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 No. S-18249/ S-18259

Superior 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 AMICUS CURIAE

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By: _____
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CONSTITUTIONAL PROVISIONS

Alaska Constitution

Article 1 – Declaration of Rights

Section 1. Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

FEDERAL STATUTES

Old-age and survivors insurance
(Title II to the Social Security Act, 42 U.S.C. § 401, et seq.)

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

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

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

* * * *

(j) Representative payees.

(1)

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

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

(C)

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

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

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

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

* * * *

(5) In cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits. In any case in which a representative payee that—

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

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

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

* * * *

(7)

(A) If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee that is not a Federal, State, or local government agency has misused all or part of an individual's benefit that was paid to such representative payee under this subsection, the representative payee shall be liable for the amount misused, and such amount (to the extent not repaid by the representative payee) shall be treated as an overpayment of benefits under this subchapter to the representative payee for all purposes of this chapter and related laws pertaining to the recovery of such overpayments. Subject to subparagraph (B), upon recovering all or any part of such amount, the Commissioner shall certify an amount equal to the recovered amount for payment to such individual or such individual's alternative representative payee.

(B) The total of the amount certified for payment to such individual or such individual's alternative representative payee under subparagraph (A) and the amount certified for payment under paragraph (5) may not exceed the total benefit amount misused by the representative payee with respect to such individual.

* * * *

(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. § 408. Penalties

(a) In general

Whoever—

* * * *

> **(5)** having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; …

* * * *

shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both ….

(b) Restitution

> **(1)** Any Federal court, when sentencing a defendant convicted of an offense under subsection (a) of this section, may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victims of such offense specified in paragraph (4).
>
> **(2)** Sections 3612, 3663, and 3664 of Title 18 shall apply with respect to the issuance and enforcement of orders of restitution to victims of such offense under this subsection.

(3) If the court does not order restitution, or orders only partial restitution, under this subsection, the court shall state on the record the reasons therefor.

(4) For purposes of paragraphs (1) and (2), the victims of an offense under subsection (a) of this section are the following:

(A) Any individual who suffers a financial loss as a result of the defendant's violation of subsection (a) of this section.

(B) The Commissioner of Social Security, to the extent that the defendant's violation of subsection (a) of this section results in--

(i) the Commissioner of Social Security making a benefit payment that should not have been made; or

(ii) an individual suffering a financial loss due to the defendant's violation of subsection (a) of this section in his or her capacity as the individual's representative payee appointed pursuant to section 405(j) of this title.

(5)

(A) Except as provided in subparagraph (B), funds paid to the Commissioner of Social Security as restitution pursuant to a court order shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund, or the Federal Disability Insurance Trust Fund, as appropriate.

* * * *

Federal Payments for Foster Care and Adoption Assistance (Title IV-E to the Social Security Act)

42 U.S.C. § 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

* * * *

(19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards;

* * * *

(29) provides that, within 30 days after the removal of a child from the custody of the parent or parents of the child, the state shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling, and

other adult relatives of the child (including any other adult relatives suggested by the parents), subject to exceptions due to family or domestic violence, that--

(A) specifies that the child has been or is being removed from the custody of the parent or parents of the child;

(B) explains the options the relative has under Federal, State, and local law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice;

(C) describes the requirements under paragraph (10) of this subsection to become a foster family home and the additional services and supports that are available for children placed in such a home; and

(D) if the State has elected the option to make kinship guardianship assistance payments under paragraph (28) of this subsection, describes how the relative guardian of the child may subsequently enter into an agreement with the State under section 673(d)of this title to receive the payments;

42 U.S.C. § 1382b. Resources

(a) Exclusions from Resources. In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded—

(1) the home (including the land that appertains thereto);

(2)(A) household goods, personal effects, and an automobile, to the extent that their total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable; …

* * * *

(e) Trusts

(1) In determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.

* * * *

(3)

(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the

individual (or of the individual's spouse) could be made shall be considered a resource available to the individual.

* * * *

(5) This subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title.

42 U.S.C. § 1382c. Definitions

* * * *

(a)(3)(C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1383. Procedure for payment of benefits.

* * * *

(a)(2)(A)(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.

STATE STATUTES

Alaska Statutes § 47.15.115. Permanent fund dividend

(a) The department shall annually apply for a permanent fund dividend and retain in trust under AS 43.23.015(e) for the benefit of the child the dividend and accrued interest on the dividend if the child is in the custody of the department when the application is due.

(b) The department shall distribute the proceeds of a trust under this section

(1) to the child when the child

(A) has reached 21 years of age; or

(B) is no longer in the custody of the department and has reached at least 18 years of age or is emancipated; or

(2) when ordered to do so by the court in the best interest of the child.

Maryland Code Ann. Family Law § 5-527.1.
Protection of resources of child in State custody.

(a) This section applies to children committed to the custody of the Department.

(b) When applying for benefits under this section for a child in the Department's custody, the Department shall, in cooperation with the child's attorney, identify a representative payee or fiduciary in accordance with the requirements of 20 C.F.R. §§ 404.2021 and 416.621.

(c) Consistent with federal law, when the Department serves as the representative payee or in any other fiduciary capacity for a child receiving Veterans Administration benefits, Supplemental Security Income, or Social Security benefits, the Department shall:

(1) use or conserve the benefits in the child's best interest, including using the benefits for services for special needs not otherwise provided by the Department or conserving the benefits for the child's reasonably foreseeable future needs;

(2) ensure that when the child attains the age of 14 years and until the Department no longer serves as the representative payee or fiduciary, a minimum percentage of the child's benefits are not used to reimburse the State for the costs of care for the child and are used or conserved in accordance with items (3) and (4) of this subsection, as follows:

(i) from age 14 through age 15, at least 40%;

(ii) from age 16 through age 17, at least 80%; and

(iii) from age 18 through age 20, 100%;

(3) for the child's benefits or resources that are below or not subject to any federal asset or resource limit, exercise discretion in accordance with federal law and in the best interest of the child to conserve the funds or use the funds for services for special needs not otherwise provided by the Department, including choosing one or more of the options listed under item (4) of this subsection;

(4) appropriately monitor any federal asset or resource limits for the benefits and ensure that the child's best interest is served by using or conserving the benefits in a way that avoids violating any federal asset or resource limits that would affect the child's eligibility to receive the benefits, including:

(i) applying to the Social Security Administration to establish a Plan for Achieving Self-Support (PASS) account for the child under the Social Security Act and determining whether it is in the best interest of the child to conserve all or part of the benefits in the PASS account;

(ii) establishing a 529A plan for the child and conserving the child's benefits in that account in a manner that appropriately avoids any federal asset or resource limits;

(iii) establishing an individual development account for the child and conserving the child's benefits in that account in a manner that appropriately avoids any federal asset or resource limits;

(iv) establishing a special needs trust for the child and conserving the child's benefits in the trust in a manner that is consistent with federal requirements for special needs trusts and that appropriately avoids any federal asset or resource limits;

(v) if the Department determines that using the benefits for services for current special needs not already provided by the Department is in the best interests of the child, using the benefits for those services;

(vi) if federal law requires certain back payments of benefits to be placed in a dedicated account, complying with the requirements for dedicated accounts under 20 C.F.R. § 416.640(e); and

(vii) applying any other exclusions from federal asset or resource limits available under federal law and using or conserving the child's benefits in a manner that appropriately avoids any federal asset or resource limits;

(5) provide an annual accounting to the child and the child's attorney of how the child's resources, including Veterans Administration benefits, Supplemental Security Income, and Social Security benefits, have been used or conserved in accordance with this section; and

(6) provide the child with financial literacy training when the child has attained the age of 14 years.

(d)

(1) The Department shall immediately notify the child through the child's attorney of:

(i) any application for Veterans Administration benefits, Supplemental Security Income, or Social Security benefits made on the child's behalf or any application to become representative payee for those benefits on the child's behalf;

(ii) any decisions or communications from the Veterans Administration or the Social Security Administration regarding an application for benefits described under item (i) of this paragraph; and

(iii) any appeal or other action requested by the Department regarding an application for benefits described under item (i) of this paragraph.

(2) When the Department serves as the representative payee or otherwise receives Veterans Administration benefits, Supplemental Security Income, or Social Security benefits on the child's behalf, the Department shall provide notice to the

child through the child's attorney of the following before each juvenile court hearing regarding the child:

(i) the dates and the amount of benefit funds received on the child's behalf since any prior notification to the child's attorney; and

(ii) information regarding all the child's assets and resources, including the child's benefits, insurance, cash assets, trust accounts, earnings, and other resources.

(e) This section may not be construed to affect any additional notice required by a State court.

FEDERAL REGULATIONS

20 CFR § 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:

* * * *

(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. § 404.2035. 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. 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.

PRELIMINARY STATEMENT

Amici curiae Facing Foster Care in Alaska; Children's Advocacy Institute; Children's Defense Fund; Children's Rights; First Focus on Children; Foundation for Research on Equal Opportunity; Gen Justice; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; Partnership for America's Children; and Prof. Daniel L. Hatcher submit this amici curiae brief supporting Z.C., et al.'s cross-appeal from the decision by Superior Court Judge William F. Morse (the "Decision") granting partial summary judgment in favor of Alaska's Office of Children's Services, et al. ("OCS"). Z.C., et al. are a certified class of Alaska foster children (the "Foster Children") who received federal benefits while committed to OCS custody. Amici support the Foster Children's appeal of dismissal of their equal-protection claim and their request for a constructive trust and disgorgement to remedy OCS's due-process violations.

Amici are Alaskan and national children's advocacy organizations dedicated to improving the welfare of abused, neglected, or abandoned children placed in state custody and living in foster care. For years, Amici have opposed states' surreptitious practice of "applying" (*i.e.*, expropriating) two forms of Social Security benefits to reimburse themselves for the cost of providing foster care: (a) Supplemental Security Income" benefits ("SSI") to disabled children under Title XVI of the Social Security Act ("the Act"),[1] and (b) "Old Age, Survivor, and Disability Income" ("OASDI") "survivor" benefits

[1] To receive SSI, children under 18 must have a "medically determinable physical or mental impairment" causing "marked and severe functional limitations" for a year, 42 U.S.C. § 1382c(a)(3)(C)(i), as determined by a state's Disability Determination Service ("DDS").

to surviving or disabled children of deceased, retired, or disabled parents with sufficient work credits to qualify for Social Security under Title II of the Act.

State agencies accomplish this confiscation by clandestinely arranging for the Social Security Administration ("SSA") to appoint them as "representative payees" ("RPs") so they can use their fiduciary power to reimburse themselves. Most states hire for-profit contractors to help secure the benefits, creating its own cottage industry and profit-center. All gain goes to the state, which saves 50% matching funds that it otherwise would spend to obtain federal Title IV-E funding. In over half of all cases, the state saves its *entire cost* of care. The Foster Children get nothing; they receive *exactly* the same level of care and services they would have received without federal benefits. Put bluntly, the Foster Children do not benefit from their benefits; instead, OCS, their fiduciary, profits mightily.

OCS gets itself appointed RP by circumventing a federal regulation that ranks state agencies lowest among possible RP candidates, below parents, kin, and other connected caring adults. SSA appoints OCS as RP in almost all cases, despite OCS's status as RP of last resort, because OCS conceals *known* information about parents and relatives from SSA. OCS does this covertly, without informing anyone: not the Foster Children, their parents, or even their court-appointed legal representatives. Foster Children age out of the system without ever knowing that OCS used *their* benefits to enrich itself.

Seizing foster children's benefits to replenish state coffers does not necessarily violate the Social Security Act, *see Wash. State Dep't of Soc. and Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371 (2002) ("*Keffeler II*"), but *Keffeler II*

addressed only one provision of the Act, declined to consider any constitutional issues, and did not involve concealment.[2] This case involves constitutional issues and concealment.

OCS's policy violates equal protection under the Alaska Constitution. Most Foster Children are disabled or orphaned, yet they are singled out to pay for their own care. 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. Appropriating the Foster Children's federal-benefit property confers inferior status due to their disability or orphanhood—discrimination that should be assessed rigorously with heightened scrutiny. The Decision dismisses the claim at the outset, ruling that no discrimination occurs because the Foster Children are not similarly situated to other foster children due to their federal benefits. This circular approach errs by treating the discrimination itself as the basis for finding a lack of similarity.

OCS has no valid rationale for its discrimination. Conserving state funds is not a valid interest in equal-protection analysis, and OCS's other policy justifications simply misapprehend the federal Act. The Decision points to the supposed legality of seizing the funds under the Act per *Kellefer II*, but the Foster Children allege *constitutional* violations, not statutory violations. The Act does not empower OCS to engage in rank discrimination.

The Decision also errs by finding that the Act preempts the equal-protection claim. Nothing in the Act bars state courts from holding RPs accountable for violating a state constitution or overrides the strong presumption against preemption, especially ouster of

[2] Amici do not agree that federal law supports OCS's seizure of Plaintiffs' benefits, but that issue is not presented here.

state-court jurisdiction. It further errs by rejecting equitable remedies *sua sponte* on a ground that the parties had not raised. Finally, it errs by finding that OCS's conduct is not inequitable, ignoring both its own ruling that OCS violated due process and the evidence of concealment and breaches of fiduciary duty, which are inequitable *per se*.

OCS's appropriation of benefits causes lasting harm. Since *Keffeler II* was decided two decades ago, studies have documented how youth age out of foster care without assets and financial support, leading to dire results. These high-risk children must navigate their transition to independence without permanent family connections, supports, and resources. A growing awareness is emerging that confiscating their property is terrible policy, both for the youth and, ultimately, for Alaska. These benefits could make a lasting difference for the Foster Children's successful transition to adulthood. OCS should not be allowed to divert the benefits based upon flimsy and faulty policy justifications while allowing non-disabled, non-orphaned peers to keep their assets.

OASDI and SSI benefits should not be a profit center ripe for plunder by a state agency exercising near-plenary fiduciary authority, surreptitiously pocketing the funds to save $1.9 million annually, while relegating the youth to age out of care without resources. The Foster Children need every dollar to make the difficult transition to adulthood or address current needs. OC's disparate treatment of them is unconstitutional.

STATEMENT OF INTEREST OF AMICI

Facing Foster Care in Alaska ("FFCA") is a lifeline for foster youth and alumni. A statewide network of current and former foster youth, it leads efforts in advocacy, training, and peer support to improve the lives of thousands of foster youth across Alaska.

FFCA empowers current and former foster youth to share their lived expertise to be heard in key decisions affecting children and families.

Children's Advocacy Institute ("CAI"), founded at the nonprofit University of San Diego School of Law in 1989, is an academic, research, and advocacy nonprofit organization working to improve outcomes for children and youth, with special emphasis on improving the child protection and foster care systems. CAI trains law students and attorneys to be effective child advocates, and conducts research and advocacy through its San Diego, Sacramento, and Washington, D.C. offices to leverage change for children and youth through impact litigation; regulatory, administrative, and legislative advocacy; and public education. CAI has led efforts to advance federal, state, and local reform to preserve the federal benefits of foster youth for fifteen years.

Children's Defense Fund ("CDF") is a 501(c)(3) non-profit child advocacy organization that has worked relentlessly for nearly 50 years to ensure a level playing field for all children. CDF serves and advocates for the largest, most diverse generation in America: the 74 million children and youth under the age of 18 and 30 million young adults under the age of 25, with particular attention to children experiencing poverty, children of color, and those with disabilities. We partner with policymakers, aligned organizations, and funders to serve children, youth, and young adults and provide a strong, effective, and independent voice for all the children of America. CDF works collaboratively at the federal, state, and local levels to achieve child welfare policy and practice reforms that keep children safe and give them the opportunity to thrive, while maintaining connections to family and community. The questions presented in this amicus brief in support of

plaintiffs' appeal of dismissals of their equal-protection claim relate directly to CDF's mission to ensure the best outcomes for the nation's children and youth. Since the Supreme Court made its ruling in the *Keffeler* case in 2003, CDF has concluded that foster youth receiving disability and survivor benefits are best served when they are afforded due process, equal protection, and access to their benefits for their current and future needs beyond existing state obligations.

Children's Rights is a national non-profit organization dedicated, through impact litigation and policy and advocacy work, to improving the lives of children served by government systems in the United States, including child welfare and specifically foster care systems. Children's Rights has investigated, prosecuted, and enforced injunctive orders of reform in child welfare systems in over 15 jurisdictions in the United States. Children's Rights has specific experience related to improving the array of placements and services for older youth in the foster care system, including those designed to prevent grave outcomes for youth when they exit the foster care system.

First Focus on Children is a 501(c)(3) nonprofit bipartisan children's advocacy organization. It is dedicated to ensuring children and families are a priority in federal policy and budget decisions. First Focus on Children works to improve the well-being and protect the rights of the next generation of America's leaders. Its advocacy is focused in the areas of child health, education, early childhood, family economics, child welfare, immigration, and child safety, in addition to tax and budget policies that lift children out of poverty. In all their advocacy, First Focus on Children's staff seek to increase investments in programs that support and protect our nation's most precious resource, our children.

Foundation for Research on Equal Opportunity ("FREOPP") conducts original research on expanding economic opportunity to those who least have it. FREOPP's research has shown that too many youth aging out of foster care succumb to poor life outcomes in part due to the lack of financial resources. OASDI and SSI benefits are provided to children to help them overcome significant disadvantages. It is wrong for child welfare agencies to take these benefits, highlighting the need to protect individual rights and government benefits to help ensure that youth aging out of foster care have an opportunity to achieve independence and thrive in adulthood.

Gen Justice works in legislatures and courtrooms nationwide to advance and protect the constitutional rights of abused, neglected, and abandoned children. Gen Justice has been instrumental in shepherding numerous reforms through state legislatures to improve child welfare systems, including landmark legislation in Arizona to guarantee independent, client-directed legal counsel for every child in foster care. Through its children's law clinic, Gen Justice provides *pro bono* legal assistance to hundreds of children and families annually. This case is of special importance to Gen Justice, as it implicates a core mission—to strengthen and protect children's constitutional rights to due process and equal protection throughout their time in foster care.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. It works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Its legal and policy agenda is informed by—and often conducted in collaboration with—youth,

family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

National Association of Counsel for Children ("NACC"), founded in 1977, is a 501(c)(3) non-profit child advocacy and membership association dedicated to advancing the rights, well-being, and opportunities of youth in the child welfare system through access to high-quality legal representation. A multidisciplinary organization, our members include child welfare attorneys, judges, and professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state policy advocacy, the Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and the amicus curiae program. *See* www.naccchildlaw.org.

National Center for Youth Law ("NCYL") is a non-profit law firm that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to protect the rights of low-income children to ensure they have the resources, support, and opportunities they need. NCYL works to ensure the safety, stability, and wellbeing of children in foster care, including older youth and youth with disabilities, and has engaged in litigation and policy advocacy to ensure that youth who are exiting foster care are given appropriate support for a successful transition to adulthood.

Partnership for America's Children is a network of 50 nonpartisan child policy advocacy organizations across 40 states that represent children and their needs at the local,

state, and national levels within and across states. The Partnership for America's Children's mission is to support its network of child advocacy organizations in effective advocacy as they work to improve policies affecting children. Many Partnership members undertake advocacy to reduce and mitigate trauma for children and to improve the lives of young people aging out of foster care without permanent families.

Daniel L. Hatcher is a professor of law at the University of Baltimore School of Law and a national expert on poverty law, including foster children's Social Security benefits. He has prior experience as a legal aid attorney, including statewide policy advocacy and representing children in foster-care proceedings, and as senior staff attorney for the Children's Defense Fund. Professor Hatcher has testified before Congress and state legislative committees and has written extensively regarding issues in this case, *e.g.*, *The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens*, NYU Press (2016); *States Diverting Funds from the Poor*, in Holes in the Safety Net: Federalism and Poverty (Ezra Rosser, ed., Cambridge University Press 2019); *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797 (2006); *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N. Mex. L. Rev. 159 (2012).

ARGUMENT

I. Foster Children Desperately Need Their Financial Benefits.

Nationally, over 400,000 abused, neglected, or abandoned children live in foster care. [R. 2106]. An estimated 5% of these children receive federal SSI or OASDI benefits,

averaging approximately $700 per month.[3] Approximately 20,000 youth "age out" of foster care to "independence" every year without finding a permanent family or home,[4] and having endured multiple changes of placement, school, and friends.[5] In Alaska, 3,007 foster children were in state custody in April 2022, 66% of whom identify as Alaska Native.[6]

Foster children face uniquely daunting risks. They "have much higher rates of serious emotional and behavioral problems, chronic physical disabilities, birth defects, developmental delays, and poor school achievement."[7] For example:

- An estimated 40-80% experience chronic physical health problems, 43% show growth abnormalities, and 33% have untreated health problems.[8]
- Up to 80% of foster children suffer from moderate to severe mental health problems, compared with 18%-22% of their peers.[9]
- A shocking 30% of foster care alumni meet lifetime diagnostic criteria for PTSD

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[3] Cong. Res. Serv., *Children in Foster Care: Frequently Asked Questions* 1 (Nov. 23, 2021), https://sgp.fas.org/crs/misc/R46975.pdf.

[4] Children's Bureau, U.S. Dep't of Health & Hum. Servs., *What supports and resources are in place for youth transitioning from foster care*? (July 15, 2021), https://www.acf.hhs.gov/cb/faq/foster-care7#:~:text=There%20are%20more%20than%20400%2C000,need%20to%20become%20self%2Dsufficient.

[5] More than half of Alaska children in foster care for 24 months or longer experience three or more placements. *See* Children's Bureau, U.S. Dep't of Health & Hum. Servs., Alaska, https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/alaska.html.

[6] Alaska Dep't of Health and Soc. Servs., Alaska Office of Children's Services Statistical Information (May 10, 2022), https://dhss.alaska.gov/ocs/Pages/statistics/default.aspx.

[7] Am. Acad. of Pediatrics, *Health Care of Young Children in Foster Care*, 109 Pediatrics 536, 536 (2002).

[8] Sarah McCue Horwitz et al., *Specialized Assessments for Children in Foster Care*, 106 Pediatrics 59, 59 (2000). *See also* Sandra H. Jee et al., *Factors Associated with Chronic Conditions Among Children in Foster Care*, 17 J. Health Care for Poor and Underserved, 328, 336 (2006).

[9] Nat'l Conf. of State Legislatures, *Mental Health and Foster Care* (Nov. 1, 2019), https://www.ncsl.org/research/human-services/mental-health-and-foster-care.aspx; *see also* J. Curtis McMillen et al., *Prevalence of psychiatric disorders among older youth in the foster care system*, 44 J. Am. Acad. Child. Adolesc. Psychiatry 88 (2005); Susan dos Reis et al., *Mental Health Services for Youths in Foster Care and Disabled Youths*, 91 Am. J. of Pub. Health 1094, 1099 (2001)).

based upon trauma experienced before or during foster care, compared with 7.6% of their demographic peers and *double* the PTSD level of war veterans.[10]

National longitudinal studies and federal statistics released after the Supreme Court's decision in *Keffeler II* clearly demonstrate that foster children aging out of care face an uphill battle to achieve self-sufficiency and have high risks for undesirable outcomes:

- Within 5-7 years after leaving state care, large percentages (12%-30%) of former foster youth find themselves homeless.[11]
- Transition-aged foster youth have elevated risks of depression, suicidal ideation, and other mental health disorders, as well as chronic physical health conditions including asthma, hypertension, tuberculosis, diabetes, hepatitis, and substance abuse disorders.[12]
- A recent study of former foster youth found that 15% had no high school diploma or GED, and only 5% and 6%, respectively, had obtained two or four-year post-secondary degrees.[13]
- Youth aging out of care face high unemployment and earn little income.[14] One-fifth to one-third have "very low probabilities of employment and hardly any earnings at any time between ages 18 and 24," and an additional one-fifth to one half are not likely to be employed during their early and mid-twenties.[15]

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[10] Peter Pecora et al., *Mental health of current and former recipients of foster care: A review of recent studies in the USA*, 14 Child & Family Social Work 132, 139 (2009).

[11] Amy Dworsky et al., *Assessing the Impact of Extending Care Beyond Age 18 on Homelessness: Emerging Findings from the Midwest Study* 3 (2010), http://chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf; Children's Aid Soc., *Youth Aging Out of Foster Care Face Poverty, Homelessness, and the Criminal Justice System* 3 (2006), http://www.childrensaidsociety.org/ files/upload-docs/FosterCare.pdf; Mark E. Courtney et al., *Findings from the California Youth Transitions to Adulthood Study (CalYOUTH): Conditions of Youth at Age 23*, at 19 (2020), https://www.chapinhall.org/wp-content/uploads/CY_YT_RE1020.pdf.

[12] Md. Dep't of Legis. Servs., *Overview of Homelessness and Homeless Services in Maryland* 15 (Sept. 2015) (compiling research); *cf.* Courtney et al., *supra* note 11, at 74.

[13] Courtney et al., *supra* note 11, at 31.

[14] Jennifer Earle Macomber, et al., *Coming of Age: Employment Outcomes for Youth Who Age Out of Foster Care Through Their Middle Twenties*, i (2008), https://www.urban.org/research/publication/coming-age-employment-outcomes-youth-who-age-out-foster-care-through-their-middle-twenties.

[15] *Id*. at ii; *see also* Children's Aid Soc., *supra* note 11, at 2; Carol Brandford et al., *Foster Youth Transition to Independence Study: Final Report*, 4 (2004) (less than half of aged-out foster youth in study were employed).

- Up to 75% of former foster youth rely on means-tested benefits.[16]

The average age of self-sufficiency in the United States is 26, and the average youth receives $62,000 in support from parents between ages 18-34.[17] Yet foster youth are expected to attain self-sufficiency with scant resources and little or none of the adult support enjoyed by their peers. By continuing this myopic policy to protect a tiny fraction of the state child-welfare budget, the state ultimately incurs exponentially greater costs.[18]

National Public Radio and the Marshall Project released in 2021 an investigative series on states' widespread use of foster children's SSI and OASDI benefits to reimburse themselves, focusing on Alaska foster youth. The reported experiences starkly depict the real-time ramifications and impacts of this practice:

- Named Plaintiff Z.C. entered care after homelessness and emotional trauma. OCS surreptitiously applied for SSI, ultimately diverting over $700 per month to reimburse itself for her care. Had she had access to her benefits, she would have used them to pay for an apartment and a car to find work.
- T.H.'s mother died when he was 7, entitling him to OASDI starting at age 12 when his father was incarcerated and he entered foster care. Now 21, he lacks

[16] Mark E. Courtney et al, *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26* (2011), https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf.

[17] This number is derived by applying the annual CPI to data in Robert F. Schoeni et al., *Material Assistance Received From Families During Transition to Adulthood* in "On the Frontier to Adulthood: Theory, Research and Public Policy" 405 (2005) (Richard A. Settersten, Jr. et al., eds.).

[18] Pew Charitable Trusts reports that each national cohort of young people leaving foster care costs taxpayers $8 billion in the long term from lost revenues due to lost earnings and costs including homelessness, substance abuse treatment, criminal justice involvement, unplanned pregnancies, medical expenses, mental health treatment, Food Stamps, and other public benefits. *See* Teresa Wiltz, *States Tackle 'Aging Out' of Foster Care, Pew Charitable Trusts* (Mar. 25, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/25/states-tackle-aging-out-of-foster-care#:~:text=Each%20cohort%20of%20young%20people%20leaving%20foster%20care,the%20Jim%20Casey%20initiative.%20Signs%20of%20Good%20Results.

the resources he needs to reach independence (*e.g.*, college). T.H. did not learn about his OASDI and its diversion until age 16, shortly before he left care.

- K.E. ran away from several foster placements, resulting in placements in mental institutions. An Alaska Native, K.E. says that she did feel comfortable with her non-Indian foster families and did not ask for basic needs such as clothes and feminine hygiene products. OCS never told her that it was taking her $780 monthly SSI benefits. Her reaction: "The state is taking my personal money when they're barely even taking care of me? That doesn't seem right."

- M.S. was placed in many foster homes and facilities, where she suffered abuse. Eventually, she developed PTSD and panic attacks and qualified for SSI. OCS intercepted her $720-$790 monthly benefits without her knowledge. At age 18, she left foster care when pregnant and had to move into a motel with her abusive boyfriend because she no money to pay rent. At one point, she was unhoused and living in a tent.

- C.L., orphaned prior to entry into care, had his OASDI benefits taken by the state while he had to walk more than a dozen miles to and from his job because he could not afford gas money. He left foster care with no family and "without a dime to his name."

- E.H. entered foster care as a young child after his mother's death. Starting at age 16, OCS took his $700-$1000 monthly OASDI benefits. He would like to earn a degree in pastoral counseling but cannot afford tuition of a Christian college.

- M.J. entered foster care after his father murdered his mother. He was entitled to OASDI upon her death. While OCS was pocketing his OASDI benefits totaling $20,000, M.J. scrounged food samples at grocery stores, hoarded ramen noodles, and "trekked around Anchorage in a tattered secondhand jacket." [19]

These experiences and reactions are typical. This Court should not doubt for a moment that these benefits could have made a profoundly positive difference in the lives of the Foster Children had OCS let them have access to their funds.[20]

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[19] Eli Hager et al., *The Hidden Bill for Foster Care: State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care*, Nat'l Pub. Radio (Apr. 22, 2021), https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-care; Eli Hager et al., *State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care. Most Children have No Idea*, Marshall Project (May 17, 2021), https://www.themarshallproject.org/2021/04/22/foster-care-agencies-take-thousands-of-dollars-owed-to-kids-most-children-have-no-idea.

[20] The North Carolina case of John G. is illustrative. Abandoned at age 3 and abused by multiple guardians, John arrived in foster care with nothing but survivor benefits and title to an old house facing foreclosure due to default by his last guardian. Instead of paying his

II. No Legal Barrier Prevents Foster Children from Receiving their Benefits.

In defending its self-reimbursement policy, OCS contends that (1) conserving the funds would cause the Foster Children to exceed SSI's $2,000 resource limit, causing eventual disqualification; *see*, *e.g.*, Exc. 65, 294-95, 546-48 & 548 n.46; Tr. 29, 94; (2) federal law *requires* OCS to spend the funds on maintenance such as food, shelter, and clothing, so OCS *must* reimburse itself for these services;[21] and (3) the Foster Children will lose their federal-benefit eligibility if OCS receives Title IV-E funds to fund care while conserving the SSI benefits, *see*, *e.g.*, Exc. 118, 269 & n.42, 296-97. 351, 382; Tr. 140-42. These contentions are wrong.

For starters, these concerns can all be avoided by OCS using the SSI for the children's current and future needs, above and beyond the basic foster care stipend.[22] In other words, it can spend the Foster Children's funds *on the Foster Children*.

SSI does not strictly cap all beneficiary assets exceeding $2,000 in aggregate value. Savings above that amount *are* allowed via federally recognized accounts: (1) "special needs" trusts ("SNTs"), including "pooled" SNTs;[23] (2) "ABLE" (Achieving a Better Life

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mortgage, the local DSS pocketed his OASDI until a court intervened and ordered it to use the benefits to save and repair the house. Erick Eckholm, *Child Welfare Agencies Seek Foster Children's Assets*, N.Y. Times (Feb. 17, 2006).

[21] *See* Exc. 296 ("As *required* by the SSA, OCS first spends the social security benefit on immediate … needs which is food, housing, and clothing."); R. 1727 ("benefit *must* be used for support and current maintenance, e.g., food, clothing, and shelter"); R. 2095 (using funds for "current maintenance" is "required"); R. 2100 (SSA "*requires* Social Security benefits to be used for current maintenance of the child," and RPs are "*required* to use the benefit for the child's current maintenance") (emphasis added for all).

[22] From better clothes to a summer trip to music or dance lessons, there are many items that fost2er children ordinarily must forego that the benefits could provide.

[23] ***SNTs***: The Act shelters funds (including SSI benefits) placed in irrevocable discretionary SNTs for disabled individuals. 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(A); Soc. Sec.

Experience) accounts;[24] and (3) "PASS" (Plan to Achieve Self Sufficiency) accounts. [25] The funds also can be used for expenses that are excluded from the resource cap.[26] These are real options that SSI beneficiaries use every day to shelter savings.[27] Indeed, OCS already does this for foster children's permanent fund dividends ("PFDs"). Alaska law

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Admin ["SSA"], Program Operations Manual System ["POMS"] GN 00602.075 ("Transfer of Benefits to a Trust"), https://secure.ssa.gov/poms.nsf/lnx/0200602075 (RP "is permitted to transfer [OASDI] and/or [SSI] benefits to establish a trust, or fund an existing trust, provided the terms of the trust are not contrary with use of benefits policies"). SNTs pay for supplemental needs and cannot be used for direct support or to supplant government funding. *See* 162 Am. Jur. Trials 385 § 7 (2019) ("A special needs trust … defray[s] … costs … that are not covered by any other … benefits program."); *Ashcraft & Gerel v. Shaw*, 728 A.2d 798, 803 n.4 (Md. Ct. Spec. App. 1999) ("the trust assets are preserved for special needs of the beneficiary that will not be covered by government subsidized programs"). OCS asserts that "Plaintiff is not eligible for that kind of trust" and that "SSI benefits cannot be accumulated in a trust like that" but admits that research is needed to for details. [Tr. 100]. Smaller sums can be placed in a "***pooled***" SNT that uses a nonprofit entity as trustee for multiple trusts. 42 U.S.C. § 1396p(d)(4)(C).

[24] ***ABLE accounts*** are congressionally established "529A Plan" tax-advantaged savings accounts for individuals with disabilities. The first $100,000 is excluded from SSI's resource limit, and up to $16,000 in SSI benefits and other funds may be invested annually. Funds may be used for education, housing, transportation, health, living expenses, employment support, assistive technology, financial management, and legal expenses. SSA, *Spotlight on Achieving a Better Life Experience (ABLE) Accounts* (2022 ed.), https://www.ssa.gov/ssi/spotlights/spot-able.html.

[25] ***PASS accounts*** allow disabled foster children with a clear plan for reaching independence and self-sufficiency to save SSI benefits and other income to support implementing a plan to work, including education, training, transportation, assistive technology, computer items, etc. *See* SSA, *Spotlight on Plan to Achieve Self–Support*, https://www.ssa.gov/ssi/spotlights/spot-plans-self-support.htm (accessed Mar. 20, 2022).

[26] ***Permitted expenditures***: Also excluded from the cap are assets that OCS often does not provide: a home, a car, or household goods and effects. *See* 42 U.S.C. §§ 1382b(1), (2)(A).

[27] A Maryland law enacted in 2018 requires it to conserve substantial portions of foster youth's federal benefits in special non-capped accounts, available to the youth when they leave foster care. *See* Md. Code Ann. Fam. Law § 5-527.1. To do this, it has successfully utilized pooled SNTs. *See* Md. Dep't of Hum. Servs., Policy No. SSA/CW #19-6, *Protecting the Resources of Foster Children in Custody* (Oct. 1, 2018), https://dhs.maryland.gov/documents/SSA%20Policy%20Directives/Child%20Welfare/SSA%2019-06%20CW%20Protecting%20Resources%20of%20Children%20in%20Custody.pdf. New York City and Philadelphia recently announced that they, too, will institute policies to conserve benefits.

requires OCS to apply for and retain foster children's PFDs in trust until they turn 21 or leave OCS custody.[28] OCS thus can readily do the same for SSI benefits.

For OASDI benefits, the analysis is ever simpler: there are *no* asset caps and *no limitations* on how the benefits may be spent or saved.

OCS's argument that federal law *requires* it to reimburse itself (*see* n.21, *supra*) is pure nonsense. SSA requires no such thing. Rather, as *Keffeler II* explains, "payments made for 'current maintenance' are *deemed* to be 'for the use and benefit of the beneficiary.'"[29] OCS confuses SSA's *examples* of ways to comply with the Act as if they are the exclusive means. RPs must ensure that the child's basic needs are met and must use the benefits for that purpose if they are not, but nothing prevents RPs from utilizing other available sources of maintenance and saving the benefits for supplemental needs or future use.[30]

The regulatory scheme makes this clear. RPs have fiduciary duties to act in the child's best interests, as OCS acknowledges. [R. 1989]. These include "using *and saving* the money for the child's benefit," reporting changes and filing annual accountings with SSA, and conserving unused funds.[31] Under SSA regulations, "payments made for 'current maintenance' are deemed to be 'for the use and benefit of the beneficiary,'" which includes "'cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort

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[28] AS § 47.15.115.

[29] 537 U.S. at 377 (quoting 28 C.F.R. §§ 404.2040(a), 416.640(a)).

[30] 42 U.S.C. §§ 405(j)(1)(C), 1383(a)(2); 28 C.F.R. §§ 404.2040(a), 404.2045, 416.640, 416.645.

[31] SSA, POMS GN 00502.114.A, https://secure.ssa.gov/poms.nsf/lnx/0200502114 (emphasis added); *see also* 20 C.F.R §§ 404.2035(a), 416.635(a).

items.'"[32] SSA's policy is that, ***if current needs are otherwise met***, the benefits must be used for "reasonably foreseeable" future needs, and, "[i]f not needed for these purposes, …. ***the payee must conserve or invest benefits*** on behalf of the beneficiary."[33] Because OCS already provides for current maintenance, it should use the funds for other services or items, which could include specialized equipment or therapy not covered by OCS or Medicaid, participation in clubs or sports teams, or (as seen in John G.'s case, n.20, *supra*) payment to secure housing upon emancipation.[34]

Moreover, this argument does not apply to OASDI, which is 100% unrestricted. *See* R. 1727 ("There is no prohibition on what you can spend this money on[.]").

Finally, OCS overstated Title IV-E's impact. Although SSA counts federal IV-E funding as income reducing SSI benefits dollar-for-dollar, and SSI eligibility is lost if SSI benefits are reduced to zero for one year, only federal foster-care funds count as income; state funds are excluded,[35] so SSI benefits would be reduced by half the IV-E rate (due to the 50% match), not by 100%. Because 25-30% of the Foster Children are not IV-E eligible [Exc. 341], and approximately 40% receive OASDI, the point is moot for over half of the Foster Children. Maryland's pioneering statute, now in its fourth year of successful

[32] *Keffeler II*, 537 U.S. at 376 (quoting 28 C.F.R. §§ 404.2040(a), 416.640(a)).

[33] SSA, POMS GN 00602.001, https://secure.ssa.gov/poms.nsf/lnx/0200602001.

[34] *See* SSA, *A Guide for Representative Payees* 4, https://www.ssa.gov/pubs/EN-05-10076.pdf (accessed Mar. 20, 2022).

[35] *See* Cong. Res. Serv., *Social Security and SSI Benefits for Children in Foster Care*, 15 (Sept. 28, 2012), https://crsreports.congress.gov/product/pdf/RL/RL33855/20 (state foster care payments "generally do not reduce an SSI-eligible foster child's federal SSI benefit because they are not counted as income").

implementation, *see* n.27, *supra*, proves that benefits *can* be saved without compromising SSI eligibility—which is precisely what an RP acting as a true fiduciary is supposed to do.

* * *

In sum, OCS justifies its confiscation with inaccurate and flimsy justifications. Its reasons are obvious: OCS wants courts to believe that it is acting magnanimously, with only the children's interests in mind, when its motive is pecuniary and self-interested. Even if, *arguendo*, *Keffeler II* could be stretched to mean that the Act permits expropriation of benefits, this would not eclipse the facts that (i) OCS does this by choice, for self-interested reasons; (ii) the constitutional claims here are distinct from the narrow statutory ruling in *Keffeler II*; and (iii) much has been learned since *Keffeler II* was decided two decades ago. OCS's strident protestation that it has no choice and that confiscation of benefits is for the children's own good rings hollow. OCS makes the Foster Children pay for their own care—unlike any other foster children—to save money, and, as shown below, it does so by breaching its fiduciary duty, concealing its acts, and withholding vital information.

III. OCS Engineers Its Appointment as RP for Alaska's Foster Children.

SSA appoints an RP based upon who would best serve the child's interests, using a "flexible" seven-tiered order of preference with parents at the top and child-welfare agencies like OCS at the bottom:

(1) custodial parents or guardian;
(2) non-custodial parents who pay support and show strong concern for the child's well-being;
(3) non-custodial, non-supporting but strongly concerned parents;
(4) custodial relatives or stepparents;
(5) non-custodial relatives or stepparents who pay support and show strong concern;

(6) non-custodial, non-supporting but strongly concerned relatives or stepparents;

(7) authorized social agencies or custodial institutions.[36]

SSA tells its staff not to defer to state foster care agencies seeking RP appointments:

> Cases involving foster care are among the most sensitive SSA encounters. It is essential that SSA do all it can to protect the rights of children who may not be able to rely on their parents to do so. When you select a payee for a child in foster care, exercise caution and follow proper procedures to ensure we appoint the best payee available and provide appropriate due process. *Do not routinely appoint the foster care agency as payee for a child in foster care. Gather all pertinent information and make a thoughtful and careful choice and decide each case on its own merit.*"[37]

Despite SSA's policy directive, and despite state agencies' rank as candidates of last resort, OCS is appointed RP for almost all foster children in Alaska.[38] This is no accident.

When children enter foster care or subsequently become eligible for benefits, OCS routinely applies for appointment as RP. [Exc. 293]. SSA's form BK-11 requires OCS to provide names and contact information for parents, relatives, and others with a significant relationship with the child [*e.g.*, R. 735], but OCS apparently *never* provides SSA with information about relatives or others with significant ties to the child who could serve as RP.[39] In court-ordered discovery, OCS provided 42 forms prepared by its contractor PCG

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[36] 20 C.F.R. §§ 404.2021(c), 416.621(c).

[37] SSA, POMS GN 00502.159, https://secure.ssa.gov/poms.nsf/lnx/0200502159 (emphasis added).

[38] On December 5, 2019, OCS was RP for *all* 259 foster children known to receive SSI (140), OASDI (107), or both (12). [Exc. 337-40, 293]. *Cf.* Brief for Florida et al. (38 other states and territories) as Amici Curiae Supporting Petitioners, *Keffeler II* (No. 01-1420), 2002 LEXIS 380 at 17 (discussing states' "regular" RP appointments).

[39] *See* R. 734-961 (BK-11 forms all leaving blank OCS's answer to question 7). Despite this blatant non-reporting, OCS told the Superior Court that it provides this information. [Exc. 447 ("through the submission of the required SSA-BK-11 form, OCS notifies the SSA of the names and contact information for the child's natural parents," as well as "any (other) relatives or close friends who have provided support and/or show active interest

[R. 723-24]; of these, OCS *never* identified nonparental relatives or other adults in *any* forms, *see* R. 734-961, and it identified parents as potential contacts only twice, when OCS deemed the parents cooperative with reunification case plans, *see* R. 822, 919. It usually gave cryptic, unhelpful explanations, *e.g.*, checking the box for "Parent shows interest," but saying "Unknown" for details [R. 752, 762, 776, 770, 779, 797, 832, 836, 851, 872, 876, 886, 890, 900, 904, 908, 939, 959]; or, conversely, checking the box for "Parent shows no interest," but explaining that "court has removed child from parental custody" [R. 745, 756, 770, 801, 808, 814, 855, 881, 894, 925, 945] (which does *not* mean a lack of interest); or not checking either box [R. 861, 913].

This non-reporting of alternative RPs is willful concealment. Many parents who lose custody of their children maintain a "strong concern" for their children's well-being. When parents are unable or unfit to serve, there might be a relative or other trusted adult in the child's life who could administer the benefits in the child's best interest quite differently. OCS is *required by law* to collect information about relatives and assist their involvement and possible caregiving,[40] yet it conceals that information from SSA, thereby dooming their appointment as RPs. This flagrant concealment breaches OCS's fiduciary duty. SSA cannot obtain the information on its own, so, by staying silent, OCS manipulates its own appointment as a *fait accompli*.

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with the claimant")]. OCS attaches the CINA temporary custody order, *id.*, which might name the parent(s) [R. 1429], but that is a far cry from filling out the form.

[40] Title IV-E requires states to "exercise due diligence to identify" all adult grandparents and other known adult relatives and to inform them about the child's removal and options "to participate in the care and placement." 42 U.S.C. § 671(a)(29). OCS must consider adult relatives over a non-related adult as potential caregiver. *Id.* at § 671(a)(19).

This is self-dealing at its worst. The fiscal incentive is obvious: refilling the state treasury by avoiding the 50% match for IV-E-eligible children, trading the standard 50-50 state/federal split for fully federal dollars. OCS cannot compel private RPs to reimburse it for the cost of foster care, so OCS has every incentive to engineer its own self-interested appointment as RP, passing over higher-priority adults in the child's life.

OCS claims that expenditures are carefully accounted for; that excess funds are used for additional needs like school tuition, computers, or healthcare; and that surplus funds remaining after that are conserved for future use or sent back to SSA if unused, *see* Exc. 295, 393-94; R. 1975; Tr. 142, 144, but such assertions should be taken with a grain of salt. Federal funds are "rarely" used for non-maintenance,[41] and OCS admits that the funds replace what must be spent on the child anyway [Tr. 91].

As the NPR investigation sums up the practice, "36 States and D.C. typically comb through records to find children who could receive benefits, then apply on the children's behalf, name themselves as RPs, and then seize the benefits for themselves."[42] OCS admits that, if it stopped taking the funds, the Foster Children would have additional funds to spend or save. [Tr. 90]. Thus, the Foster Children lose vital financial support due to a policy that makes a relatively negligible dent in the state's child-welfare budget.[43]

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[41] Cong. Res. Serv., *supra* note 35, at 16 (in 42 of 43 states, "funds are rarely used for non-maintenance purposes").

[42] Hager et al., *supra* note 19 (first cited article).

[43] Cong. Res. Serv., *supra* note 35, at 17 (state "spending of Social Security benefits on child welfare represents a relatively small share" (0.61%) "of their total spending").

Many states contract out the task of mining children's cases for potential benefits to private contractors who use predictive analytics to find children and process applications.[44] Alaska paid MAXIMUS, the contractor responsible for Z.C.'s SSI application [R. 344], and its successor Public Consulting Group ("PCG"), a fee—a bounty—for each successful application.[45] [Exc. 420-21]. MAXIMUS markets its revenue-maximization services to save states money [R. 2828], not to benefit children. The hunt for benefits is a profit center and revenue stream, not a *bona fide* effort to help children.

IV. Alaska's Constitution Prohibits Discriminatory Treatment of Foster Children.

OCS does not dispute that it forces only the Foster Children to pay for the cost of their own care. The dispute is whether this disparate treatment violates equal protection.

Article I, section 1 of the Alaska Constitution "mandates equal treatment of those similarly situated" and "protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause," affording "greater protection to individual rights than the … Fourteenth Amendment"[46] in two ways. First, "Alaska's more stringent equal protection standard" adopts "a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental

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[44] Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1800 n.8, 1821(2006) [R. 551]; *see also* Joseph Shapiro, *Consultants Help States Find and Keep Money that Should Go to Foster Kids*, Nat'l Pub. Radio (Apr. 28, 2021), https://www.npr.org/2021/04/28/991503850/consultants-help-states-find-and-keep-money-that-should-go-to-foster-kids.

[45] OCS states that PCG currently processes applications only. [R. 2088].

[46] *Alaska C.L. Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (footnotes and citations omitted).

interest at stake."[47] Second, the bottom rung is "more demanding" than the federal rational-basis test and "close[s] the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry."[48]

The analysis first examines whether plaintiffs are similarly situated to a comparison class. Here, the Decision rules that Foster Children whose benefits are taken to pay for their care are not similarly situated to foster children whose assets are not taken. [Exc. 607-08]. The second test considers whether the disparate treatment is justified under Alaska's sliding scale of scrutiny. Relying on *Keffeler II*, the Decision finds a sufficient fit between means and ends. [Exc. 609]. Finally, the Decision rules that the federal scheme preempts the equal-protection claim. [Exc. 601-03]. These rulings are erroneous.

A. The Foster Children Are Similarly Situated but Treated Differently.

The Decision rules that the Foster Children are not situated similarly to other foster children because their benefits are subject "to a complex set of eligibility rules and requirements concerning [their] use," and other foster children's assets are not, and thus are "not amenable to equal protection comparison." [Exc. 607]. This circular analysis errs by using the disparate treatment (penalizing foster children with federal benefits) as the basis for finding that the children are not similarly situated.

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[47] *Id.*

[48] *Isakson v. Rickey*, 550 P.2d 359, 362-63 (Alaska 1976); *see also Alaska C.L. Union*, 122 P.3d at 791 ("Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be *substantial*.") (emphasis in original).

Courts may not consider the classifications as the basis for finding dissimilarity except in the clearest of cases. "The goal of identifying a similarly situated class ... is to isolate the factor allegedly subject to impermissible discrimination."[49] Where plaintiffs and the comparison group "are the same in all relevant respects, except that" plaintiffs have a particular characteristic that is treated differently by the state, such that, "[i]f all other things are equal," disparate treatment of this characteristic "gives rise to an inference of discrimination. But where the comparison group has less in common with [plaintiffs], then factors other than the protected expression may very well play a part in the [disparate treatment]."[50] Thus, "two groups are similarly situated if they are equivalent in all relevant respects *other than the isolated factor* constituting the alleged discrimination."[51] Here, the court found dissimilarity based upon the isolated factor itself, not other factors.

California cases explain the reasoning for this rule:

> The use of the term "similarly situated" in this context refers only to the fact that "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' ..." … There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The "similarly situated" prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently

[49] *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (quoting *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), superseded by statute on other gds.).

[50] *Aguilar*, 883 F.2d at 706.

[51] *Goble v. Mont. State Fund*, 325 P.3d 1211, 1219 (Mont. 2014)) (emphasis added, citations omitted).

> similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.[52]

The groups need only be "alike," not completely identical: "the similarly-situated test … does not require identical comparators" that are "'identical in all relevant respects.'"[53]

Where it is patently obvious that the classifications should be treated differently, courts may use the "similarly-situated" test as "shorthand" for finding constitutionally valid grounds for the disparate treatment under the standard sliding-scale analysis:

> But in "clear cases" we have sometimes applied "in shorthand the analysis traditionally used in our equal protection jurisprudence." If it is clear that two classes are not similarly situated, this conclusion "necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."[54]

"[T]his abbreviated analysis" is used only in "exceedingly clear cases" where courts may "summarily conclude" that "different legal treatment of the two classes" is obviously needed.[55] It is not an excuse to avoid the analysis altogether.

This is far from an "exceedingly clear case." As discussed above, OCS's stated justifications are wrong: SSA rules do not require OCS's disparate treatment. The children have similar needs, and the law that foster children cannot be required to pay for their own

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[52] *People v. Nguyen*, 63 Cal. App. 4th 705, 714 (1997) (citations omitted); *see also Fenn v. Sherriff*, 109 Cal. App. 4th 1466, 1488 (2003).

[53] *Simmermon v. Gabbianelli*, 932 F. Supp. 2d 626, 633 (D.N.J. 2013) (quoting *Southersby Dev. Corp. v. Borough of Jefferson Hills*, 852 F. Supp. 2d 616, 628 (W.D. Pa. 2012)) (citations omitted).

[54] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 966-67 (Alaska 2005) (footnotes omitted (quoting *Lauth v. State,* 12 P.3d 181, 187 (Alaska 2000)); *see also Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1136 (Alaska 2016) (explaining that whether classes are similarly situated depends on whether, under applicable scrutiny level, the "stated rationales" for the classification "justify discriminating" between the classes).

[55] *Lauth*, 12 P.3d at 187; *Dennis O. v. Stephanie O.*, 393 P.3d 401, 411-12 (Alaska 2017).

care applies to both groups.[56] One class, however, is charged nothing and the other must reimburse OCS for the cost of care. Similarly situated children are not treated equally.

B. OCS's Disparate Treatment of Foster Children Is Not Justified.

As OCS lacks a valid rationale for diverting the benefits and offers only pretexts for its own self-enrichment, *see* pp.14-18, *supra*, its policy violates equal protection.

When similarly situated groups are treated differently, the following sliding scales of scrutiny determine whether the challenged practice violates equal protection:

> [W]e first determine the importance of the constitutional right at stake. This is "the most important variable" in determining the applicable level of scrutiny. We then examine the state's interests. These interests may range from merely legitimate to compelling, depending on the burden that the challenged regulation places on the exercise of constitutional rights. Finally, we consider the means the state uses to advance its interests. Depending on the importance of the right involved, the means-to-ends fit may range from a substantial relationship, at the low end of the sliding scale, to the least restrictive means available to achieve that interest at the highest end.[57]

Under these tests, "[t]he burden on the state increases in proportion to the primacy of the interest involved."[58] Applying this triple scale here, OCS's policy that only disabled and orphaned foster children with federal benefits must pay for their own care is discriminatory. The Foster Children lose a vital constitutional right (property needed for future economic stability) and have vulnerabilities warranting suspect-class status (foster children with severe disabilities or orphanhood); the state has limited interest in purportedly acting on

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[56] *Cf. Miller v. Youakim*, 440 U.S. 125, 144 & 143 n.24 (1979) (affirming statutory right of relatives caring for foster children to receive federal subsidies because foster children placed with kin and non-kin were "similarly in need of the protections and monetary benefits afforded by the [federal funds]" and because related and unrelated foster parents were "subject to the same state-imposed responsibilities" imposing "equivalent" costs).

[57] *Alaska Inter-Tribal Council*, 110 P.3d at 967 (footnotes omitted).

[58] *Herrick's Aero-Auto-Aqua Repair Serv. v. State*, 754 P.2d 1111, 1114 (Alaska 1988).

their behalf to preserve their future SSI eligibility; and OCS's justifications are patently invalid. All three factors point to unconstitutional discrimination.

1. *Importance of affected right and classification*. Heightened scrutiny is warranted. Class members are highly vulnerable children, having been removed from their families due to abuse, neglect, or abandonment. They often face additional trauma while in foster care, and they face especially steep challenges when they leave foster care to fend for themselves without a support structure. The Foster Children typically receive federal benefits because they suffer from physical or mental disabilities that minimize their earnings potential or because one or both parents is deceased. For the state to impose additional pecuniary injury, distinct from their peers in care, is perverse, harmful, and should have heightened justification. Moreover, the constitutional right at issue—funds paid because their parents had paid into Social Security during their work years or due to qualifying disabilities—is critically important to the Foster Children: a lifeline of desperately needed support for when they age out of care.[59] Impairment of funds "that individuals depend on to supply 'the basic necessities of life'" as "'a source of sustaining income, a replacement for the ability to earn income, or a source of money to provide for basic needs such as past or future medical care'" warrants heightened (close) scrutiny.[60] A right "is an important one" under Alaska law if it meets any of these tests.[61]

[59] *See Malabed v. N. Slope Borough*, 70 P.3d 416, 420-21 (Alaska 2003) (applying "close" scrutiny to enactment affecting "important" interest).

[60] *C.J. v. Alaska Dep't of Corr.*, 151 P.3d 373, 379-80 (Alaska 2006) (footnotes omitted).

[61] *Wilkerson v. Alaska Dep't of Health & Soc. Servs.*, 993 P.2d 1018, 1024 (Alaska 1999) (distinguishing right to work in an industry from a foster parent's right to obtain a license).

Heightened scrutiny is further warranted because the funds already have been paid out, belong to the Foster Children, and are being intercepted by OCS ostensibly as fiduciary; they are tangible property and not merely an entitlement. Property ownership is accorded strong protection under the Alaska Constitution.[62] If restrictions on worker's compensation benefits that infringe upon the right to travel receive heightened scrutiny,[63] so should OCS's seizure of desperately needed benefits from disabled and orphaned foster children who lose "a source of money to provide for basic needs." But even under lesser scrutiny, OCS's policy still fails the other equal-protection tests.

2. *No significant state interest*. The Superior Court ruled that OCS's legal compliance with SSA's rules for RPs suffices to show a significant state interest. [Exc. 609]. But the mere fact that OCS's policy is not challenged as illegal under the Act does not mean that OCS has a strong interest to do so under the Alaska Constitution.

The true state interest here is financial. Echoing *Keffeler II*, the Superior Court ruled in its remedies discussion that OCS does has a valid interest in securing additional federal funds and saving state funds. [Exc. 595-96]. This ruling does not apply to equal protection for three reasons. First, for those Foster Children who are not IV-E-eligible (25%-30% of the class) or who receive OASDI (approximately 40%), no state savings occur. Second, OCS has denied a pecuniary motive. [Exc. 432-33]. Third, conserving government

[62] *R & Y, Inc. v. Munic. of Anchorage*, 34 P.3d 289, 293 (Alaska 2001); *Ehrlander v. Alaska Dep't of Transp. & Public Facilities*, 797 P.2d 629, 633 (Alaska 1990).

[63] *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 273 (Alaska 1984); *cf. Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 260 (1974) ("governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements").

resources is not valid justification under state and federal equal-protection laws: "[W]e have repeatedly explained that 'cost savings alone are not sufficient government objectives under our equal protection analysis.' The government can adequately protect its tax base and minimize cost without discriminating between similarly situated classes."[64] Alaska can certainly do so without dipping into vital assets of its disabled and orphaned foster children.

The only other interests that OCS has proffered belong to the *Foster Children*, not the state. OCS asserts that its policy prevents loss of SSI eligibility due to the Title IV-E offset and the $2,000 resource limit. [Exc. 65, 118, 269 & n.42, 294-97, 546-48 & 548 n.46; Tr. 29, 94, 140-42]. Putting aside OCS's failure to utilize the financial vehicles available to avoid the limit—which it would use if it were acting as loyal fiduciary—it is for the *Foster Children*, not OCS, to decide whether this alleged risk is worth taking. Moreover, OCS's purported concerns about SSI do not apply to OASDI benefits, which do not continue past age 18 or 19 and are not means-tested. OCS has no justification for taking the Foster Children's OASDI survivor benefits.

3. *No substantial relationship of means to end*. The third prong, OCS's choice of means to achieve its ends, weighs overwhelmingly in the Foster Children's favor. As shown above, most of OCS's justifications are fallacies. OCS has available multiple methods of conserving the Foster Children's adult SSI benefits without jeopardizing their

[64] *State v. Schmidt*, 323 P.3d 647, 663 (Alaska 2014) (footnote omitted)); *accord State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1004 (Alaska 2019) ("we have rejected cost savings alone as a legitimate state interest to discriminate"); *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"); *Mem'l Hosp.*, 415 U.S. at 263 ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens").

SSI eligibility. Their OASDI benefits are not even theoretically at risk. Where the State's justifications are infirm, the "fit" between the areas of legitimate governmental concern and the challenged discriminatory policy is attenuated to an extreme. Pocketing the Social Security benefits of foster children to pursue dubious policy is tantamount to outright plunder. It falls far below the substantial relationship required for rational-basis scrutiny.

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OCS's policy violates equal protection. Forcing the Foster Children—and the Foster Children only—to pay for their own care by seizing their federal benefits is not just a counter-intuitive, morally bankrupt policy that strips foster children of their property, it discriminates against disabled and orphaned children by intercepting their federal compensation for those disabilities and losses.[65] OCS has no cognizable interest in this practice apart from benefiting the public fisc, an impermissible justification. Its other rationales range from flimsy to fallacious, and none explains its failure to require other foster children to contribute to the cost of their care or its rejection of multiple alternative ways to address its stated concerns. For these reasons, OCS's policy of stripping disabled and orphaned Foster Children of their funds is the epitome of unequal justice.

[65] This is not contrary to *Guard. Est. of Keffeler v. Dep't of Soc. & Health Servs.,* 88 P.3d 949 (Wash. 2004) ("*Keffeler III*"), which, after remand by *Keffeler II*, denied a *different* equal-protection claim—disparate treatment of foster children with public RPs versus those with private RPs—and held by a 7-2 margin that both groups were treated similarly. *Id.* at 956. The Foster Children are not pursuing an RP-based equal-protection claim.

C. Federal Social Security Law Does Not Preempt State Court Enforcement of Alaska's Violations of Alaska's Constitution.

The Superior Court's ruling that the Act impliedly preempts the Foster Children's right to equal protection [Exc. 603] leaves OCS unaccountable for its discrimination. SSA does not have jurisdiction over state agencies' use of benefits that does not violate federal law. If a state-agency RP violates state law, but not federal law, only state courts could provide relief. But under the Superior Court's ruling, state courts lack power to adjudicate such claims and the Foster Children's only recourse is to seek federal administrative relief from a system that lacks jurisdiction. This leaves the Foster Children with no pathway to enforce their rights. Instead of protecting federal oversight over state activities, applying implied "field" preemption here would insulate states from accountability and give them carte blanche to violate important rights under state law.

This perverse result is bad enough in the abstract. OCS asserts plenary control over funds belonging to the Foster Children, to whom it owes fiduciary duties *twice*—once as their legal custodian and again as RP—to pocket their funds for its own fiscal benefit. This is outrageous. Applying federal preemption to *insulate* a state agency from accountability for its self-interested acts violating state-law rights of the disabled and orphaned Foster Children in its legal custody turns the preemption doctrine upside down.

The Superior Court properly did not find express or conflict preemption. Rather, it ruled that the Act "occupies the field" of activity so pervasively that Congress must have intended to preclude enforcement of state laws and to vest SSA with exclusive power. Recognized federal "fields" include immigration policy, nuclear power, and foreign affairs.

OCS's discrimination is not preempted. Field preemption has a high bar: when "federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[66] Alternatively, congressional intent may be inferred by a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[67] Courts must apply an overriding presumption that "Congress did not intend to displace state law"[68] "unless that was the clear and manifest purpose of Congress."[69]

There are other limitations. Courts must "'start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[70] Next, field preemption is inapt if "Congress has left some room for state involvement"[71] because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."[72] Finally, courts must apply a "deeply rooted presumption in favor of concurrent state court jurisdiction," rebuttable only "by an explicit statutory directive, by unmistakable

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[66] *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[67] *Arizona v. United States*, 567 U.S. 367, 399 (2012) (quoting *Rice*, 331 U.S. at 230).

[68] *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981).

[69] *Rice*, 331 U.S. at 230.

[70] *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Rice*, 331 U.S. at 230); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied, we 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.'") (quoting *Rice*, 331 U.S. at 230) (citation omitted)).

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

[72] *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[73] These further limitations apply here.

First, Alaska's constitutional right against discrimination is an historic state police power. Child welfare and foster care are even more paradigmatic state police powers, and state courts have primary jurisdiction in child welfare: "[F]ederal courts consistently have shown special solicitude for state interests" in these areas.[74]

Second, nothing in 42 U.S.C. § 405 gives SSA oversight over an RP's *use* of funds that is legal under the Act[75] but violates state law. Instead, the Act addresses "*misuse*," which occurs when an RP "converts" a payment "to a use other than for the use and benefit of such other person" and entitles SSA to revoke its certification of an RP and replace it with a new RP.[76] Apart from proscribing conversion and imposing reporting obligations, the Act leaves RPs alone. This solicitude does not authorize RPs to violate equal protection.

The Act leaves ample room for state enforcement. 42 U.S.C. §§ 405(j)(1)(A) and (7)(A) confer concurrent jurisdiction on *either* SSA "*or a court of competent jurisdiction"* to determine whether an RP "has misused" a benefit, such that SSA may decertify the RP and a *private* RP may be liable for repayment. Citing *In re Ryan W.*, 76 A.3d 1049, 1059 (Md. 2013), the Superior Court ruled that "court of competent jurisdiction" refers to a U.S.

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[73] *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990).

[74] *Lehman v. Lycoming Cnty. Child's Servs. Agency*, 458 U.S. 502, 511-12 (1982) (rejecting federal habeas jurisdiction over state-court decision terminating parental rights).

[75] Amici strongly disagree that state courts lack authority to address RP misuse, but that issue is not present here: Plaintiffs do not claim misuse.

[76] 42 U.S.C. §§ 405(j)(1)(A), (j)(5), (j)(9); 1383(a)(2)(iv).

District Court's judicial review of the SSA's decision, but judicial review is discussed in a prior subsection, 42 U.S.C. § 405(g), that would have been referenced here if it were the subject. Instead, the provisions use the broad term "court of competent jurisdiction," which the U.S. Code elsewhere defines to include state courts.[77] Moreover, the "court of competent jurisdiction" makes a fact determination of misuse, which cannot occur in limited judicial review. Most telling, 42 U.S.C. § 405(j)(7)(A) authorizes SSA *or a court of competent jurisdiction* to hold private RPs liable for misused funds but *excludes* federal or *state agencies* from liability.[78] Instead, *SSA* must repay the beneficiary per 42 U.S.C. §§ 405(j)(1)(A) and (j)(5). Given this broad carve-out, SSA's authority over state-agency RPs is limited to decertification. It thus falls upon state courts to exercise oversight, lest state agencies be left free to discriminate at will. Surely, Congress did not intend that.[79]

Third, the Act's RP provisions lack the precision and specificity needed to preempt state constitutional claims and remedies. Citing *In re Ryan W.*, the Superior Court pointed to reforms enacted in 2004 that strengthen SSA oversight over RPs and give beneficiaries a right of recompense from SSA in cases of misuse. These measures provide better federal

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[77] *See*, *e.g.*, 18 U.S.C. §§ 2711(3) ("the term 'court of competent jurisdiction' includes— … (B) a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants"); 2037(2) ("term 'court of competent jurisdiction' means— … (B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device").

[78] Section 405(j)(7)(A) provides, "If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee that is *not* a Federal, *State*, or local government agency has misused all or part of an individual's benefit … the representative payee shall be liable for the amount misused….") (emphasis added).

[79] For these reasons, *Ryan W.* misreads 42 U.S.C. § 405(j)(7)(A). *See* 76 A.3d at 1070-76 (Adkins, J., dissenting, joined by Bell, C.J.) (explaining why the Act does not preempt state juvenile courts' authority to replace state agency with a new RP).

protection and a federal remedy (SSA restitution) but do not exclude state remedies.[80] Given that the case law as of 2004 permitted state-court enforcement,[81] Congress's failure to enact *any* provision prohibiting state-court enforcement or establishing congruent federal alternatives demonstrates a lack of preclusive intent and demonstrates that Congress did not intend the federal scheme "to be the *exclusive avenue*" of enforcing beneficiaries' constitutional rights.[82]

The standard for overcoming "this deeply rooted presumption in favor of concurrent state court jurisdiction"[83] is extremely rigorous, requiring "an explicit statutory directive," "unmistakable implication from legislative history," or "clear incompatibility between state-court jurisdiction and federal interests."[84] None of these exists here: no explicit terms, no legislative history (let alone unmistakably clear history), and no "clear incompatibility"

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[80] Establishing a limited federal remedy does not show preemptive intent. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 380 (2012) ("'[I]t is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.'") (quoting *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 479 (1936)).

[81] As discussed in *In re J.G.*, 652 S.E.2d 266, 272-73 (N.C. Ct. App. 2007), multiple courts held prior to the 2004 amendments "that state courts have concurrent jurisdiction to hear disputes between [an RP] and a beneficiary concerning the use of Social Security funds." *See Jordan v. Heckler,* 744 F.2d 1397, 1399 (10th Cir. 1984); *Jahnke* v. *Jahnke,* 526 N.W.2d 159, 163 (Iowa 1994); *Grace Thru Faith v. Caldwell,* 944 S.W.2d 607, 609-13 (Tenn. Ct. App. 1996); *Catlett v. Catlett,* 561 N.E.2d 948, 953 (Ohio Ct. App. 1988); *In re Estate of Kummer,* 461 N.Y.S.2d 845, 860-61 (N.Y. App. Div. 1983).

[82] *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (emphasis added); *see also id.* at 252-53 ("Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights").

[83] *Tafflin*, 493 U.S. at 459.

[84] *Id*. at 459-60 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). Even if an express preemption clause preempts state statutes or regulations, where "its structure and framework do not convey a 'clear and manifest' intent … to go even further and implicitly pre-empt all state common law," field preemption does not apply. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002).

between state jurisdiction and federal interests. To the contrary, the Act handcuffs the SSA and leaves it to state courts to police state agencies.

Finally, field preemption ordinarily does not apply unless the federal statutory scheme leaves "no room" for state involvement.[85] SSI is a cooperative federal-state program, where disability decisions are made by Alaska DDS, SNTs are reviewed by state AGs, and federal benefits may be supplemented with state funding. Field preemption typically is inapt for such cooperative programs.[86]

Thus, the statute fails every test for implied preemption—as the Superior Court recognized for due process [Exc. 591] but, incongruously, not for equal protection. Instead, the court misread the ruling in *C.G.A. v. State*, 824 P.2d 1364 (Alaska 1992), that the Act's anti-assignment clause, 42 U.S.C. § 407(a), preempts a support order requiring an RP of a juvenile in state custody to remit his OASDI benefits to the state to pay for his care. That ruling applies *express* preemption, *not* field preemption, as § 407(a) "'unambiguously rules out any attempt to attach Social Security benefits.'"[87] Section 407(a) is not relevant here.

Ultimately, the issue comes down to congressional intent. No express language, no legislative history, no parallel remedies, no feature of the Act demonstrates the clear intent

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[85] *Allen v. State*, 203 P.3d 1155, 1161 (Alaska 2009); *Dupier*, 118 P.3d at 1050.

[86] *Washington Dep't of Soc. & Health Servs. v. Bowen*, 815 F.2d 549, 557 (9th Cir. 1987) ("'the case for federal preemption becomes a less persuasive one'" where "'coordinated state and federal efforts exist within a complementary administrative framework'") (quoting *N.Y. Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973)); *Allen*, 203 P.3d at 1161-62 (holding that field preemption does not apply to the Food Stamps program).

[87] *C.G.A.*, 824 P.2d at 1367 (quoting *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curiam)). *C.G.A.* states that the federal remedy for abusing an RP's authority precludes a counterpart state remedy, but the cited provision, 42 U.S.C. § 408(a)(5), merely makes an RP's conversion of benefits a *felony* and thus does not support field preemption. *See id.*

of Congress to preclude state-law claims of unconstitutional discrimination. If such intent existed, much stronger proof is required than what was cited by the Superior Court.

V. Plaintiffs Are Entitled to Show Harm and Injury Entitling Them to Restitution.

Despite declaring that OCS violated the Foster Children's constitutional right to due process and ordering injunctive relief, the Superior Court denied equitable restitution (disgorgement and a constructive trust), finding a lack of proof of causation of harm and a lack of inequitable conduct. [Exc. 594-96]. Both rulings err as to basic facts.

The causation ruling misapprehends the procedural posture of cross-motions for summary judgment. Neither party sought summary judgment on causation or addressed causation at all. The issue was not before the Superior Court, and it was error for the court to rule *sua sponte*. It also was extremely unjust, as the Foster Children had no notice that they needed to proffer their evidence to the court to avoid summary judgment.

The unfairness of the Superior Court's *sua sponte* ruling is compounded by its exceptionally long delay in certifying the class. Given its ruling that causation must be proven for each class member, the prejudice was acute. Identities and records of foster children are confidential.[88] Counsel received only limited discovery—the redacted BK-11 application forms—and nothing that would have allowed investigation and assembly of causation evidence. Due to the *sua sponte* ruling, counsel could not inform the court about the problem and oppose summary judgment for lack of discovery under Rule 56(f).[89]

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[88] Alaska R. P. Ch. Need 22.

[89] *See Jovanov v. Alaska Dep't of Corr.*, 404 P.3d 140, 152 (Alaska 2017) ("We have reversed a superior court's *sua sponte* grant of summary judgment on more than one occasion."); *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606, 612 (Alaska 1998) (reversing

The Superior Court also denied equitable restitution for the due-process violation by finding that the Foster Children had not shown that OCS's conduct was inequitable, a key element of unjust enrichment (the prerequisite for restitution remedies). It reasoned that, because *Keffeler II* held that Section 407(a), the anti-assignment clause, did not bar states from taking foster children's benefits, "the Court cannot find that this systemic lawful use of federal funds is inequitable…." [Exc. 595-96].

This ruling confuses the wrongful conduct in the due-process claim. As the court stated one page earlier in explaining why causation was an important element of the claim, "the precise conduct by the State that violated the children's due process …. was not the use of the benefits" or "the deprivation of the child's potential receipt of supplemental funds." Rather, "[i]t was the failure to give notice of the application for OCS to become the representative payee and the potential adverse financial consequences if some alternate payee was not appointed." [Exc. 594-95]. This distinction applies to remedies. Hence, the court erred by relying on the alleged legality of OCS's diversion of the funds to decide the inequity of its due-process violation. They are separate issues.

The due-process violation here *is* inequitable. *Any* willful violation of the Alaska Constitution is *per se* inequitable. But much more happened here. OCS used its lack of notice to secure its RP appointment and profit from disabled and orphaned Foster Children's benefits. Its ulterior motive was pecuniary. It concealed key information from

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summary judgment on issue raised *sua sponte* where party lacked "reasonable opportunity to oppose" it); *Kentopp v. Anchorage*, 652 P.2d 453, 464 (Alaska 1982) (holding that court "erred in considering *sua sponte*" key issue that "was not raised by the parties below" in motions and denying summary judgment under Rule 56(f) to allow for discovery).

SSA, preventing appointment of a more appropriate RP to protect the Foster Children's best interests. Concealment, breach of fiduciary duties, and violation of constitutional rights of an exceptionally vulnerable group of abused and neglected children, in a self-interested effort to profit from their benefits, all qualify as "inequitable."

The only remaining issue is whether the requested relief is available. It is: Foster Children seek return of their property entrusted to OCS's care as a fiduciary, not damages. No expenditure from the state treasury is required—just return of property. Equitable relief encroaches on state sovereignty when the liability "must be paid from public funds in the state treasury."[90] The Foster Children's funds are kept in dedicated accounts separate from the general treasury. [Exc. 260]. Returning this property does not implicate the state treasury. Even if the funds were spent, inverse-condemnation liability for taking property without compensation would apply, also superseding sovereign immunity. By accepting fiduciary responsibility over the property, OCS implicitly waived sovereign immunity.[91]

CONCLUSION

For the foregoing reasons and for those raised by the Foster Children, the judgment of the Superior Court as to their equal-protection claim and the requested relief for their due-process claim should be reversed and the case remanded for further proceedings.

[90] *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

[91] *See id.* at 673 (recognizing that sovereign immunity may be waived for equitable restitution); *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Rsrv. v. California*, 813 F.3d 1155, 1170 (9th Cir. 2015) ("[R]estitution was contemplated by the parties as a potential remedy for which sovereign immunity was waived").

Respectfully submitted,

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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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