagraph (A)(ii), the Commissioner of Social Security shall provide written notice of the Commissioner’s initial determination to make any such payment. Such notice shall be provided to such individual, except that, if such individual—

(I) is under the age of 15,

(II) is an unemancipated minor under the age of 18, or

(III) is legally incompetent,

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

(xiii) Any notice described in clause (xii) shall be clearly written in language that is easily understandable to the reader, shall identify the person to be designated as such individual’s representative payee, and shall explain to the reader the right under clause (xi) of such individual or of such individual’s legal guardian or legal representative—

(I) to appeal a determination that a representative payee is necessary for such individual,

(II) to appeal the designation of a particular person to serve as the representative payee of such individual, and

(III) to review the evidence upon which such designation is based and submit additional evidence.

...

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

(ii) Clause (i) shall not apply in any case where the representative payee is a State institution. In such cases, the Commissioner of Social Security shall establish a system of accountability monitoring for institutions in each State.

...

FEDERAL REGULATIONS:

20 C.F.R. § 404.2030 [20 C.F.R. § 416.630] How will we notify you when we decide you need a representative payee?

(a) We notify you in writing of our determination to make representative payment. This advance notice explains that we have determined that representative payment is in your interest, and it provides the name of the representative payee we have selected. We provide this notice before we actually appoint the payee. If you are under age 15, an unemancipated minor under the age of 18, or legally incompetent, our written notice goes to your legal guardian or legal representative. The advance notice:

- (1) Contains language that is easily understandable to the reader.
- (2) Identifies the person designated as your representative payee.
- (3) Explains that you, your legal guardian, or your legal representative can appeal our determination that you need a representative payee.
- (4) Explains that you, your legal guardian, or your legal representative can appeal our designation of a particular person or organization to serve as your representative payee.
- (5) Explains that you, your legal guardian, or your legal representative can review the evidence upon which our designation of a particular representative payee is based and submit additional evidence.

(b) If you, your legal guardian, or your legal representative objects to representative payment or to the designated payee, we will handle the objection as follows:

- (1) If you disagree with the decision and wish to file an appeal, we will process it under subpart J [subpart N] of this part.
- (2) If you received your advance notice by mail and you protest or file your appeal within 10 days after you receive this notice, we will delay the action until we make a decision on your protest or appeal. (If you received and signed your notice while you were in the local field office, our decision will be effective immediately.)

PARTIES

This case includes an appeal and a cross-appeal from the October 22, 2021 final judgment granting Z.C. relief on one of his claims and denying the other. [Exc. 713] The State of Alaska, Department of Health and Social Services (DHSS), Adam Crum in his official capacity as DHSS’s commissioner, the Office of Children’s Services (OCS), and Kim Guay in her official capacity as OCS’s director, collectively “OCS” or the “State,” are the appellants in this case, S-18249, and the cross-appellees in S-18259. Z.C., an adult who was a foster child in OCS custody when he became the named plaintiff in the case [Exc. 31-32], is the appellee in S-18249 and the cross-appellant in S-18259.

INTRODUCTION

This litigation is an attempt to use the Alaska Constitution to repair perceived policy shortcomings in a purely federal law. The Social Security Administration (SSA) often appoints OCS to act as representative payee for minor beneficiaries in its care. [Exc. 293] And the United States Supreme Court in *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, (*Keffeler II*), approved of agencies like OCS using those benefits to pay for the cost of children’s foster care, even though OCS would cover the cost from general funds if the SSA appointed a different representative payee.¹ The Court held that the purpose of Social Security benefits is to “see[] that basic needs are met, not [to] maximiz[e] a trust fund attributable to

¹ 537 U.S. 371, 375, 389-90 (2003).

fortuitously overlapping state and federal grants.”² Yet, the superior court found in the Alaska Constitution a procedural-due-process-based right to notice regarding the representative payee process, to guard against deprivation of the very interest *Keffeler II* held does not exist.

According to the superior court’s ruling, OCS must notify *all* children in its custody—whether or not they are Social Security beneficiaries—of (1) the fact that OCS applies to be the representative payee for beneficiary children in its care and (2) the potential financial distinction between having the SSA choose OCS instead of a different payee who might use the benefits to supplement, rather than offset, the State-provided care all Alaska foster children receive. [Exc. 583, 711]

The superior court’s order should be reversed because federal law preempts it. Field and conflict preemption principles both apply. Representative payee selection and the procedural rights of beneficiaries that attach to that program fall within a regulated, exclusively federal field in which Congress left no room for state participation.³ The State’s only role in the process is to submit an application making itself available to serve, if selected by the SSA, as a child’s representative payee. [Exc. 293]

Comprehensive federal law controls the SSA’s investigation and appointment decision from there; OCS cannot influence the selection.⁴

² *Id.* at 390.

³ *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015).

⁴ 42 U.S.C. §§ 405(j), 1383(a)(2).

Moreover, the applicable federal statute regarding beneficiaries' notice rights commands that the "notice shall be provided solely to the legal guardian or legal representative of" the beneficiary, not to the broader set of recipients the superior court included.⁵ The superior court's order was originally written to require individualized notices, but the SSA instructed the State *not* to follow that order because the SSA determined that it violated federal law protections of children's privacy rights. [Exc. 659] In short, the superior court's attempt to supplement the existing "harmonious whole"⁶ of federal representative payee procedures creates numerous obstacles to the effectuation of federal Social Security policy. It is preempted.

In addition, this Court should reverse the superior court's faulty due process analysis. Z.C. established none of the factors of a successful procedural due process challenge.⁷ *Keffeler II* confirms that no constitutionally protected private interest exists.⁸ Nor is there any risk of erroneous deprivation of any right. Due process attaches to the benefits themselves,⁹ but not to the appointment of a potentially financially advantageous payee. And no child's benefits are threatened by OCS's representative payee applications. To the contrary, the *absence* of OCS as a payee candidate would threaten

⁵ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii).

⁶ *Arizona v. United States*, 567 U.S. 387, 401 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)).

⁷ *Maness v. Gordon*, 325 P.3d 522, 527 (Alaska 2014) (citing *Mathews v. Eldridge*, 424 U.S. 319, 339-40 (1976)).

⁸ *Keffeler II*, 537 U.S. at 389-90.

⁹ *Mathews*, 424 U.S. at 332 (recognizing the protected "interest of an individual in continued receipt of [Social Security] benefits").

continued benefits for most foster children beneficiaries, who usually have no one else to serve.¹⁰ [See Exc. 633]

Accordingly, the superior court's order simply does not advance the interest Z.C. and the superior court sought to protect. The SSA's procedures already require an exhaustive search for the best payee for every child, with protections to ensure that foster care agencies like OCS are appointed only when no one else will do.¹¹ During the year OCS sent court-ordered individualized notices (before the SSA prohibited sending such notices), the SSA did not change one representative payee appointment. [Exc. 633]

At bottom, Z.C. and the superior court disagree with the Supreme Court's holding in *Keffeler II* that using Social Security benefits to pay for foster care is consistent with Congress's intent that the funds be used to meet children's basic needs. But that policy choice was for Congress, not the superior court. The judgment should be reversed.

ISSUES PRESENTED

1. *Federal preemption.* Congress gave the SSA exclusive authority over the selection of representative payees for minor beneficiaries. Federal statutes and regulations govern the search for payee applicants, selection of the payee best suited to serve the interests of each beneficiary, contents and recipients of notice, and procedures

¹⁰ See *Keffeler II*, 537 U.S. at 390-91.

¹¹ See, e.g., Social Security Administration, Program Operations Manual System at GN 00502.105, *Preferred Representative Payee Order of Selection Charts*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502105>, and at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

for challenging the SSA's selection. The notice the superior court ordered conflicts with the federal law already governing notice. Is the superior court's order preempted by federal law?

2. *Due process.* Foster children eligible for Social Security benefits have a due-process-protected interest in those benefits. But the U.S. Supreme Court confirmed that no independent right exists to have benefits distributed through a payee who might use them for additional resources or conserve them, rather than through the agency that uses them for the child's care. Did the superior court err in requiring OCS to provide additional notice, beyond what the federal government provides, to protect a potential financial advantage to which the beneficiaries have no federal right?

STATEMENT OF THE CASE

I. The Social Security Administration, implementing a comprehensive federal statutory and regulatory scheme, often appoints OCS as representative payee for children in OCS custody who are eligible for benefits.

Minor children can be eligible to receive benefits under two programs created by the Social Security Act (the Act). The first, the Old Age and Survivor's Disability Insurance (OASDI) program found in Title II, provides monthly payments to children who were dependent on a deceased wage-earner at the time of his or her death.¹² Second, disabled children who meet income and resource limitations can receive benefits through the Supplemental Security Income (SSI) program found in Title XVI of the Act.¹³

¹² 42 U.S.C. § 402(d); 20 C.F.R. § 404.350.

¹³ 42 U.S.C. § 1382; 20 C.F.R. §§ 416.202, 416.906.

Both programs are administered and heavily regulated by the SSA and not by states.¹⁴ The SSA’s statutes and regulations governing both OASDI and SSI require almost all minor beneficiaries to receive their benefits indirectly, through a representative payee.¹⁵ Those regulations contain comprehensive subparts governing the subject of representative payment for both programs.¹⁶ And the SSA’s Program Operations Manual

¹⁴ 42 U.S.C. § 405(a) (“The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.”); *Bowen v. City of New York*, 476 U.S. 467, 469 (1986) (“The Federal Government provides benefits to disabled persons under . . . programs administered by the Social Security Administration (SSA).”); *Reed v. Heckler*, 756 F.2d 779, 780 n.1 (10th Cir. 1985) (explaining that the “SSI program” is “a federally funded public assistance program providing minimum subsistence benefits for needy . . . disabled persons . . . administered by the SSA,” while “OASDI . . . is a quasi-insurance program that pays benefits to insured workers and their spouses and children when workers are no longer able to work because of age, disability, or death,” and “is also administered by the SSA.”); *State, Dep’t of Health & Soc. Servs., Div. of Pub. Assistance v. Gross*, 347 P.3d 116, 118 (Alaska 2015) (“Certain persons who are disabled and unable to work are entitled to federal [SSI] benefits administered by the United States Social Security Administration.”); compare *Dandridge v. Williams*, 397 U.S. 471, 472–73 (1970) (describing the *jointly* state and federally financed and administered program for Federal Aid to Families with Dependent Children).

¹⁵ 42 U.S.C. §§ 405(j), 1383(a)(2)(A)(ii)(I); 20 C.F.R. §§ 404.2010(b), 416.610(b) (“Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee.”); POMS, *Policy for Determining Capability in Children*, at GN 00502.070, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502070>.

¹⁶ 20 C.F.R. §§ 404.2001 *et seq.* (OASDI), 416.606 *et seq.* (SSI). The representative payment regulations for the OASDI and SSI programs are functionally identical.

System (POMS) adds even more detail about the federal government’s procedures for investigating, selecting, and monitoring representative payees for beneficiaries.¹⁷

A. The SSA’s representative payee selection process requires a thorough investigation to identify the best payee for each beneficiary, and includes special protections for foster children.

The SSA has exclusive control over who will serve as a beneficiary’s representative payee.¹⁸ It selects as payee “the person, agency, organization, or institution that will best serve the interest of the beneficiary.”¹⁹ SSA regulations provide “categories of preferred payees” in preference order, and the SSA uses this list to guide its “flexible” selection process.²⁰ The list looks first to parents, step-parents, relatives, and close friends of the beneficiary.²¹ Individuals who contribute to and take an interest in the support of the child beneficiary are preferred.²² Social service agencies like OCS are last on the

¹⁷ Social Security Administration, Program Operations Manual System (hereinafter POMS), *available at* <https://secure.ssa.gov/apps10/poms.nsf/Home?readform> (“This section of the SSA Program Policy Information Site contains the public version of the [POMS]. The POMS is a primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions.”).

¹⁸ 42 U.S.C. §§ 405(j), 1383(a)(2).

¹⁹ 20 C.F.R. §§ 404.2020, 416.620. Legally competent adults and emancipated minors can make advance designations of their own representative payees, but other minors cannot. 20 C.F.R. §§ 404.2018(a), 416.618(a).

²⁰ 20 C.F.R. §§ 404.2021, 416.621.

²¹ 20 C.F.R. §§ 404.2021(c), 416.621(c); POMS at GN 00502.105, *Preferred Representative Payee Order of Selection Charts*, *available at* <https://secure.ssa.gov/apps10/poms.nsf/lxx/0200502105>.

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

SSA's list, but the SSA views such agencies more favorably when they have custody and legal authority to act on a beneficiary's behalf.²³

The SSA's regulations require an investigation before every representative payee appointment.²⁴ That investigation is not limited to potential representative payees who file applications to be appointed; rather, the agency's POMS directs SSA field offices to seek out "payee leads."²⁵ Field offices are "responsible for finding the person or organization best suited to be [the] payee" for each beneficiary.²⁶ In conducting the investigation, field offices are directed not to "overlook any potential source to find a suitable payee."²⁷

The POMS contains a section adding detail specific to cases involving beneficiary children in foster care.²⁸ In such cases, the SSA must satisfy itself before appointing an agency like OCS that doing so is in the beneficiary's best interest, though the manual notes that "[f]oster care agencies have traditionally been among SSA's most dependable payees."²⁹ That section cautions that it is "extremely important" for the SSA to "follow all legal requirements" in cases involving children in foster care, "including conducting a

²³ 20 C.F.R. §§ 404.2020, 404.2021(c), 416.620, 416.621(c).

²⁴ 20 C.F.R. §§ 404.2024, 416.624.

²⁵ POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502100>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

²⁹ *Id.*

complete investigation of the individual or organizational representative payee applicant, using the payee preference list appropriately to identify when other payee leads should be developed and providing due process to the child’s parent and/or legal guardian.”³⁰

The manual instructs that where a foster care agency “has custody and may be legally responsible for the child, there may be other concerned relatives who would be better choices as payees.”³¹ When selecting the payee for a foster child, the POMS stresses that SSA employees must “exercise caution and follow proper procedures to ensure [the SSA] appoint[s] the best payee available and provide[s] appropriate due process.”³² The SSA must not “appoint the foster care agency as payee for a child in foster care” as a matter of “routine[,]” but must instead “[g]ather all pertinent information and make a thoughtful and careful choice and decide each case on its own merit.”³³

If the investigation uncovers the existence of “a prospective payee that is a preferred payee equal to or higher in preference” than a foster care agency applicant, the SSA field office “must contact the prospective payee to determine if he, she, or it wishes to file a payee application” before making the payee determination, unless the SSA has “convincing evidence that the prospective payee is clearly not a suitable payee choice.”³⁴ If such a payee candidate exists, the SSA must “document why they are or are not

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ POMS at 00502.105, *Preferred Representative Payee Order of Selection Charts*, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502105>.

interested in filing as payee before appointing the agency.”³⁵ Parents must be contacted unless “the court has barred [the parent] from having contact with the child” or the parent’s rights have been terminated.³⁶

When the SSA selects a payee, the federal statutes and regulations require sending a notice to the beneficiary.³⁷ For child beneficiaries, though, the statute mandates that the notice be “provided *solely*” to the beneficiary’s “legal guardian or legal representative.”³⁸

The notice

shall be clearly written in language that is easily understandable to the reader, shall identify the person to be designated as such individual’s representative payee, and shall explain to the reader the right . . . of such individual or of such individual’s legal guardian or legal representative—

(I) to appeal a determination that a representative payee is necessary for such individual,

(II) to appeal the designation of a particular person to serve as the representative payee of such individual, and

(III) to review the evidence upon which such designation is based and submit additional evidence.³⁹

The POMS instructs that the SSA is subject to a “legal requirement” that it “provide advance notice about the payee appointment to the proper persons,” and emphasizes that

³⁵ POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502159>.

³⁶ *Id.*

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

³⁸ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii) (emphasis added).

³⁹ 42 U.S.C. §§ 405(j)(2)(E)(iii); 1383(a)(2)(B)(xiii).

“the parents (or legal guardian) of a child in foster care must be provided advance notice of the appointment unless their parental rights were terminated.”⁴⁰

Once appointed, a child’s representative payee must manage and use the benefits received in the best interests of the beneficiary.⁴¹ According to the SSA’s regulations, a representative payee serves the best interests of the beneficiary by using the benefits to meet the recipient’s basic needs.⁴² The funds must be used for “current maintenance” of the child, which the SSA defines to include paying for “food, shelter, clothing, medical care, and personal comfort items.”⁴³ Only after those needs are met and benefit funds remain can the representative payee conserve or invest any remaining funds for the beneficiary.⁴⁴ Recipients of SSI benefits, however, may not accumulate more than \$2,000 in cash or countable resources or the disabled beneficiary becomes ineligible for benefits.⁴⁵ Representative payees are subject to SSA accounting and reporting requirements, and must notify the SSA of any changes affecting a beneficiary’s eligibility.⁴⁶

⁴⁰ POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

⁴¹ 20 C.F.R. §§ 404.2035, 416.635.

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

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

⁴⁴ 20 C.F.R. §§ 404.2045, 416.645.

⁴⁵ 20 C.F.R. §§ 416.202(d), 416.1205.

⁴⁶ 20 C.F.R. §§ 404.2035(d), 404.2065, 416.635(d), 416.665.

The SSA’s appointment of a representative payee is an “initial determination” under SSA regulations, and such determinations “are subject to administrative and judicial review.”⁴⁷ Similarly, the question “whether [the SSA was] negligent in investigating or monitoring or failing to investigate or monitor [a] representative payee, which resulted in the misuse of benefits by [a] representative payee” is a reviewable “initial determination” under the regulations.⁴⁸ Federal law also creates a process for beneficiaries to seek re-issuance of benefits misused by representative payees, including institutional representative payees.⁴⁹ The SSA then seeks restitution from the culpable representative payee.⁵⁰

In addition to its rules about formal notice, the SSA publishes general information about the representative payee program on its website, including an explanation for beneficiaries about how payees are selected.⁵¹ The website explains to beneficiaries that the SSA “tr[ies] to select someone who knows you and wants to help you,” and that “sometimes . . . social service agencies . . . offer to serve as payees.”⁵² Beneficiaries who have “someone [they] would like to have as [their] payee” are invited to “tell a Social

⁴⁷ 20 C.F.R. §§ 404.902(q); 416.1402(e).

⁴⁸ 20 C.F.R. §§ 404.902(x); 416.1402(o).

⁴⁹ 42 U.S.C. § 405(j)(5), (9).

⁵⁰ *Id.*

⁵¹ Social Security Administration, *When a Payee Manages Your Money*, available at <https://www.ssa.gov/payee/bene.htm?tl=8>.

⁵² *Id.*

Security representative and [the SSA] will consider” the request.⁵³ The same website tells beneficiaries who “disagree with Social Security’s decision to send benefits to a payee” about the appeal procedures in place for such decisions.⁵⁴

B. OCS applies to be the representative payee for Social Security beneficiary children in its care, and the benefits generally follow children when they transition out of custody.

Children enter foster care in Alaska when a court finds that their needs are not being met at home and they are therefore in need of aid.⁵⁵ [Exc. 291-92] Some of those children—about eight percent of those in OCS custody as of 2019—are beneficiaries of OASDI, SSI, or both. [See Exc. 292-93] Children sometimes come into OCS custody with Social Security benefits already in place. [Exc. 293] Often though, OCS identifies the child as potentially eligible and files the initial application for benefits. [Exc. 293]⁵⁶ OCS learns whether a child is already a Social Security beneficiary based on SSA authorization for the State to view its data. [Exc. 293] Conversely, the SSA requires OCS to share its own database identifying all children in OCS custody so the SSA can quickly

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ AS 47.10.011.

⁵⁶ Survivor beneficiaries under the OASDI program are more likely than those eligible for SSI disability benefits to come into OCS custody with benefits in place. Among the SSI beneficiary children in OCS care as of January 2020, OCS identified eligibility and filed the applications for 66 percent; just 34 percent came into foster care receiving benefits. For survivor beneficiaries, OCS identified 15 percent as eligible. The remaining 85 percent had benefits already in place. [Exc. 293]

ascertain that a beneficiary has come into or left foster care and review that child's payee appointment when the child's circumstances change. [Exc. 294]⁵⁷

In the case of new applications for SSI disability benefits, one of the required forms requires the signature of a minor applicant who is 12 years old or older.⁵⁸ Otherwise, children generally do not participate in the application process for their benefits. [See Exc. 116]

When children come into OCS custody, they are often placed with foster parents who receive a monthly stipend to cover the cost of their care, including food, shelter, school supplies, and other needs.⁵⁹ OCS applies to be the representative payee for any Social Security beneficiary child in its custody. [Exc. 114; 293-94] If appointed, OCS spends a child's Social Security benefit to partially cover the stipend, which pays for the child's immediate needs for food, clothing, and housing, and then on additional items after the child's basic needs are met. [Exc. 295-96, 402] The cost of a child's day-to-day needs nearly always exceeds the amount of the Social Security benefit, and the remaining cost of a child's care comes from state general fund money. [Exc. 296] And if the SSA appoints a representative payee other than OCS, the cost of the beneficiary child's foster care is paid from general fund money or through Title IV-E of the Act. [Exc. 296]

⁵⁷ 42 U.S.C. § 405(j)(11) (requiring the SSA to "enter into agreements with each State" for the purpose of identifying "minor beneficiaries who are in foster care" so that, when such beneficiaries "enter[] or exit[] foster care or change[] foster care placement," the SSA can "redetermine the appropriate representative payee for such individual.")

⁵⁸ POMS at DI 11005.056, *Signature Requirements for Form SSA-827*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0411005056>. See also Exc. 116.

⁵⁹ 7 AAC 53.020.

Title IV-E provides federal funding to states to offset foster care payments for eligible children.⁶⁰ But a child for whom the State receives Title IV-E funding cannot also receive SSI disability benefits, because the purposes of the benefits—providing food and shelter—overlap.⁶¹ An SSI beneficiary for whom the State collects Title IV-E foster care funding would have his or her Social Security benefits reduced dollar-for-dollar by the amount of the Title IV-E benefit, a reduction to zero given that the Title IV-E payment nearly always exceeds the amount of the SSI benefit.⁶² [Exc. 296-97, 352, 382] After a year of receiving no benefit, the SSA terminates the beneficiary from the program and the beneficiary would have to reapply to receive benefits again in the future.⁶³ [Exc. 297, 351]

OCS’s practice of applying Social Security benefits to offset foster care stipends is common across the United States and has been addressed and upheld by the United States Supreme Court as consistent with the purpose of the Act.⁶⁴ OCS reports annually to the

⁶⁰ See 42 U.S.C. §§ 670, 672, *et seq.*

⁶¹ 20 C.F.R. §§ 416.1124(c)(12), 416.1143; POMS at SI 00835.706, *In-Kind Support and Maintenance Provided Residents of Institutions*, available at <https://secure.ssa.gov/poms.nsf/lnx/0500835706>, (“If the source of payments for the care is federally funded income based on need (e.g. foster care under title IV-E...), the total payment is considered cash income ... to the individual and the SSI payment is reduced dollar-for-dollar.”).

⁶² *Id.*

⁶³ 20 C.F.R. § 416.1335.

⁶⁴ *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390 (2003) (*Keffeler II*) (“Under her statutory authority, the Commissioner has read the ‘interest’ of the beneficiary in light of the basic objectives of the Act: 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

SSA the amount of benefits that were spent on food, housing, clothing, education, medical, dental, recreation, and personal items, as federal law requires.⁶⁵ [Exc. 295-96]

SSI eligibility makes a child automatically eligible for Medicaid.⁶⁶ [Exc. 297] And an SSI beneficiary leaving foster care will receive an automatic evaluation for eligibility under the adult criteria at age 18.⁶⁷ [Exc. 297] Disability as determined for SSI purposes may make the former foster child eligible for additional public assistance as well.

[Exc. 297] For those reasons—because SSI benefits continue to help foster youth after they leave foster care and Title IV-E benefits do not—when OCS is the child’s representative payee, OCS favors obtaining and maintaining Social Security benefits and foregoing Title IV-E benefits for eligible children. [Exc. 117, 297]

II. The superior court awarded Z.C. an injunction requiring OCS to give a general notice in every CINA case as a matter of due process under the Alaska Constitution.

The original plaintiff in this case, DeAngelo Maynard, filed a complaint on July 10, 2014 raising two claims—“Violation of the Due Process Clause of the Alaska Constitution” and “Violation of the Equal Protection Clause of the Alaska Constitution.” [R. 2624, 2628] Because Mr. Maynard was not in OCS custody when he filed the

minimum income level,’ 20 C.F.R. § 416.110 (SSI) . . . , and to provide workers and their families the “income required for ordinary and necessary living expenses,” § 404.508(a) (OASDI).”).

⁶⁵ See 20 C.F.R. §§ 404.2065, 416.665.

⁶⁶ 20 C.F.R. §§ 416.2101 *et seq.*

⁶⁷ 20 C.F.R. § 416.987.

complaint [R. 2626], a new plaintiff—Z.C.—was substituted and an amended complaint accepted January 7, 2016, raising the same two claims. [Exc. 31, 38]

Z.C. requested two forms of relief for the constitutional violations he alleged. First, he sought declaratory relief and “an injunction prohibiting the State from applying for Social Security benefits on a beneficiary’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.” [Exc. 36] The Complaint specified that in the plaintiff’s view, the notice should “inform[] the [child] of the opportunity to seek appointment of an alternative representative payee.” [Exc. 36]

Second, Z.C. sought “an injunction requiring the State to hold in trust an amount equal to the Social Security funds the State received in its capacity as representative payee” from two years before the filing of the complaint. [*Id.*] Z.C. asked the Court to order the State to “release the funds held in trust” to “the new representative payee” if one were appointed, “or, where the beneficiary no longer requires a representative payee, to the beneficiary.” [Exc. 36-37] Alternatively, Z.C. requested “disgorgement . . . to each foster child” of *all* Social Security benefits the State received as payee “without first providing that foster child” with a notice. [Exc. 37]

In 2015, the original plaintiff moved for partial summary judgment on the due process claim. [Exc. 1] The State cross-moved for summary judgment on both claims, arguing that federal law controls all aspects of the Social Security representative payment program and the case is preempted by federal law. [R. 179] After Z.C. was substituted as

plaintiff, the parties cross-moved again—Z.C. on the due process claim only and the State on both claims. [Exc. 41, 61]

In late 2017—seven months after the second round of summary judgment briefing was complete—the superior court issued an order asking the parties to answer a series of questions about the operation of the representative payee program. [Exc. 106] Over the course of another year, the parties did so, and they also provided supplemental written arguments. [Exc. 112-82]

Another year after that round of filings, the court entered an order on September 4, 2019 granting summary judgment to Z.C. on his due process claim. [Exc. 183] The court described Z.C.’s claim as a due-process-based challenge to “the State’s failure to provide the child and interested parties advance notice of the application to be the representative payee and to provide an explanation of the consequence of that appointment.” [Exc. 192] In the court’s view, the consequence was that OCS, as representative payee, would use the child’s Social Security benefit to cover payments for the child’s foster care, generally leaving little left over for other purposes. [Exc. 196] However, “[a] beneficiary with a private payee will still have the State’s foster care subsidy to pay for basic needs.” [Exc. 196] Therefore, a “beneficiary with a private payee will have to spend less, if any, of the social security benefits to meet those basic needs. Thus, a greater percentage of the benefits will be surplus and thus available for discretionary expenditure, saving, or investment.” [Exc. 196-97]

Despite acknowledging the absence of any allegation that any child was being deprived of benefits, [Exc. 192⁶⁸] the court conducted a due process analysis tied to “due process protection from the termination or decrease in the amount of benefits.” [Exc. 195] In the superior court’s view, the State’s application to become representative payee affected a “private interest” because it could lead to a “potential elimination . . . of . . . choices available to a child with a representative payee.” [Exc. 197] The court held that this interest was at risk because “[i]f foster children in the State’s custody do not get notice of the State’s application to be the representative payee and an explanation of the significance of such an appointment, they are less likely to understand that they may seek an alternate private payee and what the potential financial advantages of that alternative could be.” [Exc. 196]

The court next concluded that “the burden to the State” of providing notice “would be minimal.” [Exc. 200] Accordingly, the court held that OCS has a duty, as a matter of due process under the Alaska Constitution, to “craft a generic explanation of the application process for appointment of a representative payee and the comparative consequences of the appointment of a private payee or the State as payee.” [Exc. 201] “The notice,” the court said, “must explain the concept of a representative payee and who could be a payee. It must explain the consequence of the selection of the State, rather than a private person or entity, as payee.” [Exc. 204]

⁶⁸ *Citing Keffeler II*, 537 U.S. at 375.

The superior court instructed that this notice “should be given to the child and other interested parties in the CINA case.” [Exc. 201] Despite the fact that no child is in OCS custody in the absence of a CINA case, the court went on to say that “[i]f there is no CINA case, the notice should go to the child, the child’s guardian ad litem, and the child’s parents if they are alive and they still have parental rights, and foster parents.” [Exc. 201]

The State moved for reconsideration of the summary judgment order, and the court promptly denied the motion. [Exc. 206-11] Then in March 2020, the superior court entered another order, in which it characterized OCS as “tak[ing] Social Security benefits from foster children without providing them with any sort of notice.” [Exc. 468] The order instructed OCS to “immediately provide a written notice . . . explain[ing] the concept of a representative payee and who could be a payee and how the foster child might act to select a different payee than [OCS].” [Exc. 469] That order instructed that the notice must “explain the consequence of the selection of [OCS,] rather than a private person or entity, as the payee.” [Exc. 469] The court instructed OCS to provide the notice to “the foster child and other interested parties in the CINA case,” and to include the child’s parents, guardian ad litem, and the child’s foster parents. [Exc. 469]

OCS again moved for reconsideration, explaining that “the [SSA] ha[d] reviewed the Order and informed the State that compliance with the order would violate federal

privacy law.” [Exc. 470]⁶⁹ The court summarily denied the motion, saying nothing about the SSA’s instructions to OCS. [Exc. 473] OCS began sending individualized notices to all foster children for whom it serves as representative payee, and in connection with new applications to be appointed representative payee. [Exc. 474-77]

A year after OCS began providing the court-ordered notices, the SSA warned OCS that by complying with the state court’s order, OCS was violating its privacy agreements with the SSA. [Exc. 632] OCS made a formal request for a waiver of the privacy restrictions in the state-federal agreements, in order to comply with the court’s order. [Exc. 632, 656-67] The SSA denied that request, and provided a legal analysis asserting that the notices ordered by the superior court were a violation of federal law because complying with the order required “redisclos[ure of] SSA data” about children, which the State receives pursuant to agreements with the SSA.⁷⁰ [Exc. 632, 658] Specifically, the SSA objected to OCS informing “the child’s guardian ad litem, the child’s parents . . . and the child’s foster parents” that a “child received Social Security benefits,” that “OCS has applied to be a minor child’s representative payee [and] explaining the consequence of that appointment.” [Exc. 660]

The SSA stated that, although disclosures “required by law” can be grounds for a waiver, the state court order did not meet that standard. [Exc. 659-60] The SSA wrote:

⁶⁹ (“The Social Security Administration has informed the State that it should not comply with the order pending further legal review by federal general counsel.”)

⁷⁰ Those agreements are critical to the functioning of other programs vital to needy families in Alaska. [Exc. 630-31]

SSA is not obligated to comply with the Alaska Court's order because SSA is not a party to the matter and because SSA has not waived its sovereign immunity. As such, the Alaska Superior Court is not a court of competent jurisdiction and its order does not provide an independent basis for disclosure. See 20 C.F.R. § 401.180 (disclosure under court order or other legal process).

The SSA also stressed that "SSA gives the child's parent, legal guardian, or legal representative notice of the selection of the payee," citing the federal regulations.

[Exc. 660]

Placed in the impossible position of violating either the superior court's order or its agreements with the SSA, which rest on federal privacy laws and are critical to the functioning of programs for vulnerable Alaskans, OCS ceased applying to be representative payee for beneficiary children coming into OCS custody. [Exc. 633-34] OCS moved for Civil Rule 60(b) relief from the superior court's order, attaching the SSA's letter and reiterating its original argument that federal law preempts state intrusion into the federal representative payee selection process. [Exc. 612, 623-26]

The superior court, though purporting to deny the Rule 60(b) motion, dramatically revised its order in response to OCS's motion regarding the SSA's position. [Exc. 698-99, 711-12] Instead of requiring OCS to provide individualized notices to the participants in only *beneficiary* children's CINA cases at the time OCS applies to be representative payee, the revised order required OCS to send notices to "the child, the child's parents (if his or her parental rights have not been terminated), and the child's subsequently appointed GAL" *every time* "the State takes temporary or legal custody of any minor child." [Exc. 711] Foster parents and "other interested parties" were no longer included.

The revised order instructs that the notice must advise that: (1) if the child is eligible for Social Security benefits, “then OCS will apply to the SSA to become the child’s representative payee,” (2) “the child or another on the child’s behalf may propose an alternative representative payee to the SSA,” and (3) “the financial consequences of OCS, rather than a private person, becoming the representative payee.” [Exc. 711]

In the meantime, the parties cross-moved for summary judgment on the plaintiff’s remaining claims for violation of the Equal Protection clause of the Alaska Constitution, for restitution of benefits received by OCS as representative payee or, in the alternative, for the benefits to be placed in trust. [Exc. 212, 230, 254] The Court granted summary judgment to OCS on the equal protection claim and on the trust creation and restitution remedies for the due process claim. [Exc. 583] But the superior court suggested, on its own, that affected children may be entitled to “nominal damages.” [Exc. 596-97] Without the benefit of briefing on the issue, the court entered nominal damages of \$30 to each child for whom OCS was appointed representative payee without providing a notice for a period beginning two years before the filing of the original complaint. [Exc. 714]

In this appeal, OCS seeks reversal of the superior court’s grant of summary judgment to Z.C. on his due process claim.⁷¹

⁷¹ The equal protection claim and the due process damages issues are the subject of Z.C.’s cross appeal.

STANDARDS OF REVIEW

This Court “review[s] a grant of summary judgment de novo.”⁷² “[C]onstitutional questions, including due process questions,” receive de novo review, and this Court “adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy.”⁷³

ARGUMENT

I. The superior court’s order requiring OCS to provide notice beyond what the SSA provides is preempted by federal law.

“[W]here state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.”⁷⁴ Congress can preempt state law either with express statutory text⁷⁵ or by implication; implied preemption in turn has two varieties—field preemption and conflict preemption.⁷⁶ All three species of preemption “work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.”⁷⁷

⁷² *Blair v. Fed. Ins. Co.*, 433 P.3d 1048, 1051 (Alaska 2018).

⁷³ *Anderson v. Alaska Hous. Fin. Corp.*, 462 P.3d 19, 25 (Alaska 2020) (quoting *Dennis O. v. Stephanie O.*, 393 P.3d 401, 405 (Alaska 2017)).

⁷⁴ *Allen v. State, Dep’t of Health & Soc. Servs. Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009).

⁷⁵ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

⁷⁶ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018).

⁷⁷ *Id.*

Field preemption occurs 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,”⁷⁸ even complementary or consistent state laws.⁷⁹ In such cases, federal law is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁸⁰ Thus, where Congress creates “a single integrated and all-embracing system,” no state regulation may supplement it, “even if it is parallel to federal standards.”⁸¹

“Conflict preemption” invalidates state laws where “compliance with both federal and state regulations is a physical impossibility” or where “the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸² Where state law “impose[s] a duty that [is] inconsistent—*i.e.* in conflict—with federal law,” the state law is preempted.⁸³

These two preemption varieties are not “rigidly distinct.”⁸⁴ Rather, “field preemption may be understood as a species of conflict pre-emption,”⁸⁵ especially in cases

⁷⁸ *Allen*, 203 P.3d at 1161.

⁷⁹ *Oneok*, 575 U.S. at 377.

⁸⁰ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

⁸¹ *Arizona v. United States*, 567 U.S. 387, 400-401 (2012) (federal immigrant registration system occupied field and preempted state law) (internal quotations omitted).

⁸² *Id.* at 399 (internal citations and quotation marks omitted).

⁸³ *Murphy*, 138 S.Ct. at 1480.

⁸⁴ *English v. General Elec. Co.*, 496 U.S. 72, 79 n. 5 (1990).

⁸⁵ *Id.*

like this one where the state law in question—here, a state court order—injects new policy goals and duties into a field already covered by federal law.⁸⁶ The closely related doctrines reinforce the conclusion that the superior court’s orders must be reversed.

A. Congress preempted the superior court’s order because federal law completely occupies the field of representative payee selection and associated notice.

The representative payee selection program for OASDI and SSI benefits is a “field,” fully and exhaustively governed by federal statutes and regulations, administered by a federal agency, with nationwide uniformity.⁸⁷ Congress enacted statutes regarding the SSA’s duty to seek out and appoint the representative payee best able to serve the interests of each beneficiary.⁸⁸ And Congress passed a detailed statute specifying *exactly* what notice should be provided, the content of the notice, and limiting to whom it should be provided, when the SSA determines that a beneficiary needs a representative payee and selects one.⁸⁹ Those statutes are administered solely by the SSA, through detailed regulations and procedures.⁹⁰

⁸⁶ See *Gade*, 505 U.S. at 115–16 (describing “conflict pre-emption, which occurs when state law is held to ‘undermin[e] a congressional decision in favor of national uniformity of standards,’” and “presents ‘a situation similar in practical effect to that of federal occupation of a field.’”) (Souter, J., dissenting) (quoting L. Tribe, *American Constitutional Law* 486 (2d ed. 1988)) (cited with approval in *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n. 6 (2000)).

⁸⁷ 42 U.S.C. §§ 405(a), 405(j), 1383(a)(2)(A)(ii); 20 C.F.R. §§ 404.2001 *et seq.*, 416.606 *et seq.*

⁸⁸ 42 U.S.C. §§ 405(j), 1383(a)(2).

⁸⁹ 42 U.S.C. §§ 405(j)(2)(E); 1383(a)(2)(B)(xii), (xiii).

⁹⁰ See *e.g.*, 20 C.F.R. §§ 404.2030(a), 416.630(a); POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502159>.

The representative payee program—indeed, the entire OASDI and SSI programs—are decidedly *not* “co-operative federal-state venture[s], which anticipate[] significant involvement of both the state and the federal governments.”⁹¹ OCS has no role in the representative payee selection process beyond submitting applications for appointment, the same as any private person or entity willing to serve as payee.⁹² The State has neither control over the federal criteria used for representative payee selection nor any influence over the decision.

In its legal analysis of the superior court’s order, the SSA noted that it already provides all the notice that Congress deems necessary. [Exc. 660] State law simply has no part in the “harmonious whole” of the Social Security representative payee regulatory regime.⁹³ Federal law governs alone. The field is occupied, leaving no room for state supplementation.

B. The superior court’s order directly conflicts with and creates obstacles to the SSA’s policy objectives, as encapsulated in federal law.

The superior court’s order is also invalid as a matter of conflict preemption. The goal of the superior court’s mandated notice—encouraging appointment of a non-OCS payee in hopes that a child might receive more resources due to “fortuitously overlapping state and federal grants”—does not advance *Congress’s* purpose underlying the benefit

⁹¹ *Allen*, 203 P.3d at 1161.

⁹² *See, e.g.*, 20 C.F.R. §§ 404.2024, 416.624.

⁹³ *See, e.g., Arizona*, 567 U.S. at 401 (explaining that “[t]he federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance,” and that the regulatory scheme “was designed as a ‘harmonious whole.’”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)).

programs, which is to see that beneficiary children’s “basic needs are met.”⁹⁴ Further, Congress intentionally structured the Title IV-E program to *avoid* the outcome desired by the plaintiff and the superior court. If OCS pays for a child’s foster care from general funds reimbursed by Title IV-E, the child’s SSI benefit is reduced by that same amount.⁹⁵ [Exc. 296-97] Congress did not intend for a private payee to be able to conserve a child’s SSI benefit while other government money covers the child’s foster care.

The Act provides for notice before representative payee appointment and sets out three specific pieces of information the notice must contain: the right to appeal the SSA’s decision to appoint a payee, the right to appeal the choice of a specific payee, and the right to review the evidence upon which the payee selection was made.⁹⁶ But the superior court decided that OCS should issue a separate notice and include *additional* information about representative payee selection. [Exc. 201, 469, 711] The court instructed that foster children should be advised that OCS would apply to be its representative payee and of the potential difference, financially, between having OCS as a representative payee versus having someone else instead. [Exc. 711]

⁹⁴ *Keffeler II*, 537 U.S. at 390 (describing the purposes of the SSI and OASDI programs to provide “sufficient income and resources to maintain a standard of living at the established Federal minimum income level” and “to provide workers and their families the income required for ordinary and necessary living expenses”).

⁹⁵ *See, e.g.*, POMS at SI 00835.706, *In-Kind Support and Maintenance Provided Residents of Institutions*, available at <https://secure.ssa.gov/poms.nsf/lnx/0500835706>.

⁹⁶ 42 U.S.C. §§ 405(j)(2)(E)(iii); 1383(a)(2)(B)(xiii). *See also* 20 C.F.R. §§ 404.20.30, 416.630.

The SSA has its own detailed procedures for seeking out, inviting, and ultimately appointing the best payee for each beneficiary, in line with its federal mandate.⁹⁷ That process does not consider whether one payee would conserve more of the funds than another or how payees might use the funds differently.⁹⁸ The content of the notice the superior court ordered is not consistent with the actual selection process or Congress’s goals. This creates an “obstacle” preemption problem, where state law interferes with congressional policy.⁹⁹

Provided in an individualized fashion as originally ordered, the superior court’s notice requirement conflicted with federal *privacy* law as well. [Exc. 201, 469, 632-33, 658] In the SSA’s view, OCS may not give the notice in the way the court originally required without sharing private beneficiary status information, in violation of its data exchange agreements with the SSA, which in turn enforce federal privacy laws.¹⁰⁰

⁹⁷ See, e.g., 42 U.S.C. §§ 405(j), 1383(a)(2); 20 C.F.R. §§ 404.2020, 404.2021, 416.620, 416.621; POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502100>.

⁹⁸ See, e.g., POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

⁹⁹ See, e.g., *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000) (state tort law preempted where it would stand as an “obstacle” to the accomplishment of federal law objectives); *Felder v. Casey*, 487 U.S. 131, 153 (1988) (state law that would impair Congress’s intent for national uniformity in federal civil rights law preempted).

¹⁰⁰ 20 C.F.R. § 401.180. This is an additional indication of field preemption: when the superior court attempted to interfere in one part of the federal scheme—notice to children—it ran afoul of another—privacy rules about Social Security data. The representative payment program is so entirely occupied by federal law that there is no room for state law to intrude.

[Exc. 659-60] The superior court’s requirement “imposed a duty that [is] inconsistent—*i.e.* in conflict—with federal law,” and is therefore preempted.¹⁰¹

Seeking to address this conflict, the superior court broadened the notice requirement to cover *all* children in OCS custody, not only those eligible for Social Security benefits. [Exc. 710-11] That amendment to the order may have resolved the conflict with the federal privacy agreements, but it did nothing to repair the direct conflict with the federal notice statutes. Those statutes provide that a child’s “legal guardian or legal representative” “shall” be the “*sole[]*” recipient of the notice regarding the representative payee appointment.¹⁰² The court inappropriately expanded the right to notice that Congress specifically tailored for minor beneficiaries.¹⁰³ The fact remains that the order regulates in a field fully occupied by Congress, in a way inconsistent with the federal government’s objectives, and in direct contravention of the narrowly targeted federal notice statute.

In *C.G.A. v. State*, an Alaska superior court had ordered a parent who was a beneficiary child’s representative payee to turn over the benefits to the State.¹⁰⁴ This Court held that federal Social Security law preempted that order.¹⁰⁵ “The very existence

¹⁰¹ See *Murphy*, 138 S.Ct at 1480 (describing *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 480-86 (2013), in which the Court struck down a state drug labeling requirement stricter than the one imposed by federal law).

¹⁰² 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(b)(xii) (emphasis added).

¹⁰³ *Id.*; see *Murphy*, 138 S. Ct. at 1480.

¹⁰⁴ *C.G.A. v. State*, 824 P.2d 1364, 1365-66 (Alaska 1992).

¹⁰⁵ *Id.* at 1367.

of a federal remedy” for improper use of benefits by a representative payee, this Court said, “preempts state interference with an appointed payee’s decision to spend the social security benefits.”¹⁰⁶ In other words, state law cannot be used to solve perceived problems with the operation of the federal representative payee program. Just as federal law contains the remedy if a payee misuses benefits, federal law contains the protections Congress deemed necessary for identifying and appointing the best payee and for giving notice when that decision is made.

Simply put, the superior court in this case found the federal notice protections for children to be inadequate and sought to supplement them using the Alaska Constitution. But the court’s “thoughts on the efficacy of [its] approach versus [Congress’s approach] are beside the point, since [the courts’] business is not to judge the wisdom of the National Government’s policy; dissatisfaction should be addressed to the [SSA] or, perhaps, Congress.”¹⁰⁷ The court’s goal, however well-intentioned, immediately created a direct “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁸ The SSA threatened the State’s access to critical databases for the functioning of programs for needy Alaskans, and to prevent that result, children with no other representative payee candidates available had their access to benefits through an OCS appointment threatened. [Exc. 629-34]

¹⁰⁶ *Id.*

¹⁰⁷ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003).

¹⁰⁸ *Gade*, 505 U.S. at 98 (citing *Hines*, 312 U.S. at 67).

If the notices required by federal law and issued by SSA are inadequate, the plaintiff must address the issue in federal court and make the SSA a party. The superior court's order requiring OCS to provide broader and different notice than what federal law requires the SSA to provide should be reversed. Federal law preempts the order.

II. Procedural due process principles under the Alaska Constitution do not give rise to additional notice rights beyond what the federal government already provides.

Article I, section 7 of the Alaska Constitution promises that “[n]o person shall be deprived of life, liberty, or property without due process of law.”¹⁰⁹ To determine whether a violation of a person's right to procedural due process has occurred, this Court has adopted the three-part test set forth by the United States Supreme Court in *Mathews v. Eldridge*.¹¹⁰ Under that test, courts consider “three distinct factors”: (1) the nature of “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹¹¹

The superior court's error here lies in the first two factors. No constitutionally protected private interest exists in the potential financial benefit of having a non-OCS

¹⁰⁹ Alaska Const. art. I, § 7.

¹¹⁰ *Maness v. Gordon*, 325 P.3d 522, 527 (Alaska 2014) (citing *Mathews v. Eldridge*, 424 U.S. 319, 339-40 (1976)).

¹¹¹ *Mathews*, 424 U.S. at 334-35.

representative payee. OCS’s representative payee applications create no risk of deprivation of the actual constitutionally protected interest in the benefits themselves. And even if an interest in having a non-OCS payee existed, the superior court’s supplemental notice procedure adds nothing to what federal law already provides.

A. The “private interest” the superior court’s decision sought to protect has been specifically rejected by the United States Supreme Court.

Z.C. characterized the interest at stake here as the Social Security benefits themselves, [Exc. 31] or the “free use” of those benefits. [Exc. 58, 82] Similarly, the superior court described the protected interest as the “interest in a person’s social security benefits” [Exc. 193], and “protection from the termination or decrease in the amount of benefits” [Exc. 195]. Alternatively, the superior court cited a Maryland case, *In re Ryan W.*,¹¹² for the proposition that children have a protected property interest in the “free use” of benefits. [Exc. 194]

This case does not concern the court’s first characterization of the interest, protecting the benefits themselves. OCS does not dispute that Social Security benefits are a type of property interest entitled to the protections of procedural due process—protections that flow from the government entity that actually *administers* those benefits.¹¹³ But this case contains no allegation of any threat of termination or decrease in

¹¹² *In re Ryan W.*, 76 A.3d 1049, 1069 (Md. 2013).

¹¹³ *See Mathews*, 424 U.S. at 332; *Baker v. State*, 191 P.3d 1005, 1009 (Alaska 2008) (explaining that “recipients of public assistance benefits should be afforded a degree of protection from agency error and arbitrariness in the *administration of those benefits*”) (emphasis added).

amount of eligible children’s Social Security benefits. [Exc. 89, 490] Z.C. does not dispute that OCS has done exactly what federal law requires and anticipates, by using benefits to pay for children’s day-to-day maintenance expenses. [See, e.g., Exc. 192, 586] And it is beyond dispute that the government entity that determines eligibility for and the amount of the benefit is the SSA, not the State.¹¹⁴

The superior court’s second candidate for a constitutionally protected property interest, the “free use” of Social Security benefits, is similarly unavailing. In *Ryan W.*, the Court of Appeals of Maryland relied on *McGrath v. Weinberger* for the proposition that “free use” of benefits demands constitutional protection.¹¹⁵ But in *McGrath*, the Tenth Circuit distinguished between the strong interest in the benefits themselves and the comparatively weak interest in “free use,” which is circumscribed to a degree when the SSA determines that an *adult* beneficiary cannot manage his or her own benefit and requires a representative payee.¹¹⁶ The court thus rejected the argument that a hearing was necessary before the SSA determines that an adult beneficiary requires a payee.¹¹⁷

¹¹⁴ 42 U.S.C. §§ 405(j); 1383(a)(2).

¹¹⁵ *Ryan W.*, 76 A.3d at 611.

¹¹⁶ *McGrath v. Weinberger*, 541 F.2d 249, 253 (10th Cir. 1976) (“There is not a termination of benefits, as was the case in *Eldridge*, but rather a deprivation of free use of benefits” due to appointment of a representative payee).

¹¹⁷ *Id.* at 253-54 (observing “that the risk of an erroneous deprivation of the beneficiary’s interest in the free use of his benefits appears to be relatively slight” and finding that post-decision appeal procedures provide adequate procedural protection).

Minor beneficiaries effectively never receive their benefits directly,¹¹⁸ and thus, as a matter of federal law, have not even the “slight” interest in “free use” that adult beneficiaries possess.¹¹⁹ *McGrath* does not support the Maryland court’s citation, or in turn, the superior court’s citation, for the proposition that children have a constitutionally protected interest in “free use” that demands protection.¹²⁰

The superior court’s decision, though purporting to support protection for benefits themselves, actually aims to protect a very different financial interest. Although the court said its analysis followed the well-recognized benefit interest, the decision actually held, implicitly, that the financially advantageous supplemental resources that could result from the appointment of “a payee other than OCS” warrant constitutional protection. [Exc. 192] The court’s later orders acknowledge this. [Exc. 585]¹²¹

That holding was incorrect. The speculative advantageousness of a non-OCS payee does not rise to the level of a constitutionally protected property interest. “[T]he range of interests protected by procedural due process is not infinite,”¹²² and imposing

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

¹¹⁹ *McGrath*, 541 F.2d at 253.

¹²⁰ *Id.*

¹²¹ In its later partial summary judgment order rejecting Z.C.’s request for a constructive trust remedy, the court described the interest as “not having a representative payee other than OCS” and therefore “losing the possibility of having the Social Security benefits supplement the State’s payment of foster care costs.” [Exc. 594] The court recognized again in that context that the State’s “use of the benefits” was appropriate. [*Id.*]

¹²² *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972).

due process requirements where no benefit is actually at risk is “unwarranted.”¹²³ Here, the interest in “supplement[al]” resources with which the superior court was concerned has been rejected by the United States Supreme Court as inconsistent with the federal benefit scheme.¹²⁴ The Court rejected the argument that “the appointment of a self-reimbursing representative payee” is contrary to a beneficiary’s interests as a matter of federal law.¹²⁵ It reached that conclusion because, under the SSA’s regulations, “a payee serves the beneficiary’s interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants.”¹²⁶ That conclusion forecloses the argument that foster children have a legally protected interest in the selection of a payee who will use benefits to supplement other resources, rather than using them for the purpose federal law specifically contemplates.¹²⁷

Congress created the Social Security programs from which Alaska foster children benefit in order to ensure they can access a minimal level of income to meet basic daily

¹²³ *McGrath*, 541 F.2d at 253.

¹²⁴ *Keffeler II*, 537 U.S. at 389.

¹²⁵ *Id.* at 389-90.

¹²⁶ *Id.* at 390.

¹²⁷ The Court supported its conclusion in part with similar reasoning from state courts rejecting the argument that parent representative payees must expend other resources first, before utilizing a child’s Social Security benefits to provide for day-to-day needs. *Keffeler II*, 537 U.S. at 388 n.11 (“It bears mentioning that nothing in the [Washington] Supreme Court’s reasoning limits its holding to state agencies. The state court’s logic would apply equally to parents serving as representative payees, since they, like the [state foster care agency], are under a legal obligation to support their children’s basic needs irrespective of Social Security benefits.”) (Citing *Mellies v. Mellies*, 815 P.2d 114, 117 (Kan. 1991); *In re Guardianship of Nelson*, 547 N.W.2d 105, 108 (Minn. Ct. App. 1996)).

needs.¹²⁸ The interest the superior court sought to protect falls outside the express purpose of the federal benefit programs and cannot rise to the level of a constitutionally protected interest.¹²⁹ The first *Mathews* factor is not met.

B. Existing procedures surrounding OCS’s representative payee applications are adequate and create no risk to any constitutionally protected interest in benefits.

The superior court’s due process analysis went awry in the second part of the *Mathews v. Eldridge* test as well. That part of the balance requires consideration of the “risk of an erroneous deprivation” of a protected interest under existing procedures, and “the probable value, if any,” of additional measures.¹³⁰

The court worried that children who “do not get notice of the State’s application to be the representative payee and an explanation of the significance of such an appointment . . . are less likely to understand that they may seek an alternative private payee and what the potential financial advantages of that alternative might be.”

[Exc. 196] And the court characterized the State’s application to be the payee as “potential[ly] eliminat[ing] . . . choices available to a child with a private representative payee.” [Exc. 197] In other words, the court concluded that OCS’s applications to serve as representative payee for children in its care are “state actions” that jeopardize a

¹²⁸ *Keffeler II*, 537 U.S. at 390.

¹²⁹ The federal structure of the interplay of Title IV-E reimbursement for foster care and SSI benefits further underscores the conclusion that there is no due-process protected interest in using Social Security benefits to supplement other grants intended to meet basic day-to-day needs. *See* 20 C.F.R. §§ 416.1124(c)(12), 416.1143.

¹³⁰ *Mathews*, 424 U.S. at 334-35.

protected financial interest of the child. [Exc. 197]

But of course, as explained above, the interest that the court worried might be adversely affected by OCS's application to be the representative payee is not a constitutionally protected interest at all. The interests of the OASDI and SSI programs are best advanced, in the judgment of the SSA, when foster care agencies like OCS apply, are appointed where appropriate, and use the funds as the regulations contemplate.¹³¹

The State's payee applications create no risk of deprivation of anything, much less a protected right. On remand from *Keffeler II*, the Washington Supreme Court in *Keffeler III* addressed and rejected the exact argument accepted by the superior court, focusing on the "risk of erroneous deprivation" prong of the procedural due process test.¹³² That court correctly recognized that "the identity of a representative payee *does not influence eligibility for benefits . . .*"¹³³ "Further," the court observed, "the [SSA] does an investigation of potential representative payees prior to appointment, and the [SSA] may remove a representative payee if misuse of funds is found."¹³⁴

Indeed, the SSA goes even farther than the Washington court recognized in *Keffeler III*. Its regulations require an investigation of payee applicants, but the POMS

¹³¹ *Keffeler II*, 537 U.S. at 390; *see also* 42 U.S.C. § 405(j)(11)(A) (requiring OCS to share information about children entering and exiting its custody, so the SSA can reevaluate payee appointments upon those changes in circumstance).

¹³² *Guardianship Estate of Keffeler ex rel. Pierce v. State*, 88 P.3d 949, 955-56 (Wash. 2004) (*Keffeler III*).

¹³³ *Id.* at 955 (emphasis added).

¹³⁴ *Id.* at 955-56.

requires more—demanding in foster care cases especially that SSA employees actively search out and recruit potential payee alternatives, and take special care to appoint the most advantageous payee for each beneficiary.¹³⁵ The interest the superior court sought to supplement on the back end—by mandating a notice much broader than the SSA deems necessary in children’s cases—is something the federal government chose to address on the *front* end—through the SSA’s search for non-OCS payees.

Children also have post-payee-selection appeal rights, and the Washington Supreme Court deemed those procedures to be “sufficient to fulfill any procedural due process rights the children may have.”¹³⁶ To the extent the superior court was concerned that children might not learn about their appeal rights, given that OCS is their legal guardian and thus the “sole[]” recipient of the SSA’s notice, foster children are not alone in this regard. [Exc. 190] The SSA *always* sends the appeal notice “solely” to an unemancipated minor’s legal guardian, who will almost always be the minor’s payee as well.¹³⁷ If foster children are receiving inadequate procedural protection, most other

¹³⁵ *Id.* 956 (“a decision by the [SSA] that the State should serve as representative payee indicates that a search for another payee would be fruitless”). *See also* POMS at GN 00502.100, *How to Find Payee Leads*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502100>; POMS at GN 00502.159, *Additional Considerations When Foster Care Agency is Involved*, available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

¹³⁶ *Keffeler III*, 88 P.3d at 956.

¹³⁷ 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xii).

beneficiary children are too. If this creates a due process problem, it is one that arises from federal law, not from the State’s act of applying for payee appointment.¹³⁸

In any event, the notice the superior court ordered is so generalized—going to *every* child in OCS custody and not only the Social Security beneficiaries—that it adds nothing to the publically available information on the SSA’s website about the payee selection process and associated appeal rights.¹³⁹ The “value” of the superior court’s additional procedures is negligible at best.

In sum, neither side of the *Mathews v. Eldridge* balancing test—the weight of any constitutionally protected interest on the one hand, the adequacy of existing versus proposed procedural protections on the other—supports the superior court’s conclusion.

CONCLUSION

For these reasons, the Court should reverse the judgment of the superior court.

¹³⁸ Cf. *Keffeler II*, 537 U.S. at 388 n.11. Z.C. suggested below that the State had obligations to provide due process with respect to Social Security benefits, just as it has with respect to benefits under the Alaska Temporary Assistance Program (ATAP). [Exc. 84-85] But the ATAP program, although funded in part with federal dollars, arises in part under *state* law as well and is administered by Alaska’s Department of Health and Social Services. See AS 47.27.101 *et seq.*; 7 AAC 45.149 *et seq.*

¹³⁹ Social Security Administration, *When a Payee Manages Your Money*, available at <https://www.ssa.gov/payee/bene.htm?tl=8>.