

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Family)
and Community Services, Kim Kovol)
in her official capacity as)
Commissioner of the Department,)
Office of Children’s Services, Kim)
Guay, in her official capacity as)
Director of Office of Children’s)
Services,) Supreme Court No. **S-18259**
))
Appellants/Cross-Appellees,)
))
v.)
))
Z.C.,)
))
Appellee/Cross-Appellant.)
Trial Court Case No. **3AN-14-07961 CI**

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

**BRIEF OF CROSS-APPELLEE
THE STATE OF ALASKA**

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FEDERAL STATUTES:

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

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

...

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

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

...

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

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

- (I) is under the age of 15,
- (II) is an unemancipated minor under the age of 18, or
- (III) is legally incompetent,

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

- (iii) Any notice described in clause (ii) shall be clearly written in language that is easily understandable to the reader, shall identify the person to be designated as such individual's representative payee, and shall explain to the reader the right under clause (i) of such individual or of such individual's legal guardian or legal representative--
 - (I) to appeal a determination that a representative payee is necessary for such individual,
 - (II) to appeal the designation of a particular person to serve as the representative payee of such individual, and
 - (III) to review the evidence upon which such designation is based and submit additional evidence.

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

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

...

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

...

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

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

(H) Each servicing office of the Administration shall maintain a list, which shall be updated periodically, of public agencies and certified community-based nonprofit social service agencies (as defined in paragraph (10)) which are qualified to serve as representative payees pursuant to this subsection or section 1007 or 1383(a)(2) of this title and which are located in the area served by such servicing office.

...

(5) In cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits. In any case in which a representative payee that--
(A) is not an individual (regardless of whether it is a "qualified organization" within the meaning of paragraph (4)(B)); or
(B) is an individual who, for any month during a period when misuse occurs, serves 15 or more individuals who are beneficiaries under this subchapter, subchapter VIII, subchapter XVI, or any combination of such subchapters;

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

...

(6) In addition to such other reviews of representative payees as the Commissioner of Social Security may otherwise conduct, the Commissioner shall provide for the periodic onsite review of any person or agency located in the United States that receives the benefits payable under this subchapter (alone or in combination with benefits payable under subchapter VIII or subchapter XVI) to another individual pursuant to the appointment of such person or agency as a representative payee under this subsection, section 1007 of this title, or section 1383(a)(2) of this title in any case in which--
(i) the representative payee is a person who serves in that capacity with respect to 15 or more such individuals;
(ii) the representative payee is a certified community-based nonprofit social service agency (as defined in paragraph (10) of this subsection or section 1383(a)(2)(I) of this title);
(iii) the representative payee is an agency (other than an agency described in clause (ii)) that serves in that capacity with respect to 50 or more such individuals; or
(iv) the representative payee collects a fee for its services.

The Commissioner shall also conduct periodic onsite reviews of individual and organizational payees, including payees who are related to the beneficiary and primarily reside in the same household, selected on the basis of risk-factors for potential misuse or unsuitability associated with such payees or beneficiaries.

...

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

...

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

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

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

(B) For purposes of this paragraph--

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

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

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

FEDERAL REGULATIONS:

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

A representative payee has a responsibility to—

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

§ 404.2040 [416.640] Use of benefit payments.

(a) Current maintenance.

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

...

§ 404.2045 [416.445] 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.

...

PARTIES

The State of Alaska, Department of Family and Community Services (DFCS), Kim Kovol in her official capacity as DFCS's commissioner, the Office of Children's Services (OCS), and Kim Guay in her official capacity as OCS's director, (OCS or the State) are the cross-appellees in this case, S-18259, and the appellants in S-18249. Z.C., an adult who was a foster child in OCS custody when she became the named plaintiff in the case [Exc. 31-32], is the cross-appellant in S-18259 and the appellee in S-18249.

INTRODUCTION

In this cross appeal, as in the primary appeal, Z.C. asks this Court to use the Alaska Constitution to change federal law. Z.C. expresses policy objections to the fact that federal law allows foster care agencies serving as representative payees to use children's benefits, just as parent representative payees do, to offset the cost of the children's care. In Z.C.'s view, this option should be removed from agencies like OCS, which should instead be required to use benefits to raise the standard of living for Social Security beneficiary children above that of other foster children, or to conserve the benefits for the children to take with them when they leave care. [Cr. At. Br. 27]

Z.C.'s arguments may make reasonable policy proposals. But Congress has so far declined to adopt them, instead leaving in place an existing, purely federal, representative payee system that contemplates—and indeed, encourages—*all* payees, including agencies like OCS, to spend benefits on children's current maintenance.¹

¹ See, e.g., 20 C.F.R. §§ 404.2040(a), 416.640(a); 404.2045, 416.445.

The Alaska Constitution cannot render illegal OCS's careful adherence to federal Social Security law. First, Z.C.'s equal protection claim fails. As a matter of preemption, a state constitution cannot be used to override representative payee discretion or forbid uses of Social Security benefits expressly contemplated and encouraged under federal law.² And no discrimination takes place where OCS follows federal Social Security law for every child in its care who is eligible for federal Social Security benefits. OCS treats all foster children the same. For each type of income or asset a foster child may have, OCS follows the law applicable to that type of income or asset.

OCS asks this Court in the primary appeal to reverse the superior court's ruling requiring it to send notices regarding representative payee selection, because federal law preempts that order and because OCS has not violated any child's due process rights. If OCS prevails on that issue, this Court need not reach the follow-up question in this cross appeal regarding whether OCS must repay to children the benefits it already—and lawfully—spent on their care, as an additional due process remedy. But if this Court does reach that question, such relief is not available. OCS has not been unjustly enriched, as Z.C. would have to show to support a disgorgement remedy; the remedy, like everything else in this case, is preempted; and such an award would be indistinguishable from money damages, which are not available for constitutional violations under Alaska law.

² *E.g., C.G.A. v. State*, 824 P.2d 1364, 1367 (Alaska 1992) (“The very existence of a federal remedy preempts state interference with an appointed payee’s decision to spend the social security benefits.”); *Allen v. State, Dep’t of Health & Soc. Servs. Div. of Pub. Assistance*, 203 P.3d 1155, 1161-62 (Alaska 2009).

ISSUES PRESENTED

1. *Equal protection: Preemption.* Z.C.'s equal protection claim seeks an order prohibiting OCS from using foster children's Social Security benefits to pay for their foster care. Did the superior court correctly deem the claim preempted by federal law, which gives OCS authority and discretion as a child's representative payee to use the benefits in this way?
2. *Equal protection: Merits.* Did the superior court correctly determine that even if the equal protection claim is not preempted, OCS's use of foster children's Social Security benefits to pay for their care does not violate Alaska's equal protection guarantee because children with Social Security benefits are not similarly situated to children without benefits, and in any case, OCS's use of foster children's Social Security funds is substantially related to its legitimate interest in spending benefits on current maintenance, as federal law requires?
3. *Disgorgement as a due process remedy.* OCS's appeal addresses the injunctive remedy the superior court awarded on the due process claim. Did the court correctly conclude that disgorgement or constructive trust are not available as additional remedies on that claim, because those doctrines remedy unjust enrichment, and OCS's legal use of benefits cannot be unjust? And should the superior court have accepted OCS's additional arguments that these remedies, like the due process claim generally, are preempted and that tort-style monetary remedies are not available for constitutional claims in Alaska?

STATEMENT OF THE CASE

I. OCS’s use of children’s benefits for their day-to-day care is consistent with and encouraged by federal law and policy.

OCS’s Appellant’s brief in the primary appeal accurately and thoroughly set forth federal Social Security law, regulations, and practices relevant to foster children who are eligible for benefits. [At. Br. 5-13] OCS also described its practice of applying for appointment as representative payee for eligible children in its care and its use of the benefits for those children’s day-to-day needs when the SSA selects OCS as representative payee. [At. Br. 13-16] This cross-appeal requires no additional background. OCS adds only its response to the numerous misleading statements of law and fact in the background sections of Z.C.’s cross-appellant brief and in amici’s brief.

No doubt exists that state foster care agencies’ use of foster children’s Social Security benefits to pay for their foster care aligns with federal law and Social Security Administration (SSA) policy.³ The primary purpose of Social Security benefits is to cover children’s day-to-day needs for food, shelter, and clothing.⁴ Foster care payments directly cover these necessities.⁵ The SSA, Congress, and the United States Supreme Court are all aware that many states—including Alaska—use foster children’s benefits in

³ See, e.g., 42 U.S.C. 405(j)(9); 20 C.F.R. 404.2035, 404.2040; 416.635, 416.640; POMS at GN 00502.159 (“Foster care agencies have traditionally been among SSA’s most dependable payees”), *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) (“*Keffeler IP*”); *C.G.A.*, 824 P.2d at 1369 n.14 (“the state [as representative payee] could legitimately apply C.G.A.’s [Social Security] benefits toward foster care”).

⁴ 20 C.F.R. §§ 404.2035, 416.635; 404.2040, 416.640.

⁵ 7 AAC 53.020(b).

this way, and all three branches of the federal government consider it to be consistent with federal law and with children’s best interests.⁶

Z.C.’s Statement of the Case consists mostly of policy arguments in support of amending the Social Security Act to change this current reality.⁷ That is, after all, the injunctive relief that Z.C. seeks as remedy for her equal protection claim—an order prohibiting Alaska, alone among fifty states, from using foster children’s Social Security funds to pay for their foster care. [Exc. 466, 599] Amici Professor Hatcher and Children’s Advocacy Project wrote articles criticizing the practice in 2006⁸ and 2011.⁹

Indeed, legislation to accomplish Z.C.’s desired policy change was introduced in the U.S. House of Representatives in 2016, but it failed to move out of committee.¹⁰ The topic of foster care agencies acting as representative payees for foster children and using their Social Security benefits to partially offset the cost of their foster care has been the

⁶ See, e.g., POMS at GN 00502.159, Strengthening Protections for Social Security Beneficiaries Act, Pub. L. 115-165 (2018); *Keffeler II*, 537 U.S. at 390 (“The Commissioner [of Social Security] has decided that a representative payee serves the beneficiary’s interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants”).

⁷ There are also strong policy arguments *against* changing the law. See, e.g., *Keffeler II*, 537 U.S. at 391 (“respondents’ position . . . would tend to produce worse representative payees in these cases [of foster children], with less money to spend”).

⁸ Daniel L. Hatcher, “Foster Care Children Paying for Foster Care,” *Cardozo Law Review*, vol. 27, no. 4 (2006).

⁹ First Star and Children’s Advocacy Institute, University of San Diego School of Law, “The Fleecing of Foster Children: How We Confiscate Their Assets and Undermine Their Financial Security” (2011).

¹⁰ See H.R. 5737, “Protecting Foster Youth Resources to Promote Self-Sufficiency Act” (114th Congress 2015-2016) (available online at <https://www.congress.gov/bill/114th-congress/house-bill/5737/text>).

topic of multiple Congressional Research Service reports summarizing arguments for and against change.¹¹ And the 2018 Strengthening Protections for Social Security Beneficiaries Act added provisions specifically addressing foster care agencies as representative payees.¹² So there can be no question that Congress is well aware of how OCS uses children's benefits and has thus far declined advocates' entreaties to require foster care agencies to treat benefits differently than other representative payees do.

In short, Z.C. is factually and legally wrong to characterize OCS's actions as a "shameful," "surreptitious" practice of "diverting" children's funds "to its own coffers."¹³ OCS uses the funds for the children's benefit and in their best interests, as Congress and the SSA allow and encourage.¹⁴ And there is nothing "surreptitious" about it. As early as 1992, this Court noted that the State can serve as representative payee for a foster child

¹¹ *E.g.*, Congressional Research Service, "Children in Foster Care and Social Security Administration Benefits: Frequently Asked Questions" (November 23, 2021) (available online at <https://crsreports.congress.gov/product/pdf/R/R46975>); Congressional Research Service, "Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care" (September 28, 2012) (available online at https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/RL33855_%20v3_gb_0.pdf).

¹² Pub. L. 115-165 (2018). Section 103 requires states and tribes to share information with the SSA to allow the SSA to determine the foster care status of beneficiaries, and Section 104 addresses states' liability for overpayments of Social Security benefits on behalf of foster children. 42 U.S.C. §§ 404(a), 405(j)(11).

¹³ *E.g.*, Cross-Appellant's Brief at 1, 9.

¹⁴ *Keffeler II*, 537 U.S. at 390; 20 C.F.R. §§ 404.2035, 416.635, 404.2040(a), 416.640(a); 42 U.S.C. § 405(j)(11) (creating requirements that states share information with the SSA regarding children entering and leaving foster care, so the SSA can redetermine representative payee appointments at such junctures).

and use the funds to pay for his foster care,¹⁵ and in 2003, the United States Supreme Court confirmed that this assessment of federal law was correct.¹⁶ Z.C. and amici’s policy arguments may continue to be addressed to Congress, but they are irrelevant to the issues before this Court.

The facts set forth in Z.C.’s brief are also misleading and incomplete.¹⁷ She overlooks the central role of the SSA throughout the representative payee appointment process. Z.C. creates the impression that OCS can somehow make itself the representative payee, ignoring the SSA’s role in evaluating applications,¹⁸ investigating

¹⁵ *C.G.A.*, 824 P.2d at 1369 n.14.

¹⁶ *Keffeler II*, 537 U.S. at 390.

¹⁷ Amici’s brief also contains numerous inaccurate factual statements not supported in the record. *Compare, e.g.*, Brief of Amici at 12 (alleging without citation that Z.C.’s monthly Social Security benefit was \$700) *with* Exc. 486-87 (Z.C.’s benefit was \$30); Brief of Amici at 14 (alleging without citation that foster children must forgo “better clothes” or a “summer trip” or “dance lessons”) *with* Exc. 402 (“essentially all children in foster care, OCS works to make sure all of their needs are met, regardless of whether . . . they are a Social Security beneficiary or not, and so if the child needs something, they are likely going to get it. It’s not just Social Security beneficiaries that may have an opportunity to attend camp. Non-Social Security beneficiaries have that opportunity, too. It’s not Social Security beneficiaries that have the option to go on vacation with their foster parents. We pay for those things for non beneficiaries as well”).

¹⁸ 42 U.S.C. § 405(j)(2)(A); 20 C.F.R. §§ 404.2020, 416.620; 404.2024, 416.624; POMS §§ GN 00502.130 (“Factors to consider in Evaluating Payee Applicants”), GN 00502.132 (“Selecting a Qualified Representative Payee”), GN 00502.159 (“Additional Considerations When Foster Care Agency is Involved”).

potential alternative representative payees,¹⁹ appointing the representative payee,²⁰ sending notices of the appointment as representative payee,²¹ hearing appeals from the decision to appoint a representative payee,²² monitoring representative payees' use of funds,²³ and ultimately, collecting restitution in the event a representative payee misuses funds.²⁴ Z.C. also ignores the fact that the SSA alone has the power to remove OCS as a child's representative payee at any time if it determines that the child's interest not served by the appointment, including scenarios where a representative payee has misused a child's funds.²⁵

¹⁹ 20 C.F.R. §§ 404.2021, 416.421; POMS § GN 00502.100 (“How to find payee leads”). The most egregious misrepresentation made by the amici is that this case “involves concealment” and OCS “conceals *known* information about parents and relatives from SSA.” Brief of Amici at 2 (emphasis in original). The amici cite *no* evidence in the record that OCS ever withheld any information regarding a child's parents or relatives from the SSA. And the amici fail to recognize the SSA's responsibility to seek out potential alternate payees. In any case, Z.C. did not raise this argument below or in her cross-appeal, and “[i]t is well settled that courts will not consider issues raised by amici curiae which are not raised by the parties.” *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 809 n.62 (Alaska 1975).

²⁰ 42 U.S.C. § 405(j)(1)(A); POMS § GN 00502.183 (Making a Payee Appointment Determination”).

²¹ 42 U.S.C. § 405(j)(2)(E); 20 C.F.R. §§ 404.2030, 416.630; POMS §§ GN 00503.100 (“Advance Notice”), GN 00503.130 (“Final Notice”).

²² 42 U.S.C. § 405(j)(2)(E)(iii)(II); 20 C.F.R. §§ 404.2030, 416.630; POMS § GN 00503.110 (“Appeal rights”).

²³ 42 U.S.C. § 405(j)(3)(B), (j)(6); 20 C.F.R. §§ 404.2065, 416.665; POMS § GN 00605.001 (“Overview of Annual Representative Payee Accounting”).

²⁴ 42 U.S.C. § 405(j)(5); 20 C.F.R. §§ 404.2041, 416.641.

²⁵ 20 C.F.R. §§ 404.2050, 416.650; POMS §§ GN 00504.100 (“Determining the Need for a Successor Payee”), 00504.101 (“Termination of Organizational or Individual Representative Payees Serving Multiple Beneficiaries”).

II. The State’s motions for summary judgment on Z.C.’s equal protection claim and on her request for a disgorgement remedy for the due process claim were granted.

After the superior court awarded Z.C. relief in a series of orders regarding the notice it said OCS must provide [Exc. 183, 468, 698], the parties cross-moved for summary judgment on the remaining issues before the court: (1) Z.C.’s equal protection claim and (2) her request for a monetary remedy in addition to injunctive relief on the due process claim. [Exc. 212, 232, 254, 298; 453, 481, 510, 531] Z.C.’s description of the superior court’s order leaves out much of the court’s reasoning on both issues.

A. The superior court granted summary judgment to OCS on Z.C.’s equal protection claim because the requested remedy is preempted and because the claim fails on its merits.

Z.C.’s second claim alleged a violation of the equal protection clause of the Alaska Constitution. Citing *C.G.A v. State*²⁶ and *In Re Ryan W.*,²⁷ the superior court concluded that the equal protection claim is preempted by federal law. [Exc. 602-05] Specifically, the superior court held that Z.C.’s “*proposed remedy* is preempted.” [Exc. 605 (Emphasis added)] As a remedy for her equal protection claim, Z.C. sought an order prohibiting OCS from using foster children’s Social Security benefits to pay for foster care, despite the fact that federal law contemplates this use. [Exc. 466, 599] The court concluded that “federal law preempts a state court from dictating how a state agency like OCS may exercise its duties and discretion as a foster child’s representative

²⁶ *C.G.A v. State*, 824 P.2d 1364 (Alaska 1992)

²⁷ *In Re Ryan W.*, 76 A.3d 1049 (Md. 2013).

payee.” [Exc. 603] Recognizing that federal law gives OCS the discretion and authority to use foster children’s Social Security benefits for foster care payments when serving as their representative payee, the superior court held that state law cannot prohibit OCS from doing exactly that. [Exc. 600-05]

The superior court held in the alternative that OCS’s use of Social Security benefits—in compliance with federal law—does not violate equal protection principles at all. [Exc. 605] First, the court concluded that foster children with Social Security benefits are not similarly situated to foster children who may have other resources but not Social Security, and therefore, OCS’s practice in using children’s Social Security funds, but not other funds, to pay for foster care could not violate equal protection. [Exc. 607] The “complex set of eligibility rules and requirements concerning the use of [Social Security] benefits” distinguishes the two groups. [Exc. 607] Only Social Security beneficiary children are subject to those federal rules and requirements. [Exc. 607]

And finally, even operating under an alternative assumption that the two classes are similarly situated, the superior court still found no equal protection violation. [Exc. 609] The court held that OCS’s compliance with federal law governing the use of Social Security funds is a legitimate purpose justifying treating those funds differently than other funds. [Exc. 609] The superior court considered the purpose legitimate even if OCS could potentially comply with federal law in another way, for example, by using the funds to provide additional resources not available to other foster children or by conserving them. [Exc. 609-10] And the court found a substantial relationship between OCS’s legitimate interest in complying with federal law and its actions, which in fact

comply with federal law, even if other treatment of the benefits might also comply with federal law. [Exc. 609-10]

B. The superior court held that disgorgement or constructive trust are not available remedies for the due process violation it found.

As described in the main appeal, the superior court ruled in Z.C.'s favor on her claim that OCS violated the due process clause of the Alaska Constitution and entered declaratory and injunctive relief in her favor, requiring OCS to provide additional notice. [Exc. 183, 468] In addition to the notice remedy the court awarded, Z.C. sought further relief in the form of "disgorgement" of past benefits through creation of a trust for each foster child for whom OCS had served as a representative payee without giving the child advance notice of OCS's application. [Exc. 36-37, 587] On cross-motions for summary judgment, the superior court ruled against Z.C. on these remedies. [Exc. 595]

The superior court reasoned that disgorgement and constructive trust are remedies for unjust enrichment, and OCS could not be unjustly enriched by its lawful actions. "[T]he Court cannot find that this systemic lawful use of federal funds is inequitable such that disgorgement or an equivalent remedy is required." [Exc. 596] The Court also explained that OCS's "failure to give notice was not necessarily the cause of any financial deprivation. To show actual deprivation each child would have to show that a qualified alternate payee was known to the child (or could have been located), was willing to act in that capacity, and would have used the benefits in a manner that supplemented the State's financing the cost of foster care." [Exc. 595] The court, however, rejected OCS's alternative arguments that the due process remedies Z.C. sought

are preempted by federal law [Exc. 591] and that they would be, in reality, monetary damages—despite Z.C.’s attempt to label them otherwise—and therefore not available under Alaska law to remedy a constitutional due process violation. [Exc. 592]

Z.C. cross-appeals from the order ruling in OCS’s favor on the equal protection claim and the due process remedy.

STANDARDS OF REVIEW

This Court “review[s] a grant of summary judgment de novo.”²⁸ “Whether a federal statute preempts a state . . . rule is . . . a question of law” subject to de novo review on appeal.²⁹ Constitutional questions, including analysis of “the nature and importance of the competing personal and governmental interests at stake, . . . the relevant level of scrutiny for governmental action, and . . . the means chosen to advance governmental interests” in an equal protection claim all receive de novo review.³⁰ In reviewing such legal rulings, this Court “ ‘adopt[s] the rule of law most persuasive in light of precedent, reason, and policy.’ ”³¹ Constitutional questions surrounding due process claims similarly are legal issues subject to de novo review.³²

²⁸ *Blair v. Fed. Ins. Co.*, 433 P.3d 1048, 1051 (Alaska 2018).

²⁹ *Catalina Yachts v. Pierce*, 105 P.3d 125, 128 (Alaska 2005).

³⁰ *Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122, 1132 (Alaska 2016)

³¹ *State v. Schmidt*, 323 P.3d 647, 655 (Alaska 2014) (quoting *State v. Anthony*, 810 P.2d 155, 156-57 (Alaska 1991)).

³² *Alborn Constr., Inc. v. Dep’t of Lab. & Workforce Dev., Lab. Standards & Safety Div.*, 507 P.3d 468, 483 (Alaska 2022)

ARGUMENT

I. Federal law preempts Z.C.’s equal protection claim.

OCS described the law of preemption in its opening brief at pages 24-26. In short, “the Supremacy Clause of the United States Constitution dictates that state law must always yield” where it conflicts with federal law.³³ Federal cases and cases from this Court speak of two types of preemption—express and implied, and in turn, “implied” preemption cases have been categorized into two types.³⁴ Field preemption occurs where “Congress is said to have completely occupied a field, leaving no room for state law,”³⁵ even complementary or consistent state laws, and conflict preemption covers cases where “compliance with both state and federal law is impossible” or “the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁶

These preemption categories are not “rigidly distinct.”³⁷ Rather, “field pre-emption may be understood as a species of conflict pre-emption,”³⁸ especially in cases like this one where the state law in question—here, a court order—injects new policy goals and

³³ *Allen v. State, Dep’t of Health & Soc. Servs. Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009).

³⁴ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018).

³⁵ *Allen*, 203 P.3d at 1161.

³⁶ *Oneok*, 575 U.S. at 377 (internal quotation marks and citations omitted).

³⁷ *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

³⁸ *Id.*

duties into a field already covered by federal law.³⁹ The closely related doctrines support the superior court’s conclusion that federal law preempts the equal protection claim.

A. Federal law occupies, to the exclusion of State law, the field of representative payees’ use of beneficiaries’ Social Security funds.

In field preemption cases, federal law is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁴⁰ Thus, where Congress creates “a single integrated and all-embracing system,” no state regulation may supplement it, “even if it is parallel to federal standards.”⁴¹

Federal law governs how a representative payee may use Social Security funds on behalf of a beneficiary, and there is no room for state law to add or subtract authorized uses. In her equal protection claim, Z.C. seeks to do exactly that: she wants a state court to prohibit OCS from using Social Security benefits in the exact manner that federal law authorizes. [Exc. 599] She asks a state court to limit the discretion that the SSA confers on OCS when the SSA appoints it to serve as representative payee for beneficiary children. The federal scheme does not leave room for this type of “state interference with an appointed payee’s decision to spend the Social Security benefits.”⁴²

³⁹ See *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 115-16 (1992) (describing “conflict pre-emption, which occurs when state law is held to ‘undermin[e] a congressional decision in favor of national uniformity of standards,’” and “presents ‘a situation similar in practical effect to that of federal occupation of a field.’”) (Souter, J., dissenting) (quoting L. Tribe, *American Constitutional Law* 486 (2d ed. 1988)) (cited with approval in *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000)).

⁴⁰ *English*, 496 U.S. at 79.

⁴¹ *Arizona v. United States*, 567 U.S. 387, 400-01 (2012) (internal citations omitted).

⁴² *C.G.A. v. State*, 824 P.2d 1364, 1367 (Alaska 1992). Z.C. attempts to distinguish *C.G.A.* by artificially narrowing the holding. Cross-Appellant’s Brief at 34. But *C.G.A.*’s

This conclusion is especially clear where nationwide uniformity is part of the federal scheme.⁴³ The SSA is a national agency, operating under comprehensive federal statutes, regulations, policies, and procedures.⁴⁴ Z.C. seeks an order that would create special rules for Alaska, holding Alaska to state-specific standards that Congress has so far declined to adopt for the nation as a whole.⁴⁵ The federal Social Security program leaves no room for state-specific rules or exceptions to rules.⁴⁶ The entire field of representative payee use of Social Security benefits is preempted.

B. Z.C.’s equal protection claim directly conflicts with federal law by seeking to take away authority the SSA has conferred on OCS.

The remedy that Z.C. seeks for her equal protection claim would also directly conflict with federal law. Where state law “impose[s] a duty that [is] inconsistent—*i.e.* in

holding is not simply that the federal law prohibiting attachment of benefits preempted a state court order that a payee remit Social Security payments to the state as child support. The *C.G.A.* court held more broadly that because federal law provides a remedy when an appointed representative payee abuses her duty, any kind of state interference with how a representative payee spends the benefits is preempted. *Id.*

⁴³ See, e.g., *Arizona*, 567 U.S. at 400-01.

⁴⁴ 42 U.S.C. §§ 901 *et seq.* (creating the SSA and making it the administrator of OASDI and SSI); 20 C.F.R. §§ 422.1 *et seq.* (governing the organization and function of the Social Security Administration); POMS Home <https://secure.ssa.gov/apps10/poms.nsf/Home?readform>.

⁴⁵ See *supra*, notes 10-11 and accompanying text.

⁴⁶ E.g., *In Re Ryan W.*, 76 A.3d 1049, 1060-61 (Md. 2013) (“The SSA Commissioner is responsible for promulgating rules and regulations for implementing and executing the provisions of the Social Security Act, in addition to monitoring payees. Because this authority is vested solely with the Commissioner, the Maryland juvenile court does not have authority under Maryland law to monitor the allocation of social security benefits by a representative payee.”) (internal citations omitted).

conflict—with federal law,” the state law is preempted.⁴⁷ Federal law requires representative payees to use Social Security funds “for the use and benefit” of the beneficiary.⁴⁸ And federal law specifies that a representative payee always uses funds “for the use and benefit” of the beneficiary when it spends them for the beneficiary’s “current maintenance.”⁴⁹ As the United States Supreme Court has recognized, this includes foster care payments.⁵⁰ Thus, when the SSA appoints OCS to act as a child’s representative payee, it grants OCS the authority and discretion to use the funds to pay for the child’s foster care.⁵¹ Z.C. asks Alaska courts to curtail that authority by prohibiting OCS from doing exactly what the SSA has authorized—and encouraged—OCS to do. The state court order Z.C. requests would directly conflict with federal law.

Z.C.’s arguments conflict with the spirit of federal law, as well as the letter, thus frustrating its purpose. The SSA made a policy decision to prioritize use of Social Security benefits to cover beneficiaries’ basic day-to-day needs over saving the benefits or using them for other purposes:

⁴⁷ *Murphy*, 138 S. Ct. at 1480 (citing *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 493 (2013)).

⁴⁸ 42 U.S.C. § 405(j)(9).

⁴⁹ 20 C.F.R. §§ 404.2040, 416.640.

⁵⁰ *Keffeler II*, 537 U.S. at 390. *See also C.G.A.*, 824 P.2d at 1369 n.14 (“[T]he state [as representative payee] could legitimately apply C.G.A.’s [Social Security] benefits toward foster care”).

⁵¹ 20 C.F.R. §§ 404.2035, 416.635 (“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”).

Under her statutory authority, the [Social Security] Commissioner has read the “interest” of the beneficiary in light of the basic objectives of the Act: to provide a “minimum level of income” to children who would not “have sufficient income and resources to maintain a standard of living at the established Federal minimum income level,” and to provide workers and their families the “income required for ordinary and necessary living expenses.”⁵²

Z.C. wants this Court to re-prioritize use of these benefits for foster children, in frustration of the policy determinations made by Congress and the SSA.⁵³

In sum, whether analyzed under field or conflict preemption principles, the result is the same: federal law preempts Z.C.’s equal protection claim.⁵⁴ This case presents a

⁵² *Keffeler II*, 537 U.S. at 390. This is true of OASDI benefits as well as SSI benefits, though OASDI payments do not have the SSI benefits resource cap. Both programs are governed by identical regulations providing that benefits may be conserved only “[a]fter the representative payee has used benefit payments consistent with the guidelines in this subpart” to cover the beneficiaries’ current maintenance. 20 C.F.R. § 404.2045; 20 C.F.R. § 416.445 (emphasis added). *See also* POMS at § GN 00602.001 (“A payee *must* use benefits to provide for the beneficiary’s current needs such as food, clothing, housing, medical care and personal comfort items, or for reasonably foreseeable needs”) (emphasis added). The brief of amici misrepresents this guidance at pages 16-17.

⁵³ The United States Supreme Court compared state foster care agencies to parents in this regard and cited cases holding that federal law preempts state court orders requiring parent representative payees to conserve their children’s Social Security funds after using their own funds for their beneficiary children’s current maintenance. The federal directive that representative payees use Social Security benefits for current maintenance preempts any state court judgment requiring parents to save the money for their children instead. *Id.* at 388 n. 11 (citing *In re Guardianship of Nelson*, 547 N.W.2d 105, 108 (Minn. 1996); *Mellies v. Mellies*, 815 P.2d 114, 117 (Kan. 1991)).

⁵⁴ Z.C. argues both that the state superior court is a court of “competent jurisdiction” to determine whether OCS “misused” her benefits under 42 U.S.C. § 405(j)(1)(A) and that OCS’s alleged equal protection violations do not amount to a “misuse” of her benefits, as defined later in that same subsection of that same statute at 42 U.S.C. § 405(j)(9). Cross-Appellant’s Brief at 33. These arguments are obviously contradictory, and they were not presented to the superior court below. [Exc. 603] But the bottom line is that Z.C. simply has no colorable argument that OCS misused her benefits.

paradigmatic preemption scenario. “Congress [has] enact[ed] a law that imposes restrictions or confers rights on private actors,” and Z.C. would like this Court to create “state law confer[ring] rights or impos[ing] restrictions that conflict with the federal law.”⁵⁵ In all such cases, “federal law takes precedence and the state law is preempted.”⁵⁶

II. OCS does not violate equal protection by complying with federal law for foster children who are subject to that law.

Z.C.’s equal protection claim is meritless even if it is not preempted. Article I, section 1 of the Alaska Constitution provides in part that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.” This clause is implicated when the State treats two groups of similarly situated people unequally.⁵⁷ If this Court finds that the State is treating similarly situated people differently, it then conducts a three-part analysis of whether the differential treatment violates Alaska’s equal protection guarantee.⁵⁸ But where the State is not discriminating between similarly situated groups in at all, no equal protection analysis need be undertaken.⁵⁹

⁵⁵ *Allen v. State, Dep’t of Health & Soc. Servs. Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009).

⁵⁶ *Id.*

⁵⁷ *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (“A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently”).

⁵⁸ *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

⁵⁹ *Burke v. Raven Elec., Inc.*, 420 P.3d 1196, 1205 (Alaska 2018) (“The legal conclusion that ‘two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes.’”).

At the first step in an equal protection inquiry, this Court determines what weight to give the constitutional interest allegedly impaired by the state action.⁶⁰ This first step determines the appropriate level of review.⁶¹ The parties agree that this case implicates only economic interests, which receive the most deferential level of review.⁶² Under that level of review, this Court determines at the second step whether the State’s action serves a legitimate purpose.⁶³ Third, this Court determines whether a substantial relationship exists between the State’s purpose and its actions.⁶⁴

If the State’s actions bear a substantial relationship to its legitimate purpose, the equal protection analysis ends. Even where the State “in its wisdom could conceivably have better provided for such instances, . . . equal protection, even under Alaska’s stricter standard, does not demand perfection in classification.”⁶⁵ This is true even when a court is “sympathetic to [the plaintiff’s] particular circumstances” and upholding the State’s policy “may seem harsh.”⁶⁶ “[P]olicies reviewed under minimum scrutiny are not unconstitutional

⁶⁰ *Anthony*, 810 P.2d at 157.

⁶¹ *Id.*

⁶² *Id.*; Cross-Appellant’s Brief at 25. The amici argue that heightened scrutiny is warranted, but this Court does not consider arguments made only by amici. *See Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 809 n.62 (Alaska 1975).

⁶³ *Anthony*, 810 P.2d at 157.

⁶⁴ *Id.*

⁶⁵ *Commercial Fisheries Entry Comm’n v. Apokedak*, 606 P.2d 1255, 1268 (Alaska 1980). *See also id.* at 1264 (“the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines in the local economic sphere”) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

⁶⁶ *C.J. v. State, Dep’t of Corr.*, 151 P.3d 373, 380 (Alaska 2006).

simply because a litigant is able to propose a regulation that would further the legislative goal in a more rational manner.”⁶⁷

A. Foster children with Social Security benefits are not similarly situated to those without benefits.

Z.C.’s has not identified two similarly situated groups of foster children that the State treats differently, and her equal protection claim therefore fails before even crossing the threshold. As the trial court correctly held, foster children with Social Security benefits are subject to a complex and detailed array of federal law and regulation that does not apply to foster children without those benefits. [Exc. 607] The beneficiary foster children qualified for their benefits due to their unique circumstances, either through qualifying disability and asset levels or through loss of a wage-earner parent.⁶⁸ For children who meet the standards to qualify, federal law both provides the benefits and governs their use in complex detail.⁶⁹ Foster children without Social Security benefits are differently situated, and as a result, receive no such funds from the federal government.⁷⁰ Whatever income they may receive from other sources does not carry the same legal

⁶⁷ *Id.*

⁶⁸ *See Keffeler II*, 537 U.S. at 375 (describing OASDI and SSI Social Security benefit programs and how children may qualify for them).

⁶⁹ *See* 20 C.F.R. §§ 404.1 *et seq.*; 20 C.F.R. §§ 416.101 *et seq.*

⁷⁰ *Cf. Lauth v. State*, 12 P.3d 181, 187 (Alaska 2000) (holding that “children with one economically secure parent who is providing for their care at least fifty percent of the time are not similarly situated with children having both parents economically eligible for benefits”); *Brandon v. Corr. Corp. of Am.*, 28 P.3d 269, 276 (Alaska 2001) (holding that indigent prisoners are not similarly situated to indigent non-prisoners).

requirements and restrictions on its use. The superior court was correct in this straightforward analysis: the two groups are not similarly situated.

Z.C.'s premise is flawed in a second way as well. The State does not require foster children with Social Security benefits to pay for their foster care. The United States Supreme Court has rejected the argument that applying children's Social Security benefits to the cost of their foster care equates to requiring them to pay for their care: "[T]he department is simply not a creditor of the foster care children for whom it serves as representative payee. No law provides that they are liable to repay the department for the costs of their care, and the State . . . makes no such claim."⁷¹ OCS uses children's Social Security benefits for their current maintenance not because the children are being made to pay for their current maintenance, but because that is the use that the SSA prioritizes for the funds.⁷²

The bottom line is that OCS differentiates between classes of *funds*, not groups of *children*. In compliance with State law, OCS conserves PFD payments in trust for all children its custody.⁷³ OCS has no claim to a child's employment income or to any other funds belonging to children that are not paid to OCS for the child's benefit. [Exc. 410-11] But Social Security benefits are different; when serving as a child's representative payee,

⁷¹ *Keffeler II*, 537 U.S. at 382. It is no more accurate to say that the State requires children with Social Security benefits to pay for their own foster care than it is to say that parents of children with Social Security benefits require their children to support themselves.

⁷² *Id.*

⁷³ AS 47.10.115.

OCS follows federal law and applies Social Security benefits to a child's current maintenance.⁷⁴ [Exc. 410-11] These practices are the same for *all children* in OCS custody. [Exc. 410-11] The children are treated the same, and different funding sources are treated according to the different legal rules governing those funds.⁷⁵ [Exc. 402-03]

Z.C.'s equal protection claim fails to pass the threshold requirement. She does not identify similarly situated classes of children receiving differential treatment from the State.

B. Even if foster children with Social Security benefits and those without were similarly situated, OCS's actions are fairly and substantially related to its legitimate goal of complying with federal law.

Z.C.'s equal protection claim fails upon application of equal protection scrutiny as well. Z.C. does not dispute that compliance with federal law is a legitimate state interest.⁷⁶ Nor does Z.C. dispute that OCS's practice of applying foster children's Social Security benefits to the cost of their foster care complies with federal law.⁷⁷ Actions that

⁷⁴ Z.C.'s characterizations that OCS invariably uses foster children's benefits for foster care payments are wrong. It is true that is the most common application of the benefits, but OCS also applies the funds to other needs, including additional clothing, travel, electronics, and even occasionally vehicles. [Exc. 416-17, 486]

⁷⁵ The amicus brief at 3 states: "Non-disabled and non-orphaned foster children get to keep all of their assets (permanent fund, inheritance, earnings from employment) intact for supplemental use or to save for housing, college, or other vital needs." This statement is equally true of foster children *with* Social Security benefits. The children are not treated differently; Social Security *funds* are treated differently from PFDs, inheritance, or employment income because different laws apply to those funds. [Exc. 411]

⁷⁶ Cross-Appellant's Brief at 26.

⁷⁷ *Id.* at 11-12.

comply with federal law are undeniably substantially related to furthering the State's legitimate interest in complying with federal law. Equal protection analysis ends there.⁷⁸

The result is the same even if OCS could potentially comply with federal law in other ways.⁷⁹ Equal protection is not violated simply because a claimant can identify other ways in which the State could further its legitimate interest—even ways that the court might consider more rational or preferable.⁸⁰ If the State's actions are substantially related to its legitimate interest, the analysis ends and the court does not go on to consider alternatives.⁸¹

In sum, Z.C.'s equal protection claim fails because federal law preempts it, because OCS follows the law related to different classes of funds and does not treat similarly situated children differently, and because OCS's use of benefits for children's current maintenance is substantially related to its legitimate interest in meeting its

⁷⁸ See *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

⁷⁹ See *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 380 (Alaska 2006). It is not clear, however, that OCS could remain in compliance with federal law if it were prohibited from using Social Security funds for foster care payments, which are the primary payments covering children's "current maintenance." 20 C.F.R. §§ 404.2040; 416.640. It is especially unclear whether OCS would remain in compliance as a representative payee if it had a practice of never using funds for beneficiaries' "current maintenance," but instead conserving OASDI funds and systematically avoiding the SSI program's \$2,000 resource limit as Z.C. suggests it should do. Cross-Appellant's Brief at 28. Both OASDI and SSI contemplate conservation of benefits only if funds are left over *after* the benefit is *first* used for beneficiaries' "current maintenance." 20 C.F.R. §§ 404.2045; 416.445.

⁸⁰ See *C.J.*, 151 P.3d at 380.

⁸¹ *Anthony*, 810 P.2d at 157.

federally mandated obligations as a representative payee. The superior court correctly awarded summary judgment to OCS on this claim.

II. Disgorgement or constructive trust are not available remedies for the due process violation the superior court found.

OCS's main appeal explains the errors in the superior court's primary ruling that OCS has an obligation, as a matter of procedural due process, to provide notice to the parties in child in need of aid cases that it applies to be the representative payee for eligible children. If this Court reverses that ruling, it need not address the follow-up question of whether OCS can be ordered to return benefits already lawfully spent on children's care. But if this Court does reach that issue, it should affirm the superior court's conclusion that such a remedy is not available for the due process claim.

A. The superior court correctly held that disgorgement and constructive trust are remedies for unjust enrichment, and OCS was not unjustly enriched by its lawful use of foster children's Social Security benefits.

Z.C.'s complaint stated two causes of action alleging violations of the Alaska Constitution; it did not state a tort claim for unjust enrichment. [Exc. 32-37] The complaint requested "disgorgement," or creation of a trust, as additional remedies for the alleged constitutional violations.⁸² [Exc. 36-37] When the State pointed out that disgorgement and constructive trust are remedies for unjust enrichment, which was not

⁸² The remedy requested in the complaint seemed to be for creation of a monetary trust fund. [Exc. 36-37] Z.C. later styled the claim as one for "constructive trust," [Exc. 593] which is not the same as a monetary trust fund. A claim for constructive trust demands that a defendant transfer ownership of a titled property interest to the plaintiff. *See, e.g., Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co.*, 299 P.3d 148 (Alaska 2012); Restatement (Third) of Restitution and Unjust Enrichment § 55.

pled, Z.C. argued that the due process violation the court found itself meets the elements of unjust enrichment. [Exc. 592] The superior court correctly rejected this argument.⁸³

A successful claim for unjust enrichment requires proof of three elements:

(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.⁸⁴

The superior court did not engage with the first two elements because it found the third element could not be met. [Exc. 594] In particular, the superior court recognized that there is nothing “inequitable” about OCS using children’s Social Security funds in compliance with federal law. [Exc. 595] Z.C. now argues that this was error, despite acknowledging in both the lower court and in her opening brief that OCS’s use of the funds complies with federal law.⁸⁵ [Exc. 586-87]

The flaws in Z.C.’s argument become vividly apparent when considering the situation of a parent who serves as a representative payee, a common arrangement.⁸⁶

Parents are not unjustly enriched at their children’s expense when they use their

⁸³ On appeal, Z.C. and the amici fault the superior court for the fact that she did not develop an unjust enrichment theory in discovery below. Cross-Appellant’s Brief at 41, Brief of Amici at 37. But Z.C. did not state a claim for unjust enrichment in her complaint and had ample opportunity in the six years the case was pending to amend her complaint and develop that theory if she wished to do so, but she did not. [Exc. 36-37]

⁸⁴ *Ware v. Ware*, 161 P.3d 1188, 1197 (Alaska 2007).

⁸⁵ Cross-Appellant’s Brief at 11-12. Constructive trust additionally requires a heightened burden of “clear and convincing proof.” *Riddell v. Edwards*, 76 P.3d 847, 852 (Alaska 2003).

⁸⁶ See POMS § GN 00502.105 (“Preferred Representative Payee Order of Selection Charts”).

children’s Social Security benefits to pay for food and housing, even though the parents would otherwise spend their own funds on those things.⁸⁷ This is true even though the parents might have more disposable income to use for other purposes than they would if their children received no benefits.⁸⁸ The United States Supreme Court made this point in *Keffeler II*, noting that “parents serving as representative payees . . . like the department, are under a legal obligation to support their children’s basic needs irrespective of Social Security benefits.”⁸⁹ A “representative payee parent,” the Court explained, “can use his or her child’s social security survivor benefits for the child’s current maintenance regardless of the parent’s financial ability to meet those needs.”⁹⁰ There similarly can be no unjust enrichment when OCS acts as representative payee and uses children’s benefits to support them, as federal law contemplates.⁹¹

⁸⁷ See, e.g., *In re Guardianship of Nelson*, 547 N.W.2d 105, 108 (Minn. 1996); *Mellies v. Mellies*, 815 P.2d 114, 117 (Kan. 1991).

⁸⁸ *Id.*

⁸⁹ *Keffeler II*, 537 U.S. at 388 n. 11.

⁹⁰ *Id.* (citing *Nelson*, 547 N.W.2d at 108) (internal quotations omitted). *Keffeler II* also cited *Mellies*, 815 P.2d at 117 for this proposition, quoting it as follows: “because Social Security benefits are ‘not a windfall’ for the beneficiary, ‘a representative payee parent can use his or her child’s social security survivor benefits for the child’s current maintenance regardless of the parent’s financial ability to meet those needs.’” *Id.*

⁹¹ The superior court also correctly identified the causation problem in Z.C.’s argument. She cannot establish that she, or any other child, had a qualified alternative payee available to replace OCS and do something different with the funds. [Exc. 595] This would be particularly difficult to establish given that the SSA conducts an independent investigation into whether any payee other than OCS is available. 20 C.F.R. §§ 404.2021, 416.421; POMS § GN 00502.100 (“How to find payee leads”). In fact, during the year after OCS began sending notices as required by the superior court’s order, the SSA never denied an application by OCS to become representative payee or removed OCS as a representative payee, except at OCS’s request. [Exc. 633] This strongly

B. Alternatively, this Court may affirm on the ground that the claims for disgorgement or constructive trust are preempted by federal law.

This Court may affirm the superior court on any grounds supported by the record, even if not relied on by the superior court.⁹² Z.C.’s claims for disgorgement or constructive trust are preempted by federal law, which fully occupies the field of refunds of social security benefits and restitution from representative payees and would never recognize the relief Z.C. seeks. This Court’s precedent in *C.G.A. v. State* is dispositive of Z.C.’s request for disgorgement of the benefits the SSA paid to OCS as representative payee for children in its custody.⁹³ In that case, the superior court ordered a representative payee mother to turn over her child’s Social Security benefit to the State because the child was in OCS custody.⁹⁴ The trial court found that the mother had not used the benefits for the child’s “maintenance . . . , as she was required to do under the applicable federal regulations.”⁹⁵ On appeal, this Court reversed the order that the mother “remit funds which she lawfully received as representative payee to the state,”⁹⁶ holding that

suggests that the SSA’s initial investigations correctly concluded that none of the children for whom OCS served as payee during that time had a suitable alternate payee available.

⁹² *Snyder v. American Legion Spenard Post No. 28*, 119 P.3d 996, 1001 (Alaska 2005).

⁹³ The superior court’s ruling on this point—that a disgorgement remedy for a due process violation is not preempted [Exc. 591]—is difficult to reconcile with its correct conclusion that such a remedy is *not* available on Z.C.’s equal protection claim [Exc. 603] (“This Court concludes that federal law preempts a state court from dictating how a state agency like OCS may exercise its duties and discretion as a foster child’s representative payee.”).

⁹⁴ *C.G.A. v. State*, 824 P.2d 1364, 1366 (Alaska 1992).

⁹⁵ *Id.*

⁹⁶ *Id.*

“the very existence of a federal remedy” for payee misuse of funds “preempts state interference with an appointed payee’s decision to spend the social security benefits.”⁹⁷

In short, a state court cannot order a representative payee to turn benefits over to the beneficiary. The sole mechanism for return of benefits is through the SSA.⁹⁸ Particularly since the 2004 amendments to the Social Security Act and regulations, federal law completely occupies the field of restitution from representative payees and refunds to beneficiaries.⁹⁹ The Social Security Act defines “misuse” of benefits warranting a reissuance of benefits, SSA reissues any misused benefits to the beneficiary, and SSA seeks restitution from the representative payee.¹⁰⁰ The federal system simply does not contemplate refunds flowing directly between the representative payee and the beneficiary. SSA is at the center of the process. As the SSA explained when amending its regulations:

We are amending existing §§ 404.2041 and 416.641 to explain that: The representative payee is liable for misuse of the beneficiary’s benefits and is responsible for paying back misused benefits *to us*. We will always make every reasonable effort to obtain restitution of misused benefits and repay them to the beneficiary. In addition, we will be liable for repayment of misused benefits whenever . . . an organizational representative payee is found to have misused a beneficiary’s benefits If *we determine* that repayment of misused benefits is appropriate, *we* will certify for payment to the beneficiary or to the beneficiary’s new representative payee an amount equal to such misused benefits.¹⁰¹

⁹⁷ *Id.* at 1367 (citing 20 C.F.R. § 404.2041).

⁹⁸ *Id.*

⁹⁹ *See* “Social Security Protection Act,” 118 Stat. 493 (2004).

¹⁰⁰ 42 U.S.C. §§ 404(a), 405(j)(5), 405(j)(9); 20 C.F.R. §§ 404.2041, 416.641.

¹⁰¹ 69 FR 60224-01, 60227 (October 7, 2004) (emphasis added).

The SSA's process also accounts for the problem of a refund potentially causing an SSI beneficiary's assets to exceed the \$2,000 resource limit, a problem with Z.C.'s requested remedy that she fails to address. The SSA will exclude refunds that *it issues* to beneficiaries for misused payments from countable resources for a limited pay-down period.¹⁰² But nothing in federal law suggests that repayment pursuant to a state court judgment would be given similar consideration.

In short, federal law and regulation fully occupy this area, leaving no room for a state court to order a representative payee to return Social Security benefits directly to a beneficiary as a remedy for a supposed state constitutional violation that the SSA would not recognize.¹⁰³ Preemption principles forbid the use of state law to create a right to return of benefits that federal law would not recognize.¹⁰⁴ The superior court's order granting summary judgment to OCS on Z.C.'s disgorgement request can be affirmed on the alternative basis of preemption.

C. This Court may also affirm the superior court on the ground that Z.C. seeks monetary damages, which are not available to remedy violations of the Alaska Constitution.

Z.C. argues that she is not seeking disgorgement for "misuse" of the funds, but rather, that the superior court should have awarded her disgorgement or a constructive

¹⁰² POMS § SI 01130.602 ("Restitution Payments for Misused Benefits").

¹⁰³ This is particularly true given that Z.C. claims that she is entitled to equitable relief: "court acting in equity ordinarily cannot intrude in matters that are plain and fully covered by a statute." *Riddell v. Edwards*, 76 P.3d 847, 854 (Alaska 2003).

¹⁰⁴ *Allen v. State, Dep't of Health & Soc. Servs. Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009).

trust as a direct remedy for violation of the Alaska Constitution. [Cr. At. Br. 36] But she cites no case to that effect from any jurisdiction, and it is contrary to this Court’s precedent.

Monetary damages are not available as a direct remedy for most violations of the Alaska Constitution, including the due process clause.¹⁰⁵ This differs from federal law, which sometimes—albeit rarely—allows for money damages as a remedy for constitutional violations.¹⁰⁶

In an effort to avoid this Court’s clear precedent that damages are not available as a remedy for violations of Alaska’s due process clause, Z.C. framed her claims as being for “disgorgement” or “constructive trust.” [Exc. 592] But those labels do not fit her requested relief, and she cannot change the substance of her request by mislabeling it.¹⁰⁷ *Money damages*, not disgorgement, is the remedy for unjust enrichment.¹⁰⁸

Disgorgement, by contrast, is an equitable remedy that, like all equitable remedies, is available only when damages will not make the plaintiff whole.¹⁰⁹ Thus, disgorgement

¹⁰⁵ *Lowell v. Hayes*, 117 P.3d 745, 753 (Alaska 2005); *Dick Fischer Dev. No. 2 v. State, Dep’t of Admin.*, 838 P.2d 263, 268 (Alaska 1992).

¹⁰⁶ *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

¹⁰⁷ *See, e.g., State, Dep’t of Corr. v. Heisey*, 271 P.3d 1082, 1092 (Alaska 2012) (“regardless of the label that a claimant attaches to his or her tort, we will look first to the substance of the claim”).

¹⁰⁸ *George v. Custer*, 862 P.2d 176, 180-81 (Alaska 1993).

¹⁰⁹ *See Peter v. Progressive Corp.*, 2006 WL 438658 at *7 (Alaska Feb. 22, 2006) (“disgorgement is . . . an equitable remedy . . . [for] unjust enrichment . . . available only when there is no adequate remedy at law”); *Knaebel v. Heiner*, 663 P.2d 551, 553-54 (Alaska 1983).

may be appropriate in unusual cases when the plaintiff has been deprived of a “unique thing,” or if the amount of damages is highly speculative.¹¹⁰

Similarly, a “constructive trust” is “not a real trust” in which a trustee holds funds for the benefit of a beneficiary.¹¹¹ It is an order that a defendant transfer a traceable, titled property interest (typically, although not always, in real estate) to a plaintiff.¹¹²

Z.C. seeks neither of these unique remedies; what she seeks is damages to remedy a constitutional violation. She asked the court to order that money, in the amount of the Social Security benefits she received while in foster care, be transferred from the State’s general fund to her or her designee. [Exc. 36-37] That would be an award of damages.¹¹³ She acknowledges this at various points in her briefing when she refers to her claims as

¹¹⁰ See *id.* at 553 (money damages may be inadequate and equitable remedies appropriate in situations such as “(1) when the thing that plaintiff has been deprived of is unique and irreplaceable, (2) when a legal remedy would require that the plaintiff bring more than one lawsuit, (3) when the defendant is insolvent, and (4) when the amount of damages is highly speculative”).

¹¹¹ Restatement (Third) of Restitution and Unjust Enrichment § 55 “Constructive Trust” (2011) (“[A] [c]onstructive trust is a flexible device . . . by which a court directs that property to which B holds legal title be transferred to A. It is commonly repeated that a constructive trust is ‘not a real trust’”).

¹¹² *Id.*; *Riddell*, 76 P.3d at 852. The superior court noted that it was sympathetic to Z.C.’s policy position [Exc. 595], but this Court has warned against use of the constructive trust doctrine to avoid what the superior court sees as an unfair result of statutory law. *Id.* at 856 (“The facts in this case obviously make it tempting to deny Riddell any benefit from his fraudulent conduct; this makes the recourse of a constructive trust seem alluringly sensible. But allowing offensive factual circumstances to dictate an unauthorized legal remedy can have a pernicious effect in the long-run by upsetting the complex and delicate balance that our system of government strives to maintain between the legislature’s lawmaking powers and the courts’ traditional equitable powers.”)

¹¹³ Black’s Law Dictionary, Damages, 11th ed. (2019) (“Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.”).

being for “repayment” or “return [of] the wrongfully-taken money,” and analogizes her claims to claims for tax refunds.¹¹⁴

Z.C. cannot avoid this Court’s precedent that damages are not available to remedy a violation of Alaska’s due process clause simply by mislabeling her claim as being for “disgorgement” or “constructive trust.”¹¹⁵ She cites no case from any jurisdiction holding that the equitable remedies of “disgorgement” or “constructive trust” are available to remedy constitutional due process violations. In support of this proposition, Z.C. cites two types of cases—benefits reinstatement cases and tax refund cases, neither of which supports awarding a plaintiff “disgorgement” or a “constructive trust” as a remedy for a constitutional claim.

Three of the benefits reinstatement cases Z.C. cites involve only preliminary injunctions in which a court enjoined a government agency from reducing or terminating plaintiffs’ benefits pending adjudication.¹¹⁶ These cases granted prospective, preliminary relief to maintain the *status quo* pending litigation.¹¹⁷ She cites three cases involving final

¹¹⁴ Brief of Cross-Appellant at 3, 14, 15, 36, 44, 45.

¹¹⁵ See *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422 (Alaska 2017) (where damages will make plaintiff whole, plaintiff cannot choose to pursue equitable relief instead).

¹¹⁶ *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978); *Banks v. Trainor*, 525 F.2d 837 (7th Cir. 1975); *Willis v. Lascaris*, 499 F. Supp. 749 (N.D.N.Y. 1980).

¹¹⁷ *Tracy*, 572 F.2d at 396 (“a preliminary injunction to maintain the status quo of appellees’ eligibility and participation was warranted”); *Banks*, 525 F.2d at 841 (“The preliminary injunction was entered to maintain the status quo”); *Willis*, 499 F. Supp. at 755.

relief,¹¹⁸ one of which was reversed on appeal.¹¹⁹ These cases ordered plaintiffs be reinstated to government benefit programs, but none granted disgorgement or even back payment of benefits.¹²⁰

And all six of these cases differ from Z.C.’s case in another critical way. The plaintiffs all sued the government agency *that actually administered* the benefit.¹²¹ In the two cases involving Social Security benefits, the plaintiffs sued the SSA.¹²² The courts in those cases were careful to analyze the governing Social Security statutes and regulations to determine whether the statutory scheme authorized the court to grant the requested relief.¹²³

Z.C. also cites several tax refund cases from other jurisdictions, none of which support the position that disgorgement or a constructive trust are remedies available for

¹¹⁸ *Kennedy v. Bowen*, 814 F.2d 1523 (11th Cir. 1987); *In re Various Social Security Cases*, 392 F. Supp. 3d 784 (E.D. Ky. 2019); *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414 (D.D.C. 2005).

¹¹⁹ *Id.*

¹²⁰ One court in particular was explicit about this point. *Lightfoot*, 355 F. Supp. 2d at 438 (“Importantly, the Court’s reinstatement order is prospective in nature; it does not restore any benefits that should have been paid prior to [the date of the order]”).

¹²¹ *Tracy*, 572 F.2d at 393; *Banks*, 525 F.2d at 837; *Willis*, 499 F. Supp. at 749; *Kennedy*, 814 F.2d at 1523; *In re Various Social Security Cases*, 392 F. Supp. 3d at 784; *Lightfoot v. District of Columbia*, 355 F. Supp. 2d at 414.

¹²² *Kennedy*, 814 F.2d at 1523; *In re Various Social Security Cases*, 392 F. Supp.3d at 784.

¹²³ *Kennedy*, 814 F.2d at 1526; *In re Various Social Security Cases*, 392 F. Supp. 3d at 789-92 (determining after lengthy analysis court had jurisdiction to order reinstatement of benefits under fourth sentence of 42 U.S.C. § 405(g)).

due process violations.¹²⁴ These cases are irrelevant to the question of whether monetary damages are available as direct relief for procedural due process violations. They are not.¹²⁵

The superior court correctly awarded summary judgment to OCS on the disgorgement remedy through its unjust enrichment analysis. It could have reached the same result as a matter of federal preemption or by accurately characterizing the request as an improper attempt to obtain money damages for a procedural due process claim.

CONCLUSION

For these reasons, the Court should affirm the superior court's grant of summary judgment to OCS on the equal protection claim. The Court should reverse the judgment in Z.C.'s favor on the due process claim, but if it does not do so, the superior court's ruling that a disgorgement remedy is not available for that claim should be affirmed.

¹²⁴ *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco of Florida*, 496 U.S. 18 (1990); *Ward v. Board of County Com'rs of Love County, Oklahoma*, 253 U.S. 17 (1920); *Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486 (Ariz. 2004). This Court has ample case law regarding tax refunds based on AS 43.10.210 and AS 29.45.500, so it is not clear why Z.C. looks to other jurisdictions for this case law.

¹²⁵ *Lowell v. Hayes*, 117 P.3d 745, 753 (Alaska 2005).