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

BRIEF OF APPELLEES

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Filed in the Alaska Supreme Court
this 23rd day of August, 2022.

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Alaska Statutes

AS 47.10.005. Construction.

The provisions of this chapter shall be liberally construed to

(1) achieve the end that a child coming within the jurisdiction of the court under this chapter may receive the care, guidance, treatment, and control that will promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interests; and

(2) follow the findings set out in AS 47.05.065.

AS 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities.

(a) When a child is committed under AS 47.10.080(c)(1) to the department, released under AS 47.10.080(c)(2) to the child's parents, guardian, or other suitable person, or committed to the department or to a legally appointed guardian of the person of the child under AS 47.10.080(c)(3), a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with food, shelter, education, and medical care, and the right and responsibility to make decisions of financial significance concerning the child. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When a child is committed to the department and the department places the child with the child's parent, the parent has the responsibility to provide and pay for food, shelter, education, and medical care for the child. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter, a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military

enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. In this subsection, "major medical treatment" includes the administration of medication used to treat a mental health disorder.

(d) When the child is placed in foster care, the foster parent has the right and responsibility to use a reasonable and prudent parent standard to make decisions relating to the child. The foster parent may make decisions under (a) or (b) of this section that include decisions relating to the child's participation in age-appropriate or developmentally appropriate activities, including travel, sports, field trips, overnight activities, and extracurricular, enrichment, cultural, and social activities. The department shall provide foster parents with training regarding the reasonable and prudent parent standard. In this subsection, "reasonable and prudent parent standard" means a standard characterized by careful and sensible decisions to maintain the health, safety, and best interests of the child while encouraging the emotional and developmental growth of the child.

Federal Statutes

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

(j) Representative payees.

(1)

(A) If the Commissioner of Social Security determines that the interest of any individual under this title [42 USCS §§ 401 et seq.] would be served thereby, certification of payment of such individual's benefit under this title [42 USCS §§ 401 et seq.] may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization, with respect to whom the requirements of paragraph (2) have been met (hereinafter in this subsection referred to as the individual's "representative payee"). If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit paid to such representative payee pursuant to this subsection or section 807 or 1631(a)(2) [42 USCS § 1007 or 1383(a)(2)], the

Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee pursuant to this subsection and certify payment to an alternative representative payee or, if the interest of the individual under this title [42 USCS §§ 401 et seq.] would be served thereby, to the individual.

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

(C)

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

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

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

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

* * * *

(5) In cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall certify for payment

to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits. In any case in which a representative payee that—

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

(B) is an individual who, for any month during a period when misuse occurs, serves 15 or more individuals who are beneficiaries under this title [42 USCS §§ 401 et seq.], title VIII [42 USCS §§ 1001 et seq.], title XVI [42 USCS §§ 1381 et seq.], or any combination of such titles;

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

* * * *

(9) For purposes of this subsection, misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment under this title [42 USCS §§ 401 et seq.] for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person. The Commissioner of Social Security may prescribe by regulation the meaning of the term "use and benefit" for purposes of this paragraph.

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

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

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

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

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.

Alaska 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.

7 AAC 53.030. Base rate and rate adjustments.

(a) Subject to (b) of this section, the department will pay a base rate for foster care for a child placed by the department or a by tribal entity that has a tribal Title IV-E pass-through maintenance agreement or a memorandum of agreement for state placement in a tribe-licensed foster home with the department.

(b) The department may propose to the legislature base rates for care and supervision in child foster care after reviewing data in the current United States Department of Agriculture (USDA) *Expenditures on Children by Families*, the geographic cost differentials in Table I-1 of the Department of Administration *Alaska Geographical Differential Study 2008*, and clarification of those geographic cost differentials in the department's current *Chart of Personal Care Attendant and Waiver Services Rates*. Subject to appropriation, the department will establish a base rate by age group, inclusive of children eligible for resumption of state custody under AS 47.10.080(v). A change in the base rate becomes effective the state fiscal year following legislative approval. The base rate for care and supervision will be applied to an individual child foster care placement according to the following age ranges:

(1) starting at birth and younger than six years of age;

(2) at least six years of age and younger than 12 years of age;

(3) at least 12 years of age and younger than 21 years of age.

(c) Repealed 3/31/2005.

(d) The department will publish the in-state rate schedule, containing rates to be paid under this section, before the state fiscal year to which they apply.

(e) Notwithstanding (b) of this section, if a reduction in the base rate becomes necessary because appropriations are insufficient, the number of children needing foster care increases, or appropriations are withdrawn, reduced, or limited in any way for payment of base rates under the formula described in (b) of this section, the department will notify foster parents, in advance and in writing, of the amount of the reduction.

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. § 404.902. Administrative actions that are initial determinations.

Initial determinations are the determinations we make that are subject to administrative and judicial review. We will base our initial determination on the preponderance of the evidence. We will state the important facts and give the reasons for our conclusions in the initial determination. In the old age, survivors' and disability insurance programs, initial determinations include, but are not limited to, determinations about —

(a) Your entitlement or your continuing entitlement to benefits;

(b) Your reentitlement to benefits;

(c) The amount of your benefit;

(d) A recomputation of your benefit;

(e) A reduction in your disability benefits because you also receive benefits under a workmen's compensation law;

(f) A deduction from your benefits on account of work;

(g) [Reserved]

(h) Termination of your benefits;

(i) Penalty deductions imposed because you failed to report certain events;

(j) Any overpayment or underpayment of your benefits;

(k) Whether an overpayment of benefits must be repaid to us;

(l) How an underpayment of benefits due a deceased person will be paid;

(m) The establishment or termination of a period of disability;

(n) A revision of your earnings record;

(o) Whether the payment of your benefits will be made, on your behalf, to a representative payee;

(p) Your drug addiction or alcoholism;

(q) Who will act as your payee if we determine that representative payment will be made;

(r) An offset of your benefits under § 404.408b because you previously received supplemental security income payments for the same period;

(s) Whether your completion of, or continuation for a specified period of time in, an appropriate program of vocational rehabilitation services, employment services, or other support services will increase the likelihood that you will not have to return to the disability benefit rolls, and thus, whether your benefits may be continued even though you are not disabled;

(t) Nonpayment of your benefits under § 404.468 because of your confinement in a jail, prison, or other penal institution or correctional facility for conviction of a felony;

(u) Whether or not you have a disabling impairment(s) as defined in § 404.1511;

(v) Nonpayment of your benefits under § 404.469 because you have not furnished us satisfactory proof of your Social Security number, or, if a Social Security number has not been assigned to you, you have not filed a proper application for one;

(w) A claim for benefits under § 404.633 based on alleged misinformation; and

(x) Whether we were negligent in investigating or monitoring or failing to investigate or monitor your representative payee, which resulted in the misuse of benefits by your 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. § 404.2021. What is our order of preference in selecting a representative payee for you?

As a guide in selecting a representative payee, we have established categories of preferred payees. These preferences are flexible. We will consider an individual's advance designee(s) (see § 404.2018) before we consider other potential representative payees in the categories of preferred payees listed in this section. When we select a representative payee, we will choose the designee of the beneficiary's highest priority, provided that the designee is willing and able to serve, is not prohibited from serving (see § 404.2022), and supports the best interest of the beneficiary (see § 404.2020). The preferences are:

(a) For beneficiaries 18 years old or older (except those described in paragraph (b) of this section), our preference is —

(1) A legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concern for the personal welfare of the beneficiary;

(2) A friend who has custody of the beneficiary or demonstrates strong concern for the personal welfare of the beneficiary;

(3) A public or nonprofit agency or institution having custody of the beneficiary;

(4) A private institution operated for profit and licensed under State law, which has custody of the beneficiary; and

(5) Persons other than above who are qualified to carry out the responsibilities of a payee and who are able and willing to serve as a payee for a beneficiary; e.g.,

members of community groups or organizations who volunteer to serve as payee for a beneficiary.

(b) For individuals who are disabled and who have a drug addiction or alcoholism condition our preference is —

(1) A community-based nonprofit social service agency which is licensed by the State, or bonded;

(2) A Federal, State, or local government agency whose mission is to carry out income maintenance, social service, or health care-related activities;

(3) A State or local government agency with fiduciary responsibilities;

(4) A designee of an agency (other than a Federal agency) referred to in paragraphs (b)(1), (2), and (3) of this section, if appropriate; or

(5) A family member.

(c) For beneficiaries under age 18, our preference is—

(1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;

(2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;

(3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;

(4) A relative or stepparent who has custody of the beneficiary;

(5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;

(6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and

(7) An authorized social agency or custodial institution.

20 C.F.R. § 404.2030. 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 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.)

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. § 416.610 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. § 416.621. What is our order of preference in selecting a representative payee for you?

As a guide in selecting a representative payee, we have established categories of preferred payees. These preferences are flexible. We will consider an individual's advance designees (see § 416.618) before we consider other potential representative payees in the categories of preferred payees listed in this section. When we select a representative payee, we will choose the designee of the beneficiary's highest priority, provided that the designee is willing and able to serve, is not prohibited from serving (see § 416.622), and supports the best interest of the beneficiary (see § 416.620). The preferences are:

(a) For beneficiaries 18 years old or older (except those described in paragraph (b) of this section), our preference is —

(1) A legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concern for the personal welfare of the beneficiary;

(2) A friend who has custody of the beneficiary or demonstrates strong concern for the personal welfare of the beneficiary;

(3) A public or nonprofit agency or institution having custody of the beneficiary;

(4) A private institution operated for profit and licensed under State law, which has custody of the beneficiary; and

(5) Persons other than above who are qualified to carry out the responsibilities of a payee and who are able and willing to serve as a payee for the beneficiary; e.g., members of community groups or organizations who volunteer to serve as payee for a beneficiary.

(b) For individuals who are disabled and who have a drug addiction or alcoholism condition our preference is —

(1) A community-based nonprofit social service agency licensed by the State, or bonded;

(2) A Federal, State or local government agency whose mission is to carry out income maintenance, social service, or health care-related activities;

(3) A State or local government agency with fiduciary responsibilities;

(4) A designee of an agency (other than a Federal agency) referred to in paragraphs (b)(1), (2), and (3) of this section, if appropriate; or

(5) A family member.

(c) For beneficiaries under age 18, our preference is—

(1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;

(2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;

(3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;

(4) A relative or stepparent who has custody of the beneficiary;

(5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;

(6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and

(7) An authorized social agency or custodial institution.

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 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 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 the 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.)

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.

20 C.F.R. § 416.1402. Administrative actions that are initial determinations.

Initial determinations are the determinations we make that are subject to administrative and judicial review. We will base our initial determination on the preponderance of the evidence. We will state the important facts and give the reasons for our conclusions in the initial determination. Initial determinations regarding supplemental security income benefits include, but are not limited to, determinations about —

(a) Your eligibility for, or the amount of, your supplemental security income benefits or your special SSI cash benefits under § 416.262, except actions solely involving transitions to eligibility between these types of benefits (see §§ 416.1403 (a)(13) and (a)(14)).

(b) Suspension, reduction, or termination of your SSI benefits or special SSI cash benefits (see §§ 416.261 and 416.262) or suspension or termination of your special SSI eligibility status (see §§ 416.264 through 416.269);

(c) Whether an overpayment of benefits must be repaid to us;

(d) Whether the payment of your benefits will be made, on your behalf, to a representative payee;

(e) Who will act as your payee if we determine that representative payment will be made;

(f) Imposing penalties for failing to report important information;

(g) Your drug addiction or alcoholism;

(h) Whether you are eligible for special SSI eligibility status under § 416.265;

(i) Your disability;

(j) Whether your completion of, or continuation for a specified period of time in, an appropriate program of vocational rehabilitation services, employment services, or other support services will increase the likelihood that you will not have to return to the disability or blindness benefit rolls, and thus, whether your benefits may be continued even though you are not disabled or blind;

(k) Whether or not you have a disabling impairment as defined in § 416.911;

(l) How much and to whom benefits due a deceased individual will be paid;

(m) A claim for benefits under § 416.351 based on alleged misinformation;

(n) Our calculation of the amount of change in your federally administered State supplementary payment amount (i.e., a reduction, suspension, or termination) which results from a mass change, as defined in § 416.1401; and

(o) Whether we were negligent in investigating or monitoring or failing to investigate or monitor your representative payee, which resulted in the misuse of benefits by your representative payee.

INTRODUCTION

In raising new preemption arguments that were never properly presented to the trial court, and a due process argument that makes little or no sense, the Office of Children's Services ("OCS") is hoping for one of two things. The first is that this Court will abandon its well-settled rule that an argument never properly raised in the trial court cannot be raised on appeal. The second is that this Court will become so confused by OCS's incomprehensible due process argument that it loses sight of first principles, e.g., that the government cannot take a citizen's money unless it first notifies them. And that, in a confused state, this Court will countenance OCS's practice of diverting millions of dollars of foster children's Social Security monies – into the State's coffers – without any notice whatsoever.

Z.C. believes this Court will do neither. First, since OCS **never** argued below that the due process compliant notice mandated by the trial court was barred by "field preemption," the argument cannot now be presented to this Court for the first time on appeal. Since OCS's "conflict preemption" argument was not raised until more than one year after the court ruled against OCS, it too was waived. Second, since OCS took foster children's Social Security monies without ever notifying the children (or their lawyers or guardians), OCS violated the most fundamental tenet of due process.

This Court should affirm the trial court's rulings and injunction on the foster children's due process claim.

ISSUES PRESENTED FOR REVIEW

1. Does it violate the due process clause of the Alaska Constitution for OCS to

take foster children's Social Security benefits without first providing any notice to the affected foster children, the courts, or the children's lawyers or guardians?

2. Did OCS waive its field preemption argument by raising it for the first time on appeal?

3. Did OCS waive its conflict preemption argument by raising it for the first time in a Civil Rule 60(b) motion?

4. Does field preemption or conflict preemption bar Alaska's state courts from requiring OCS to provide notice to Alaska's foster children before taking their Social Security benefits?

STATEMENT OF THE CASE

A. OCS's Practice of Diverting Foster Children's Social Security Benefits – Without Any Notice to Anyone.

The basic facts in this appeal are all undisputed.[1] [Exc. 185] Namely, some of the foster children who are in OCS's legal custody are eligible to receive Social Security benefits from the federal government.[2] [Exc. 187] Their eligibility is predicated either on the fact that they are disabled and indigent, or orphaned, or both.[3] [Exc. 187-88, 293]

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[1] Z.C. already provided a detailed statement of the factual and procedural background of this case in her cross-appellant's brief (filed on May 20, 2022) which is incorporated by reference herein. This brief provides additional details that are relevant to the due process issue.

[2] At last count, there were 259 Alaskan foster children who were receiving Social Security benefits. [Exc. 339]

[3] The two federal benefit programs at issue in this case are Old-Age, Survivors, and Disability Insurance ("OASDI") and Supplemental Security Income ("SSI"). Unless otherwise noted, there is no material difference between OASDI and SSI benefits for purposes of the issues in this appeal. *See Guardianship Estate of Keffeler v. Dep't of Social*

SSI beneficiaries currently receive $841 every month,[4] while OASDI benefits vary depending on the deceased parent's earning history. [Exc.187-88] Critically, OCS concedes that these monies **belong** to the foster children. [Exc. 395]

These monies can make a meaningful difference in a foster child's life. They can be used to purchase "food, shelter, clothing, medical care, and personal comfort items,"[5] and "to improve the beneficiary's daily living conditions."[6] These monies can also be saved for *future* use – for example, when the foster children age out of foster care and are no longer financially supported by the State.[7] Given the large percentage of children who leave foster care with little more than the clothes on their back,[8] this is a huge potential benefit

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& 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."). These benefits are collectively referred to as "Social Security benefits."

[4] Cost-of-Living Increase and Other Determinations for 2022, 86 Fed. Reg. 58,715 (Oct. 22, 2021).

[5] 20 C.F.R. §§ 404.2040(a)(1), 416.640(a).

[6] Social Security Administration, *A Guide for Representative Payees* at 4, available at: https://www.ssa.gov/pubs/EN-05-10076.pdf (visited July 11, 2022).

[7] *See* 20 C.F.R. §§ 404.2045, 416.645. An SSI recipient may not accumulate more than $2,000 in "countable resources," subject to a long list of excluded assets that are not counted. 20 C.F.R. §§ 416.1205(c), 416.1210 *et seq.* For example, an unlimited amount of SSI benefits may be saved in a plan to achieve self-support ("PASS account"), which can be used to assist foster children in finding employment or starting a business, including paying for necessary education or training, transportation, child care, or assistive technology. *See* 20 C.F.R. § 416.1226; *see also* Social Security Administration, *Spotlight on Plan to Achieve Self Support – 2022 Edition,* available at: https://www.ssa.gov/ssi/spotlights/spot-plans-self-support.htm (visited July 9, 2022).

[8] "Youth aging out of foster care experience high rates of homelessness, incarceration, and underemployment; they are likely to become entrenched in poverty." Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out*, 17 CUNY L. Rev. 145, 148 (2014). "[F]or many who remain in foster care until aging out, poverty becomes their

and a pathway to independence for Alaska's foster children.

Because of their minority, the Social Security Administration ("SSA") generally requires, when a child is eligible for Social Security benefits, that the benefits be paid to a responsible adult; in the SSA's terminology, a "representative payee."[9] [Exc. 189-90] A "representative payee" serves in a fiduciary capacity for the child.[10] He or she is charged with managing and accounting for the child's benefits.[11]

In Alaska, OCS **always** "applies to be the representative payee for any Social Security beneficiary child in its custody."[12] [At. Br. 14; *see also* Exc. 114, 190, 294] This

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permanent placement." *Id.* at 183. A comprehensive 2008 study by the U.S. Department of Health and Human Services found that, nationally, youth aging out of foster care experience high unemployment, unstable employment patterns, and earn very low incomes. *See* Jennifer Earle Macomber, et al., *Coming of Age: Employment Outcomes for Youth Who Age Out of Foster Care Through Their Middle Twenties*, i (2008), available at: https://www.urban.org/research/publication/coming-age-employment-outcomes-youthwho-age-out-foster-care-through-their-middle-twenties (visited July 9, 2022). Between 20 to 33 percent of "[t]hese youth have very low probabilities of employment and hardly any earnings at any time between ages 18 and 24 . . . ." *Id.* at ii. Another study of former foster children in the Midwest by Chapin Hall at the University of Chicago found that 22 percent of study participants had become homeless within 30 months of aging out of foster care; nearly 40 percent were either homeless or couch surfing by age 24. *See* Amy Dworsky and Mark Courtney, *Assessing the Impact of Extending Care Beyond Age 18 on Homelessness: Emerging Findings from the Midwest Study*, 3-4 (Mar. 2010), at https://www.chapinhall.org/wp-content/uploads/Midwest_IB2_Homelessness.pdf (visited July 9, 2022).

[9] *See* 20 C.F.R. §§ 404.2010(b), 416.610(b).

[10] 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).

[11] 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]

[12] OCS was thus appointed as the representative payee for Z.C. and each of the class members in this case. [Exc. 585, 701, 713]

might be acceptable in the abstract. But the problem is the reality: Once OCS become the payee for these foster children, it diverts their Social Security monies to the State's coffers. [Exc. 191, 585, 595] "The selection of the state foster care agency . . . all but ensures the child will never see a dollar of her Social Security benefits."[13] Instead, as the trial court found, OCS "uses the Social Security benefits that it receives on behalf of the child to offset the costs the State incurs for that child's foster care." [Exc. 585]

OCS does (or did, until this lawsuit) all of this surreptitiously, without ever providing any notice whatsoever to the affected children, the judges presiding over their Child in Need of Aid ("CINA") cases, or the children's lawyers or guardians. [Exc. 115-19, 190-92, 585, 700; R. 21-22, 53-54, 60, 641] Specifically, OCS never notified anyone of the fact that these foster children were eligible for these valuable monetary payments; that OCS was applying to become their representative payee; and that OCS would (and did) take all of these monies to reimburse itself.[14]

There is no silver lining for these foster children. The undisputed facts show that the **entire** amount of these foster children's Social Security monies was transferred from their personal accounts at OCS to the State's general fund.[15] The parties also agree that these

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[13] Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1830 (Feb. 2006).

[14] OCS admits all of this. [Exc. 115-19, 190-92; R. 21-22, 60, 641] OCS also admits that it did not inform the affected foster children, their lawyers, or their guardians, that they could appeal the SSA's appointment of OCS as their representative payee, or "the possibility of the child suggesting to the SSA alternative representative payees who have preference over OCS." [Exc. 700]

[15] The record shows, and OCS nowhere disputes, that for all of the affected foster

children themselves received *no improvement* to their quality of life based on their receipt of these federal benefits. [R. 656] There is only a silver lining for the State: It received a funding stream of millions of dollars,[16] belonging to the individual foster children, which it then used "to pay for the foster care system as a whole." [Exc. 595]

There is an obvious alternative reality. *If* OCS gave notice to the affected foster children or their lawyers or guardians, they could nominate a different payee instead of OCS—for example, a caring, responsible grandmother. This alternative reality would benefit a foster child because, as the trial court found, all of the child's Social Security monies could then be used by the caring grandmother/payee to "supplement rather than reimburse the separate obligation that the State has to pay for foster care." [Exc. 701] As the trial court explained, a child with a payee that was not OCS would have more of her benefits "available for discretionary expenditure, savings, or investment in assets that do not count against the SSI resource ceiling." [Exc. 196-97] In other words, a private grandmother/payee could use a child's Social Security money to pay for *additional* food, clothing, therapies, recreation, educational opportunities, and vocational training,[17] beyond

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children, at the end of any given fiscal period, the child has a negative accounting balance with OCS. [R. 1728-1868] What this means is simple: The child is left with no Social Security benefits after the State reimburses itself for maintenance costs.

[16] In fiscal year 2019 alone, nearly $1,800,000 was diverted from the class members to the State. [Exc. 296]

[17] *Keffeler III*, 88 P.3d at 957-58 (Sanders, J., dissenting) ("One can imagine many benefits the child with a private payee might enjoy through the supplemental use of these SSI benefits not available to his or her government counterpart. By illustration, when the child who has the beneficent DSHS as her representative payee is having gruel for breakfast, grandma is serving steak and eggs. When the State's child is watching sitcoms on TV, grandma's is off to the movies. When the State's child finds a pair of knock-off sneakers underneath the Christmas tree, grandma has wrapped a new pair of Nikes. When

the "bare minimum provided by the State."[18] "[A]n unending list of possible uses is not difficult to contemplate – uses that provide a direct benefit to the disabled foster children as opposed to simply handing over the money to the state to reimburse costs for which the children have no legal obligation."[19]

Instead, the current reality is dreadful: "[T]he child that draws the short straw and winds up with [OCS] as his or her representative payee will find these additional SSI benefits confiscated by the State to reimburse itself; whereas the child with the private payee will enjoy the higher standard of living resulting from a combination of both state and federal benefits."[20]

B. Relevant Procedural History

Z.C. alleged in the operative complaint that the above practices violated the due process clause of the Alaska Constitution. [Exc. 35] After extensive briefing, the trial court agreed. In a summary judgment order dated September 3, 2019, 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

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the kids reach their teenage years and would benefit from travel around the region, the State's child is stuck waiting at the depot to take a thrilling ride on Seattle's wonderful new light rail (indulge me here), yet grandma may use the added benefits under her control to enable the child to visit the Vancouver aquarium by car or provide her grandson some other valuable educational and enriching experiences. And when the State's child turns 18 she's on her own, but grandma may set aside up to $ 2,000 from the social security to help her grandson get started without losing SSI eligibility.").

[18] *Id.* at 957.

[19] Hatcher, *supra*, 27 Cardozo L. Rev. at 1820.

[20] *Keffeler III*, 88 P.3d at 957 (Sanders, J., dissenting).

other than OCS." [Exc. 701]

The trial court's reasoning was straightforward and was based on the well-settled body of due process law.[21] First, based on OCS's concession,[22] the trial court found that the foster children had a property interest in their Social Security benefits. [Exc. 193-96] The trial court found that this property interest was "deserving of some level of due process protection from the termination or decrease in the amount of benefits." [Exc. 1195]

Second, the trial court found that the risk of deprivation of the foster children's property interest is "high," and the value of providing notice to the foster children "is therefore also high." [Exc. 200] The trial court explained:

> If 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 trial court added that the risk of deprivation stemmed from "the State's potential elimination, when it becomes the representative payee, of the choices available to a child with a private representative payee." [Exc. 197]

The trial court went on to find that there was "significant" value in providing notice

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[21] Under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), a court deciding a procedural due process claim must balance (1) the private interest that is affected by the state's action; (2) the risk of an erroneous deprivation of such interest through the procedures used by the state, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. This Court adopted the *Mathews* test in *Borkowski v. Snowden,* 665 P.2d 22, 27-28 (Alaska 1983).

[22] OCS conceded that "there is generally a private interest in a person's social security benefits." [Exc. 156] Nevertheless, OCS argued that it was a "lesser interest" that was not deserving of "heightened due process." [Exc. 158]

to the foster children "not only of the State's application to be the representative payee, but also of the potential impact of not having a private payee . . . ." [Exc. 197] The trial court explained:

> The rules surrounding these two types of social security benefits are complex. The average citizen is not likely to appreciate the consequences of the State applying to be the representative payee. A minor child is even less likely to understand the ramifications. If a child has just entered foster are, then she is probably in the midst of a traumatic dislocation of her life. Perhaps her parents are dysfunctional; perhaps they have just died. Perhaps she is newly disabled or her disability has worsened. These children are in foster care because they are vulnerable. They cannot be expected to understand the nuances of the differences between a private payee and the State acting as one. The value of notice and explanation are great.

[Exc. 197-98] The trial court also noted that OCS owes a fiduciary duty to all foster children, which further weighed in favor of giving notice. [Exc. 199]

Finally, the trial court easily rejected OCS's argument (which has been abandoned on appeal) that providing notice to foster children would be "extremely burdensome." [Exc. 200] Instead, the court found that the burden on OCS would be "minimal":

> All that the State needs to do to give proper notice to foster children eligible for OASDI or SSI is 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. The generation and distribution of such a document would be straightforward.

[Exc. 200-01]

The trial court accordingly granted summary judgment to Z.C. and ordered OCS to begin providing due process compliant notices to the affected foster children and "other

interested parties in the CINA case."[23] [Exc. 185, 201, 203-04]

OCS never once argued in its voluminous summary judgment briefing that Z.C.'s prospective due process claim was barred by either conflict preemption or field preemption. [Exc. 12-30, 61-77, 97-105, 112-22, 147-64] Thus, the trial court did not consider these arguments in its summary judgment order.[24] [Exc. 183-205]

OCS initially refused to comply, for more than five months, with the trial court's summary judgment order. [R. 2058-64] Z.C. was thus forced to move for an order compelling OCS's compliance in February 2020. [*Id.*] Over OCS's continued objection, the trial court granted Z.C.'s motion and ordered OCS to "immediately provide a written notice by 31 March 2020 to all foster children for whom [OCS is] *currently* serving as the representative payee." [Exc. 469 (emphasis in original); R. 2014-16] The trial court further stated:

> The notice must explain the concept of a representative payee and who could be a payee and how the foster child might ask to select a different payee than [OCS]. It must also explain the consequence of the selection of the Office of Children's Services, rather than a private person or entity, as the payee.
>
> The notice must be given to the foster child and other interested parties in the CINA case. If there is no CINA case, the notice shall be given to the child, the child's guardian ad litem, the child's parents if they are

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[23] The trial court's September 3, 2019 summary judgment order offered "some minimal guidance" to OCS on the contents of the notice: "The notice 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]

[24] OCS moved for reconsideration of the trial court's summary judgment ruling on September 16, 2019. [R. 1619-23] OCS's motion, which did not mention field preemption or conflict preemption, was denied the following day. [R. 1613-14]

alive and they still have parental rights, and the child's foster parents.

[Exc. 469]

OCS filed a second motion for reconsideration, which was again denied. [Exc. 470-73] On April 20, 2020, OCS finally agreed to start "complying with [the trial court's] orders so long as they remain in effect." [Exc. 475]

The parties turned to litigating Z.C.'s remaining equal protection and disgorgement claims.[25] After the trial court decided those claims in favor of OCS, [Exc. 583-611] Z.C. moved for the entry of a final judgment. [R. 2798-2801]

Instead of acknowledging that the case was over, OCS again tried to undo the trial court's due process ruling for a third time. [Exc. 612-63] OCS filed a Rule 60(b) motion, arguing for the first time that "conflict preemption" barred Z.C.'s due process claims. [Exc. 623-27] As OCS explained, the trial court's "orders requiring notice are preempted because they conflict with federal law covering the representative payee process."[26] [Exc. 623] Based on correspondence from an "Assistant Regional Counsel" at the SSA, OCS argued that it was stuck "between a rock – [the trial court's] orders regarding notice required under the Alaska Constitution – and a hard place – the Social Security Administration (SSA)'s privacy requirements." [Exc. 612] More specifically, OCS argued that compliance with the trial court's notice requirements would cause it to "violate the State's data sharing

[25] These claims are the subject of Z.C.'s cross-appeal.

[26] OCS had previously only argued that Z.C.'s disgorgement and equal protection claims were preempted. [Exc. 218-24, 493-99] This was the first time OCS argued that Z.C.'s prospective due process claim was barred by conflict preemption.

agreements with the SSA" and federal privacy statutes. [Exc. 613] Never once did OCS even mention "field preemption" in its Rule 60(b) motion. [Exc. 612-28]

Z.C. opposed OCS's Rule 60(b) motion for various reasons.[27] [Exc. 664-81]

On October 22, 2021, the trial court denied OCS's Rule 60(b) motion, finding that "[t]he State and the SSA misconstrue[d] the Court's notice requirement." [Exc. 698-712] However, the trial court made some minor modifications to its prior orders in order to address the conflict preemption concerns raised by the SSA. The court explained:

> The SSA repeatedly expressed concern about the Court's order requiring the State to violate various restrictions on the *redisclosure* of SSA information. The Court has not ordered the State to provide to any person any information that the State has obtained about a child from the SSA. The notice simply informs the recipient about the fact of the OCS application, the option to have another payee of higher preference and the financial consequences of OCS being the payee for a foster child in [its] custody. None of that information comes from the SSA.
>
> Nor has the Court required the State to provide any person information that is specific or identifies a person in foster care. The notice requirement is satisfied by a generic notice that describes specific and limited aspects of the representative payee system without reference to any specific child. If the concern is that by giving the notice to a person (other than the child or her parent) implicitly suggests or reveals that the specific child is a recipient of Social Security benefits or might be eligible for them, then the specter of a targeted notice can be eliminated by giving the notice to all children who are in the State's custody or the subject of a CINA court case regardless of whether the child was then entitled to Social Security benefits.

[Exc. 709-10 (emphasis in original)]

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[27] First, the motion was untimely. [Exc. 666-71] Second, the only new "evidence" proffered by OCS was inadmissible hearsay. [Exc. 672-75] Third, the State's data-sharing agreements with the SSA and federal privacy laws did not actually conflict with the notice required by the trial court. [Exc. 675-81]

The trial court also took the opportunity to "more precisely define who should receive the generic notice in hopes of alleviating the concerns of the SSA and better identifying the obligation of the State." [Exc. 711] The trial court clarified that the notice must be provided to "the child, the child's parents (if his or her parental rights have not been terminated), and the child's subsequently appointed GAL." [Exc. 711] Thus, foster parents would no longer receive the notice. Finally, the trial court slightly modified the contents of the required notice.[28]

The trial court entered a final judgment incorporating these clarifications into a permanent injunction on October 22, 2021. [Exc. 713-14] OCS thereafter appealed. The majority of its legal arguments concern why field preemption or conflict preemption bar Z.C.'s due process claim. [At. Br. 24-32]

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[28] The notice was revised so that it advised recipients that

> a) if the child, while in the custody of the OCS is placed in foster care and is or becomes eligible for Old-Age, Survivors, and Disability Insurance benefits or Social Security Supplemental Income benefits, then OCS will apply to the SSA [to] become the child's representative payee;
>
> b) the child or another on the child's behalf may propose an alternative representative payee to the SSA;
>
> c) the financial consequences of OCS, rather than a private person, becoming the representative payee.

[Exc. 711]

STANDARD OF REVIEW

This Court reviews de novo whether a party has waived an argument on appeal.[29] Whether field preemption or conflict preemption bars Z.C.'s due process claim under the Alaska Constitution are legal questions that this Court reviews de novo.[30] Finally, questions of constitutional law – such as whether the due process clause of the Alaska Constitution requires OCS to provide notice to foster children before diverting their Social Security monies into the State's coffers – are also reviewed de novo by this Court.[31]

ARGUMENT

I. OCS *Never* Raised and Thus Waived Its Field Preemption Argument.

As noted above, OCS tries a new tact for the first time in this appeal: field preemption. [At. Br. 26-27] OCS now claims: "The field is occupied, leaving no room for state supplementation." [At. Br. 27] The problem with OCS's field preemption argument is that it was never raised before this appeal, and it has therefore been waived.[32]

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[29] *See, e.g., Huber v. State*, 426 P.3d 969, 971 (Alaska 2018).

[30] *See Allen v. State, Dep't of Health & Soc. Servs.*, *Div. of Pub. Assistance*, 203 P.3d 1155, 1160 (Alaska 2009).

[31] *See Heitz v. State*, 215 P.3d 302, 305 (Alaska 2009).

[32] *See Hymes v. DeRamus*, 222 P.3d 874, 889 (Alaska 2010) ("We have repeatedly held that a party may not raise an issue for the first time on appeal.") (citation and internal quotation marks omitted); *Harvey v. Cook*, 172 P.3d 794, 802 (Alaska 2007) ("Ordinarily, a party seeking to raise an issue on appeal must have raised it and offered evidence on it in the trial court. Therefore, issues not properly raised in the trial court will not ordinarily be considered on appeal."); *Willoya v. State, Dep't of Corr.,* 53 P.3d 1115, 1125 (Alaska 2002) (holding that prisoner waived Eighth Amendment claim by failing to raise it in superior court); *see also Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 (D.C. Cir. 2018) ("Preemption ordinarily is an affirmative defense forfeitable by the party entitled to its benefit."); *Rimrock Chrysler, Inc. v. DOJ*, 375 P.3d 392, 398 (Mont. 2016) ("Generally, an affirmative defense is waived if not set forth affirmatively. This rule applies to a defense

OCS tries to salvage its waived field preemption argument by telling this Court that field preemption is related to conflict preemption, and since OCS argued conflict preemption in the trial court, this Court should now allow it to argue, for the first time on appeal, field preemption. [At. Br. 25-26] This is nonsense for two reasons.

First, OCS did *not* properly raise conflict preemption in the trial court. In fact, as explained below, OCS did not raise conflict preemption until more than a year after the court ruled against OCS on the due process claim. [Exc. 612-28]

Second, the fact that field preemption is related to conflict preemption does not mean that OCS did not have to raise field preemption in the trial court. The reasons for this Court's waiver rule are straightforward: "permitting a party to claim error regarding a claim not raised and litigated below is both unfair to the trial court and unjust to the opposing litigant."[33] Allowing OCS to sit on its field preemption argument until this appeal runs afoul of both of these policies.

II. OCS Did Not Timely Raise Its Conflict Preemption Argument and Thus Waived It Too.

The trial court decided Z.C.'s due process claim in its summary judgment order of September 4, 2019, after *multiple* rounds of extensive briefing submitted by the parties over the course of more than two years. [Exc. 39-182] In its decision, the trial court ordered OCS to start providing foster children notice of its representative payee applications. [Exc. 203-04] At no time, prior to the September 2019 summary judgment order, did OCS ever

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of federal preemption of state law.") (citations and internal quotation marks omitted).

[33] *Harvey*, 172 P.3d at 802 (citation and internal quotation marks omitted).

argue that Z.C.'s due process claim, or the requested notice, was barred by conflict preemption, or any other type of preemption.[34] [Exc. 12-30, 61-77, 97-105, 112-22, 147-64] And in fact, after the trial court granted summary judgment to Z.C. on the due process claim, OCS conceded that notice *was* an appropriate prospective remedy: "If in fact the plaintiff's claims are narrowed such that [she] only claims that a lack of notice is the sole violation of [her] constitutional rights, the proper remedy would be a notice to the parties identified by Z.C., not disgorgement of those benefits as Z.C. suggests." [Exc. 103]

In its first motion for reconsideration, filed shortly after the trial court's September 2019 summary judgment order, OCS said *nothing* about conflict preemption (or any other type of preemption). [Exc. 206-10] Even in its second motion for reconsideration, filed in March 2020, OCS still did not mention preemption, even once. [Exc. 470-72]

The first time OCS ever argued preemption was in its Rule 60(b) motion—filed a year later, in March 2021. [Exc. 612-28] For the first time, OCS had a new theory of defense: conflict preemption. OCS argued:

> On the one hand, this Court has ordered OCS to provide foster children, their guardians ad litem, their parents, and their foster parents with notices revealing information the State gleans from its access to federal SSA databases. . . .
>
> On the other hand, the State must follow federal privacy laws as a prerequisite to accessing the relevant information in the first place. . . . OCS is stuck between federal and state law. This is the essence of

[34] OCS only mentioned preemption with regard to Z.C.'s requested retrospective remedies of disgorgement or constructive trust. [Exc. 218-24, 493-99] OCS asserted that "[a]ny *claim for disgorgement of past benefits* due to mismanagement must be brought to the SSA, not the State of Alaska," but OCS conceded that Z.C.'s claim for prospective injunctive relief was *not* preempted. [Exc. 103 (emphasis added)]

conflict preemption.

[Exc. 626-27]

The law is well-settled that a Rule 60(b) motion is *not* "an appropriate place to slip in arguments that should have been made earlier."[35] This means one simple thing: OCS waived its conflict preemption argument.

In any event, OCS's conflict preemption argument was mooted when the trial court amended its injunction to eliminate any potential conflicts with federal privacy laws. [Exc. 709-11] OCS admits as much.[36] [At. Br. 29-30]

III. OCS's Field Preemption Argument Is Legally Wrong.

Z.C.'s cross-appellant's brief addressed why field preemption does not bar the class members' equal protection claim. [X-At. Br. 30-35] The same analysis applies, with even greater force, to the class members' due process claim. Indeed, the few courts that

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[35] *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010) (explaining that Rule 60(b) "does not provide a license for litigants to sleep on their rights"); *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016) ("[A] Rule 60(b) motion is not an appropriate vehicle to advance new arguments or supporting facts that were available but not raised at the time of the original argument."); *cf. Montgomery Ward v. Thomas*, 394 P.2d 774, 776 (Alaska 1964) (holding that where Rule 60(b) motion is based on new evidence, it "must be of such a nature that it could not have been discovered before trial [or, in this case, summary judgment] by due diligence."); *Sengupta v. Univ. of Alaska*, 21 P.3d 1240, 1261 (Alaska 2001) (holding that "the *Montgomery Ward* standard applies to motions challenging not only judgments entered after trial but also summary judgments.").

[36] OCS tells this Court that the notice "originally ordered" by the trial court conflicted with federal privacy laws, but the "amendment to the order may have resolved the conflict with federal privacy agreements . . . ." [At. Br. 30] OCS does not make any argument on appeal that the amended injunction still violates federal privacy laws in any way.

have confronted a similar due process claim have decided it on the merits.[37] As is evident from OCS's failure to cite *any* on-point cases in its cursory argument on field preemption,[38] not one court has *ever* concluded that a similar claim was preempted.[39]

"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."[40] There is a strong presumption *against* federal preemption of state law,[41] and thus "Congressional intent to occupy [a] field will not be lightly inferred."[42] "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the

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[37] *See In re Ryan W.*, 76 A.3d 1049, 1067-70 (Md. 2013); *Keffeler III*, 88 P.3d at 955-56; *cf. Crawford v. Gould*, 56 F.3d 1162, 1163, 1165, 1169 (9th Cir. 1995) (addressing on merits challenge by class of patients involuntarily committed to California state psychiatric hospital to the State of California's "practice of deducting patients' money, including Social Security benefits, from the personal deposit accounts maintained for each patient, to reimburse hospitals for the cost of patient care and maintenance.").

[38] OCS's entire field preemption argument consists of only three short paragraphs. [At. Br. 26-27]

[39] In contrast, the argument for preemption of the class members' equal protection claim at least finds *some* legal support. *See Ryan W.*, 76 A.3d at 1062. Of course, *Ryan W.* was wrongly decided on that issue, for the reasons explained in Z.C.'s cross-appellant's brief. [X-At. Br. 32-33]

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

[41] *See id.*

[42] *Webster v. Bechtel, Inc.*, 621 P.2d 890, 898 (Alaska 1980); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

Congress has unmistakably so ordained."[43]

"In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[44] Moreover, courts "will not infer an intent to occupy the field where Congress has left some room for state involvement."[45]

As an initial matter, OCS's field preemption argument is based on a sleight of hand. OCS argues that the federal government has occupied the "field" of "[t]he representative payee selection program for OASDI and SSI benefits . . . ." [At. Br. 26] OCS tells this Court that it "has no role" in this field, "beyond submitting applications for appointment, the same as any private person or entity willing to serve as payee," and that it "has neither control over the federal criteria used for representative payee selection nor any influence over the decision." [At. Br. 27] These statements are red herrings. The trial court's injunction did not purport to enter the field of the "representative payee selection program," nor did the court's due process ruling hinge in any way on the notion that OCS can somehow exert control over the federal payee selection process. [Exc. 192-204]

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[43] *Webster*, 621 P.2d at 898 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

[44] *Medtronic,* 518 U.S. at 485 (internal citations, quotation marks, and ellipses omitted).

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

Rather, the "field" in which the trial court issued its injunction is the fiduciary relationship between OCS and Alaskan children in need of aid.[46] This relationship encompasses "nearly all aspects of the child's direction, control, and protection, from 'where and with whom the child shall live' to 'decisions of financial significance concerning the child.'"[47] And OCS's fiduciary duty to these foster children includes the obligation to "to fully disclose information which might affect the other person's rights and influence his action."[48]

This field – i.e., the protection of the best interests of children in the legal custody of the state – has historically been the province of state judges.[49] In Alaska, the legislature has given trial judges plenary authority to "achieve the end that a child coming within the jurisdiction of the court . . . may receive the care, guidance, treatment, and control that will promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interests."[50] And yet, despite this historical

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[46] *See Dapo v. State*, 454 P.3d 171, 180 (Alaska 2019) ("We conclude, therefore, that the relationship between OCS and children in its legal custody pursuant to AS 47.10.084 is a fiduciary relationship . . . .").

[47] *Id.* at 179 (quoting AS 47.10.084(a)).

[48] *Henash v. Ipalook*, 985 P.2d 442, 446 (Alaska 1999) (quoting *Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 634 (Alaska 1996)) (internal quotation marks omitted).

[49] *See, e.g., Lehman v. Lycoming Cnty. Children's Servs. Agency,* 458 U.S. 502, 512-16 (1982) (holding that federal habeas corpus statute did not confer jurisdiction on the federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights because of "special solicitude for state interests" in this area).

[50] AS 47.10.005(1); *see also Ryan W.*, 76 A.3d at 1075 (Adkins, J., dissenting) (explaining that "juvenile courts have broad supervisory powers over the Department generally and its handling of a CINA child's property.").

backdrop, OCS is unable to point to anything in the statutory language or legislative history of the Social Security Act even remotely evincing a "clear and manifest purpose of Congress" to occupy the entire field of child welfare and take away the authority of state courts from protecting the best interests and state constitutional rights of foster children.

Even if this Court considers the broader "representative payee regulatory regime," as urged by OCS in its brief, OCS is simply wrong when it tells this Court that "Congress left no room for state participation" [At. Br. 2, 27] To the contrary, 42 U.S.C. § 405(j)(1)(A) expressly confers jurisdiction on any "court of competent jurisdiction" to determine whether a representative payee "has misused any individual's benefit paid to such representative payee . . . ." Thus, Congress specifically contemplated and conferred concurrent state and federal court jurisdiction to adjudicate cases involving misconduct by payees.[51] This conclusively refutes any notion that Congress intended to fully occupy the field of regulating representative payees, much less governmental payees like OCS that

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[51] *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. 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.").

have to comply with their own state constitutional obligations.

IV. OCS's Conflict Preemption Argument is Also Wrong.

OCS's conflict preemption argument is even weaker than its field preemption argument. "Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law 'stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'"[52]

OCS does not identify any actual conflicts between the trial court's injunction and federal law, such that compliance with both would be impossible. Instead, OCS tries to manufacture conflicts where none exist.

For example, OCS tells this Court that federal law "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." [At. Br. 28] It is important to clarify that this notice is provided *by the SSA*, not the representative payee.[53] And, as the trial court found, this notice from the SSA is ineffective when it comes to children who are in the legal custody of the State:

> The SSA gives the child's parent, legal guardian, or legal representative notice of the selection of the payee. When a child is in the custody of

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[52] *Allen*, 203 P.3d at 1162 (quoting *Roberts v. State, Dep't of Revenue*, 162 P.3d 1214, 1223 (Alaska 2007)).

[53] *See* 42 U.S.C. §§ 405(j)(2)(E)(ii)-(iii); 1383(a)(2)(B)(xii)-(xiii); *see also* 20 C.F.R. §§ 404.2030, 416.630.

> the State, the SSA gives the State notice of the selection of the payee. The SSA does not give the child direct notice of the selection of the payee.

[Exc. 190]

OCS's preemption argument would have some merit *if* the federal notice requirements somehow applied to representative payees, and the trial court sought to modify or expand those requirements under state law. But these federal requirements only govern the notice that is provided by the SSA.[54] Federal law neither prohibits representative payees (and especially governmental payees) from providing *additional* notice to beneficiaries, nor purports to regulate the contents of such a notice. Further, nothing in the Social Security Act or its implementing regulations purports to regulate or excuse a governmental payee's obligation to comply with state constitutional requirements. Thus, there is simply no tension, much less conflict, between federal law and the trial court's injunction.

OCS also gratuitously mentions that the trial court's original injunction may have conflicted with federal privacy laws. [At. Br. 29] While Z.C. does not agree that there was a conflict in the first place, this issue is now moot because OCS concedes that the trial court's modified injunction fixed any such conflict. [At. Br. 30]

Because there is no actual conflict, OCS argues that the notice mandated by the trial court is preempted because it "does not advance *Congress's* purpose underlying the benefit programs, which is to see that beneficiary children's 'basic needs are met.'" [At. Br. 27-28

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[54] *See id.*

(emphasis in original)] OCS applies the wrong standard for conflict preemption; the relevant question is whether the trial court's injunction actually *hinders* the accomplishment of a Congressional objective.[55] It is hard to see, and OCS certainly does not elucidate, how the simple form notice required by the trial court, which is only going to be meaningful for a small number of Alaskan foster children, somehow creates an obstacle to achieve Congress's objective in ensuring that beneficiary children's basic needs are met. To the contrary, as the trial court found, providing notice will clearly *advance* that objective by allowing foster children to potentially use their benefits to supplement the basic poverty-level of support provided by OCS to all foster children,[56] "rather than reimburse the separate obligation that the State has to pay for foster care." [Exc. 585]

OCS claims that the "content of the notice the superior court ordered is not consistent with the actual selection process or Congress's goals." [At. Br. 29] Once again, the exact opposite is true. The SSA, in implementing Congress's objectives, has determined that foster care agencies like OCS should be the payee of *last* resort.[57] Thus, according to the policy governing the SSA's selection process for representative payees, the SSA is not

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[55] *See Allen*, 203 P.3d at 1162.

[56] 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 July 13, 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).

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

supposed to "routinely appoint the foster care agency as payee for a child in foster care."[58] Rather, the SSA must still try to "identify and develop potential payees who would better serve the interests of the child."[59] The SSA's policy manual explains that "there may be other concerned relatives who would be better choices as payees," and that "[r]elatives with close ties to the child might be better able to make more balanced choices regarding use of the child's benefits."[60]

The content of the notice ordered by the trial court – which advises foster children of the financial advantages of having a private payee [Exc. 711] – thus advances Congress's objectives and facilitates the SSA's selection process by encouraging foster children (or the adults charged with protecting their best interests) to nominate alternative payees with a higher preference under federal law, who can then be vetted by the SSA for possible appointment as the payee.

OCS also argues, with little analysis, that the notice mandated by the trial court conflicts with the way "Congress intentionally structured the Title IV-E program . . . ." [At. Br. 28] The Federal Adoption Assistance and Child Welfare Act of 1980, an amendment to Title IV-E of the Social Security Act, provides federal funds (commonly referred to as "Title IV-E funds") to states to help defray the cost of providing foster care to eligible

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[58] Social Security Administration, Program Operations Manual System (POMS), at GN 00502.159, *Additional Considerations When Foster Care Agency Is Involved*, available at: https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502159 (visited July 6, 2022).

[59] *Id.*

[60] *Id.*

children.[61] Title IV-E has little relevance here. First, Title IV-E has no impact whatsoever on foster children who are receiving OASDI benefits, who comprise approximately half of the class.[62] [Exc. 339] Second, the Children's Bureau – the federal agency that administers Title IV-E – has issued official guidance in its *Child Welfare Policy Manual*,[63] which states that "[t]here is no prohibition in title IV-E against claiming Federal financial participation (FFP) for foster care maintenance payments . . . made on behalf of a child who is receiving SSI benefits. . . . A child, if eligible, may receive benefits from both programs simultaneously."[64] While, in some cases, the receipt of Title IV-E funds may reduce the amount of a child's SSI benefit,[65] the guidance from the Children's Bureau explains that

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[61] *See generally California Alliance of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1018 (9th Cir. 2009). There are various eligibility criteria, not relevant here, for a child to be eligible for Title IV-E benefits. *See* 42 U.S.C. § 672. For children who are Title IV-E eligible, the federal government reimburses *a portion* of the foster care maintenance payments based on the State's Federal Medical Assistance Percentage (FMAP). 42 U.S.C. § 674(a)(1). Alaska's FMAP is currently set at 50%, which means that for children who are Title IV-E eligible, half of each foster care maintenance payment comes from federal Title IV-E dollars and the other half comes from the State's general fund. Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy, Aged, Blind, or Disabled Persons for October 1, 2021 Through September 30, 2022, 85 Fed. Reg. 76,586, 76,588 (Nov. 30, 2020).

[62] The amount of OASDI benefits is based on the wages earned by the deceased parent and is not affected by a child's income from other sources (including Title IV-E benefits). *See* 42 U.S.C. § 402(d)(2); *see also* 20 C.F.R. §§ 404.204 (governing computation of primary insurance amounts, 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).

[63] The *Child Welfare Policy Manual* is available online at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/index.jsp (visited July 6, 2022).

[64] *Id.* at § 8.4D, Question 1—What is the Department's policy, under title IV-E, on concurrent receipt of benefits under title IV-E and Supplemental Security Income (SSI)?

[65] Social Security Administration, Program Operations Manual System, at SI

the decision to apply for Title IV-E versus SSI should only be made after the full disclosure of information:

> The difference between title XVI (SSI) and title IV-E should be considered carefully by the decision maker when choosing whether to apply for either or both title IV-E or SSI benefits on behalf of the child. Information regarding the benefits available under each program should be made available by the title IV-E agency so that an informed choice can be made in the child's best interest.[66]

Thus, if anything, the notice ordered by the trial court actually *furthers* the objectives of the Title IV-E program.

Finally, OCS's reliance on *C.G.A. v. State*[67] is wholly misplaced. In *C.G.A.*, this Court reversed an order in a delinquency case which required the child's mother "to remit funds which she lawfully received as representative payee to the state."[68] This Court held that the order was in direct conflict with the Social Security Act's anti-attachment provision, 42 U.S.C. § 407(a), which this Court held "preempts state interference with an appointed payee's decision to spend the social security benefits."[69] Here, the trial court's order requiring notice does not subject any child's Social Security benefits "to execution, levy, attachment, garnishment, or other legal process,"[70] or interfere in any way with OCS's

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00830.410, *Foster Care Payments*, available at https://secure.ssa.gov/poms.nsf/lnx/0500830410 (visited July 6, 2022).

[66] *Child Welfare Policy Manual* at § 8.4D, Question 2—How should the decision to apply for SSI or title IV-E benefits be made?

[67] 824 P.2d 1364 (Alaska 1992).

[68] *Id.* at 1366.

[69] *Id.* at 1367.

[70] 42 U.S.C. § 407(a).

spending decisions after it is duly appointed as payee. Thus, there is no conflict here.

V. OCS's Due Process Argument Makes Little Sense and Borders on the Frivolous.

As Justice Winfree observed over 10 years ago: "Due process of law requires that before valuable property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard."[71] "An 'elementary and fundamental' requirement of due process is notice reasonably calculated, under all the circumstances, to inform interested parties of action *affecting* their property rights."[72]

Here, OCS is certainly *affecting* the foster children's property rights; it is taking all of their Social Security monies to reimburse itself for their cost of care. The trial court got it right when it held that OCS was violating the 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," which resulted in the total loss of their Social Security monies. [Exc. 701; R. 1728-1868] And the trial court was also correct when it found that OCS was intentionally "becoming the representative payee in order to gain access to the foster child's Social Security benefits for its own coffers" and was diverting "foster children's Social Security benefits to pay for the foster care system as a whole." [Exc. 595]

In this predicament – of having been found with its hand deep in the proverbial

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[71] *Heitz*, 215 P.3d at 305 (quoting *Bostic v. Dep't of Rev., Child Support Enforcement Div.*, 968 P.2d 564, 568 (Alaska 1998)).

[72] *City of Homer v. Campbell*, 719 P.2d 683, 686 (Alaska 1986) (emphasis added) (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)).

cookie jar – OCS resorts to making difficult-to-follow due process arguments based on an idea of "free use" of money and the notion that OCS is only doing "exactly what federal law requires and anticipates . . . ." [At. Br. 34] As set forth below, OCS's due process arguments are completely wrong and ignore this Court's well-settled due process jurisprudence.

A. Foster Children Have a Protected Property Interest in Money That Belongs to Them.

When a citizen asserts a due process claim against the government, this Court must first determine "whether there is a deprivation of an individual interest of sufficient important to warrant constitutional protection."[73] It can hardly be questioned that money is a quintessential property interest deserving of due process protection.[74] This Court's precedents are in accord.[75] Nevertheless, OCS makes the surprising argument that its

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[73] *Bostic*, 968 P.2d at 568 (citations and internal quotation marks omitted).

[74] *See, e.g., Dickman v. Comm'r*, 465 U.S. 330, 336 (1984) ("We have little difficulty accepting the theory that the use of valuable property – in this case money – is itself a legally *protectible* property interest.") (emphasis in original); *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972) ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, *or money*.") (emphasis added); *Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001) (holding that an individual "clearly has a property interest in her money"); *McGuire v. Ameritech Servs., Inc.*, 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003) ("Money is certainly a property interest.").

[75] *See Bostic*, 968 P.2d at 568 (holding that a "significant property interest" is at stake when the State seeks to increase the amount of money a parent has to pay in child support); *Etheredge v. Bradley*, 502 P.2d 146, 148, 153 (Alaska 1972) (holding that pre-judgment attachment of $308 from checking account violated procedural due process and explaining that freezing of "checking account pending litigation presents one example of a significant interference with property interests . . . ."); *see also State v. Superior Court*, 40 P.3d 1239, 1243 (Alaska App. 2002) (holding that superior court's taking of $5,000 in cash bond securing criminal defendant's pre-trial release and giving the money to the State of Alaska implicated "the constitutional prohibition against the taking of property without due

practice of diverting foster children's Social Security monies without notice does not implicate a protected property interest. [At. Br. 32-37]

OCS's argument on this point is hard to follow. On the one hand, OCS concedes, as it must, that "[d]ue process attaches to the benefits . . . ."[76] [At. Br. 3] But OCS then argues that foster children do not have a legally protected interest in the "appointment of a potentially financially advantageous payee." [At. Br. 36] OCS is simply confusing two separate issues. The property interest here is obviously the Social Security money, which OCS admits belongs to the foster children. [Exc. 395] The appointment of OCS as the payee, instead of a more "financially advantageous" private payee, is what causes the deprivation of that property. OCS's argument improperly conflates these two distinct factors under the *Matthews* test.

The record shows that OCS maintains trust accounts (i.e., "individual Quickbooks accounts") for all foster children who are receiving Social Security benefits. [Exc. 119, 260, 295-96, 333-34, 397-400] The children's monthly Social Security monies flow into these individual trust accounts. [R. 1728-1868] The record then shows that OCS withdraws the monies from these children's trust accounts each month in order to reimburse itself for certain expenditures made by OCS on behalf of the child, including the "foster care room and board,"[77] clothing, travel, medical expenses, and other "specific expenditures for that

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process of law").

[76] OCS's concession is well taken. It has been settled since the Supreme Court's seminal decision in *Mathews* that Social Security benefits are a property interest to which due process protections attach. *See Mathews*, 424 U.S. at 332.

[77] On the accountings produced by OCS in discovery, the "foster care room and board"

child." [Exc. 260, 397; R. 1727-1868] This sort of "self-help" clearly violates due process.

At least that is what cases from around the country teach. For example, in *Wright v. Riveland*,[78] a class of prisoners challenged a Washington statute which authorized "a deduction of 35% from all funds received by inmates from outside sources," including "federal benefits and funds" received by the inmates, to help pay for the costs of their incarceration.[79] In addressing the inmates' procedural due process claim,[80] the Ninth Circuit explained: "Because inmates have a protectable property interest in funds received from outside sources, including those received from federal benefits, . . . the Department's deduction of funds from the federal benefits necessitates compliance with due process."[81]

Similarly, in *Higgins v. Beyer*,[82] an inmate sued various prison officials for "seizing money derived from a veteran's disability benefits check from his inmate account to pay a state court-ordered fine," without notice or a hearing, and pursuant to an "an

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is debited from the foster children's individual Quickbooks accounts as "Foster Care to families/individuals." [R. 1728-1868]

78 219 F.3d 905 (9th Cir. 2000).

79 *See id.* at 909-10.

80 The Ninth Circuit ultimately did not reach the merits of the inmates' due process claim. *See id.* at 913. Because the district court had declared the relevant Washington statute void on federal statutory grounds, "to the extent that it authorized the deduction of funds from federal benefits received by the Class," the Ninth Circuit concluded that the constitutional question of "the amount of process due prior to such deduction [was] rendered moot." *Id.*

81 *Id.* at 913 (citing *Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985)). The Ninth Circuit more recently reaffirmed in *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015), that a prisoner's trust account funds are a protected property interest within the scope of the Fourteenth Amendment.

82 293 F.3d 683 (3d Cir. 2002).

established state procedure for seizing a prisoner's funds to satisfy court-ordered fines."[83] The Third Circuit held that "inmates have a property interest in funds held in prison accounts. Thus, inmates are entitled to due process with respect to any deprivation of this money."[84] Because the prisoner "alleged sufficient facts to establish that he was entitled to a predeprivation notice and hearing," the court reversed the reversed the dismissal of his due process claim.[85]

The same rule applies to patients who are involuntarily committed to a state mental hospital. For example, in *Fayle v. Stapley*,[86] the court held that an involuntarily committed patient's disability insurance benefits deposited into a "Patient Deposit Fund" constituted "substantial property interests to which due process protection must be afforded."[87] And in *Crawford v. Gould*,[88] a class of patients involuntarily committed to California state psychiatric hospitals challenged the State of California's "practice of deducting patients' money, including Social Security benefits, from the personal deposit accounts maintained for each patient, to reimburse hospitals for the cost of patient care and maintenance."[89] The

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[83] *Id.* at 685-86, 693.

[84] *Id.* at 693 (internal citation and quotation marks omitted).

[85] *Id.* at 693.

[86] 607 F.2d 858 (9th Cir. 1979).

[87] *Id.* at 861 & n.2.

[88] 56 F.3d 1162 (9th Cir. 1995).

[89] *Id.* at 1163.

Ninth Circuit affirmed the district court's holding that "the notice California provides prior to withdrawing any funds from patients' accounts violates the procedural requirements of the Due Process Clause.[90]

Consistent with these authorities, the Maryland Court of Appeals (the highest state court in Maryland) held, in the case of *In re Ryan W.*,[91] that the foster child in that case had a protected property interest in his OASDI benefits that the State of Maryland was confiscating (without notice), while serving as payee, to reimburse itself for the costs of his foster care.[92] The trial court cited *Ryan W.* in holding that "the private interest in either type of benefit [i.e., SSI and OASDI] is deserving of some level of due process protection from the termination or decrease in the amount of benefits. This protection reflects the importance of the benefits to the beneficiary." [Exc. 194-95] Indeed, as the trial court recognized, foster children who are Social Security beneficiaries can use their monthly benefits to purchase food, shelter, clothing, and other "personal comfort" items,[93] and

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[90] *Id.* at 1165, 1169.

[91] 76 A.3d 1049, 1067-70 (Md. 2013).

[92] *See id* at 1069 ("Because Ryan, like all OASDI beneficiaries, has a property interest in his benefits, the Department's actions implicate Ryan's due process rights.") (citation omitted). Z.C. is not aware of any other decision that has squarely decided this issue in the context of foster care. For example, in *Keffeler III* – the only other reported decision where the same due process claim was asserted on behalf of a class of foster children whose Social Security benefits were being taken by the State of Washington – the court skipped the first *Mathews* factor and held that the "risk of erroneous deprivation of *any private interest the children may have* is low," and that "the governmental interest in not implementing additional procedures is high." 88 P.3d at 955-56 (emphasis added).

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

otherwise "improve the beneficiary's daily living conditions,"[94] *in addition to* the level of support that OCS provides for all foster children.[95] [Exc. 196]

B. OCS's Reliance On *Keffler II* is Wholly Misplaced.

OCS argues that foster children's property interest in having supplemental resources by virtue of their eligibility for Social Security benefits "has been rejected by the United States Supreme Court as inconsistent with the federal benefit scheme." [At. Br. 36] According to OCS, *Keffeler II* "forecloses the argument that foster children have a legally protected interest in the selection of a payee who will use benefits to supplement other resources . . . ." [At. Br. 36]

OCS misreads *Keffeler II*. The Supreme Court made very clear that it was deciding only a narrow question of *statutory* interpretation in *Keffeler II*, i.e., whether the State of Washington's taking of foster children's Social Security benefits violated 42 U.S.C. § 407(a).[96] More specifically, the court explained that "the case boils down to whether the department's manner of gaining control of the federal funds involves 'other legal process,' as the statute uses that term."[97] "Because the United States Supreme Court decided the case on a statutory basis, it did not address [any] constitutional claims."[98] Thus, contrary to

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[94] Social Security Administration, *A Guide for Representative Payees* at 4, available at: https://www.ssa.gov/pubs/EN-05-10076.pdf (visited July 11, 2022).

[95] *See* 7 AAC 53.020; *see also Keffeler III*, 88 P.3d at 957-58 (Sanders, J., dissenting).

[96] *Washington State Department of Social & Health Services. v. Guardianship Estate of Keffeler* ("*Keffeler II*"), 537 U.S. 371, 375 (2003).

[97] *Id.* at 383.

[98] *Keffeler III*, 88 P.3d at 951; *see also Keffeler II*, 537 U.S. at 389 n.12 (stating that

OCS's argument, the due process claim that is now before this Court (including the question of whether foster children's Social Security benefits constitute a protected property interest) is not controlled by *Keffeler II* nor any other binding authority.

C. The Lack of Notice *Guarantees* the Deprivation of Foster Children's Property.

OCS argues that "no child's benefits are threatened by OCS's representative payee applications." [At. Br. 3] To the contrary, the record evidence proves that the selection of OCS as the payee not only creates a risk of deprivation, it *guarantees* that foster children's Social Security monies will be lost to the State.[99] Because the class members were never told that OCS was intercepting their Social Security benefits to reimburse itself for their cost of care, they could not act to protect their money. The end result was that millions of dollars of the foster children's money was *actually* transferred into the State's coffers, without the foster children ever knowing. [Exc. 296; R. 1728-1868]

If foster children were notified that OCS was applying to be their payee, and intended to confiscate their Social Security benefits if appointed by the SSA, they would have every incentive to (1) seek administrative and/or judicial review of the SSA's selection of OCS as the representative payee;[100] and (2) ask a trusted family member or close friend with a higher priority than OCS to serve as the payee. They could also avail

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the constitutional claims were "far afield of the question" on which the court granted certiorari).

[99] *See* Hatcher, *supra*, 27 Cardozo L. Rev. at 1830 ("The selection of the state foster care agency . . . all but ensures the child will never see a dollar of her Social Security benefits.").

[100] *See* 20 C.F.R. §§ 404.902(q), 416.1402(e).

themselves of the federal remedies available to challenge any misuse of their benefits.[101] But, without notice, the class members could not take any of these steps to protect and maximize their interest in their Social Security benefits.[102]

The *Ryan W.* court understood this problem:

> [T]he presence of a federal administrative and judicial review process . . . serves a checks-and-balances function required to prevent, and remedy, where applicable, improper use of a child beneficiary's social security benefits. Without actual and direct notice, however, a child beneficiary, through his legal representative, is unlikely to know of and utilize timely the review process added by the 2004 amendments to the Social Security Act. If the beneficiary is neither aware that he or she is entitled to benefits, nor that a representative payee is receiving and using those benefits on his or her behalf, he or she is unlikely to benefit from the presence of an adequate federal remedy to test perceived irregularities.[103]

OCS, on the other hand, argues that "existing procedures surrounding OCS's representative payee applications are adequate and create no risk to any constitutionally protected interest in benefits." [At. Br. 37] OCS cites to the court's holding in *Keffeler III* that the risk of an erroneous deprivation is "low," because the SSA already provides a notice which "notifies the beneficiary/guardian of the appointment prior to any payment and encourages the beneficiary/guardian to contact the agency if he/she disagrees."[104] *Ryan*

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[101] *See* 42 U.S.C. § 405(j).

[102] *See* Hatcher, *supra*, 27 Cardozo L. Rev. at 1836 ("If provided with proper due process protections, including advance notice and the opportunity to object, the response of a foster child or the child's attorney to the application of a state agency to become the child's representative payee would seem obvious.").

[103] *Ryan W.*, 76 A.3d at 1069.

[104] 88 P.3d at 955. The *Keffeler III* court concluded that the SSA's notice was "sufficient to fulfill any procedural due process rights the children may have." *Id.* at 956.

W. pin-pointed the fundamental error in the court's analysis in *Keffeler III*: When a foster care agency is *both* a child's legal custodian and representative payee, the child does not actually get any notice from the SSA.[105] Rather, the SSA's notice "goes directly to the representative payee."[106] Thus, without the additional notice ordered by the trial court, the class members have no effective means to challenge OCS's appointment as their representative payee.[107]

Finally, OCS admitted that it never provides foster children with an accounting of their benefits, never tells them how much of their money is being taken, nor how OCS calculated their "cost of care." [Exc. 116-17, 192; R. 727] This means that foster children have no effective way to verify OCS's math, and to ensure that OCS has not misspent or misallocated their money.[108]

Keffeler III was wrongly decided. But it is also important to note that *Keffeler III* was decided under the due process clause of the Fourteenth Amendment. *See id.* at 950, 955-56. This Court has made clear that the "Federal Constitution protects the due process rights of all Americans. But federal law does not preclude the Alaska Constitution from providing more rigorous protections for the due process rights of Alaskans." *Doe v. Dep't of Pub. Safety*, 92 P.3d 398, 404 (Alaska 2004).

[105] *Ryan W.*, 76 A.3d at 1069. The trial court similarly found that the SSA "does not give the child direct notice of the selection of the payee." [Exc. 190]

[106] *Id.*

[107] The *Keffeler III* opinion included other non-sequiturs, quoted by OCS in its brief, such as the observation that "the identity of a representative payee does not influence eligibility for benefits . . . ." [At. Br. 38 (citing *Keffeler III*, 88 P.3d at 955)] While it is undoubtedly true that the identify of a payee does not influence eligibility, the *Keffeler III* court failed to comprehend that the appointment of a state foster care agency as the payee impacts foster children's benefits in other ways, i.e., it allows the government to expropriate the benefits.

[108] *Cf. Allen*, 203 P.3d at 1167-68 ("Due-process-compliant notices are designed to protect recipients from erroneous deprivation of benefits by allowing them to assess whether or not the agency's calculations are accurate. As evidenced by this case, agencies

For these reasons, the trial court correctly held that the risk of deprivation "if there is no notice provided to children about the consequences of the appointment of the State as representative payee is high." [Exc. 200] And that the value of providing notice "is therefore also high."[109] [Exc. 200]

D. The Diversion of Foster Children's Social Security Benefits Is the Result of State, Not Federal, Action.

Permeating OCS's brief is the constant refrain that this case "is an attempt to use the Alaska Constitution to repair perceived policy shortcomings in a purely federal law," and the lack of notice and resulting deprivation of property is the federal government's fault. [At. Br. 1] For example, OCS argues that if there is "a due process problem, it is one that arises from federal law, not from the State's act of applying for payee appointment." [At. Br. 40]

OCS is wrong. While the federal Social Security benefit programs provides the relevant context, the deprivation of foster children's property is directly the result of a series of actions taken *by OCS*, not the federal government. This triggers *OCS's* obligation,

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make mistakes. If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes."); *Shinault*, 782 F.3d at 1057 (holding, under the second *Mathews* factor, that the calculation of a prisoner's daily cost of care involved more than "a minimal risk of error").

[109] OCS argues that the value of the notice required by the trial court's generalized notice is "negligible at best," because the same information is available on the SSA's website. [At. Br. 40] That is not true; there is nothing on the SSA's website that would inform foster children, or the adults charged with protecting their best interests, about "the financial consequences of OCS, rather than a private person, becoming the representative payee." [Exc. 711] More importantly, this Court has made it abundantly clear that a governmental agency may not "improperly place on the recipient the burden of acquiring notice " from another source. *Baker v. State*, 191 P.3d 1005, 1010 (Alaska 2008).

as a state agency, to comply with due process.[110]

First, OCS affirmatively takes the necessary steps to be selected as a foster child's payee. [Exc. 112] It does so by submitting a 10-page application form to the SSA.[111] [Exc. 112] It is OCS's official policy to submit a payee application whenever OCS is making cost of care payments on behalf of a child: "When a child in a placement where the Office of Children's Services (OCS) is making cost of care payments, and that child receives or is eligible for Social Security benefits, OCS will apply to have those benefits paid to the State." [R. 354] These actions by OCS are not compelled by federal law. OCS could instead, as these children's fiduciary, assist them in identifying a trusted adult who could serve as their payee.[112] This private payee would then use the Social Security money for the children's needs, above and beyond their foster care stipend, instead of simply handing the money over to the State.

Instead, OCS *always* acts to become the payee, even if a child already has a perfectly suitable payee. [Exc. 190, 294, 379-80, 385, 422] OCS does not investigate whether the existing payee is doing an acceptable job, or whether there is another person with a higher

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[110] *See, e.g., Ostrow v. Higgins*, 722 P.2d 936, 942 (Alaska 1986) ("A valid constitutional challenge based on due process *requires state action* and the deprivation of an individual interest of sufficient importance to warrant constitutional protection.") (emphasis added, citation omitted); *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) ("Vested property rights are protected *against state action* by the provision of the Fourteenth Amendment of the Constitution of the United States and by Section 7 of Article I of [Alaska's] state constitution . . . .") (emphasis added).

[111] This application is called "Form SSA-BK-11." [Exc. 112; R. 457-66]

[112] 20 C.F.R. §§ 404.2040(a)(1), 416.640(a).

preference who is available to serve as a child's payee. [Exc. 294, 379-80, 385] Nor would it, given 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]

It thus makes sense why OCS not only fails to assist foster children in locating family members or friends to serve as their payee, but it affirmatively *conceals* the identities of such individuals from the SSA. [R. 734-961] The SSA's payee application requires OCS to list the name and contact information of any "relatives or close friends who have provided support and/or show active interest with the claimant." [R. 458] These individuals would be candidates to serve as a foster child's payee, and would have a higher priority than OCS.[113] But OCS withholds this critical data on its applications, thus preventing the SSA from appointing a private payee. [R. 734-961] This inevitably results in the appointment of OCS as the representative payee for virtually all Alaskan foster children.[114]

And, after OCS is appointed as payee, it is again state action that results in the deprivation of foster children's money. Nothing in federal requires OCS to pocket foster children's Social Security monies for self-reimbursement after it becomes the payee. Instead, and consistent with its duties under federal law, OCS could consider the unique needs and circumstances of each child and use the money to provide them with needed

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[113] *See id.*

[114] OCS is unable to identify *any* foster children in Alaska who are receiving Social Security benefits and have a private payee. [Exc. 338]

items and services not available from OCS, or conserve the money for the child's future use. Instead, OCS *always* uses the money for self-reimbursement. [R. 1728-1868]

It is the combination of these *state actions* that leads directly to the deprivation of foster children's property. But for OCS acting in this way, the affected foster children would have additional money to spend or save each month. And while OCS argues that the same procedural due process concerns might apply to other children who are not in the State's legal custody, this overlooks a fundamental difference: Only state actors have to comply with the due process clause of the Alaska Constitution; private individuals, such as a child's biological parents, do not.[115] This Court should therefore hold that OCS, which is a state agency and undoubtedly a state actor, has its own constitutional obligation to provide notice, separate and apart from any notice given by the SSA (which, for the reasons discussed above, does not actually reach the foster children).

E. OCS No Longer Disputes That the Basic Notice Required by the Trial Court Is Not Burdensome.

"In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs" that would be imposed on the State as a result of the requested procedural safeguards.[116] Here, the trial court found that the burden on OCS as a result of providing the generic notice required by the court was "minimal." [Exc. 200] Despite its contrary argument below,

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

[116] *Mathews*, 424 U.S. at 347.

where it claimed that providing a simple notice would "impose a significant burden on the State," [Exc. 27] OCS wisely concedes this issue on appeal.[117]

Thus, all three *Mathews* factors weigh heavily in favor of the trial court's conclusion that OCS was violating the due process clause of the Alaska Constitution by "not providing any sort of notice to the affected foster children before taking their Social Security benefits." [Exc. 468]

CONCLUSION

For the foregoing reasons, this Court should AFFIRM in full the trial court's declaratory judgment and injunction on the foster children's due process claim.

DATED: August 22, 2022

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[117] OCS argues that "[t]he superior court's error here lies in the first two factors" of the *Mathews* test. [At. Br. 32]

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

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

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