

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA USA FEDERAL CREDIT UNION,

Petitioner,

vs.

THE SAYER LAW GROUP, P.C., ADAM
CRUM, COMMISSIONER OF THE STATE OF
ALASKA, DEPARTMENT OF REVENUE,
DIVISION OF CHILD SUPPORT SERVICES
DIVISION, TROY R. LEWIS and SHANDA M.
LEWIS,

Respondents.

Supreme Court No. S-18515

Superior Court Case No. 3AN-21-05226CI

District Court Case No. 3AN-18-10150CI

ON PETITION FOR HEARING FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE UNA S. GANDBHIR, JUDGE

**BRIEF OF AMICI CURIAE ALASKA BANKERS ASSOCIATION, ALASKA
CREDIT UNION LEAGUE, AND CREDIT UNION NATIONAL ASSOCIATION
IN SUPPORT OF PETITIONER**

Andrew Erickson, Alaska Bar No. 1605049
Bruce Moore, Alaska Bar No. 8611124
LANDYE BENNETT BLUMSTEIN LLP
701 West 8th Avenue, Suite 1100
Anchorage, AK 99501
Phone: 907-276-5152
Email: andye@lbblawyers.com
brucem@lbblawyers.com

Filed in the Supreme Court of
the State of Alaska, this ____ day of
_____ 2023.

CLERK OF THE APPELLATE COURTS

By: _____

Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

AUTHORITIES PRINCIPALLY RELIED UPON.....iv

JURISDICTIONAL STATEMENT.....1

STATEMENT OF INTERESTS.....1

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW6

ARGUMENT6

 I. Surplus Proceeds that Are Required by AS 34.20.080(f) to Be Distributed to
 Holders of Recorded Interests Following a Foreclosure Sale Are Not the
 Property of the Obligor and Are Not Subject to a CSSD
 Withholding Order.....7

 II. CSSD’s Misinterpretation of AS 25.27.250 Represents Unsound
 Public Policy.....13

CONCLUSION16

TABLE OF AUTHORITIES

Cases

<i>Alaska Pub. Def. Agency v. Superior Court</i> , 450 P.3d 246 (Alaska 2019).....	6
<i>Brand v. First Fed. Sav. & Loan Ass’n</i> , 478 P.2d 829 (Alaska 1970).....	9
<i>Grimm v. Wagoner</i> , 77 P.3d 423 (Alaska 2003).....	6
<i>Louisville Joint Stock Land Bank v. Radford</i> , 295 U.S. 555 (1935).....	15
<i>Nelson v. Municipality of Anchorage</i> , 267 P.3d 636 (Alaska 2011).....	6, 12, 16
<i>Thomas v. Joseph Casteel Trust</i> , 496 P.3d 403 (Alaska 2021).....	8, 9
<i>United States v. Lawton</i> , 110 U.S. 146 (1884).....	15

Alaska Statutes

Ch. 20, § 10, SLA 2010 (codified at AS 34.20.080(f)(1)).....	10
Ch. 132, SLA 1998.....	12
AS 09.30.010.....	9
AS 09.30.020.....	4
AS 25.27.090.....	16
AS 25.27.230.....	4, 9, 16
AS 25.27.250.....	<i>passim</i>
AS 34.20.080.....	<i>passim</i>

AS 34.20.090.....8

Alaska Regulations

15 AAC 125.410.....16

Other Authorities

1987 Inf. Op. Att’y Gen., 1987 WL 121173 (Jul. 22, 1987).....15

Black’s Law Dictionary (11th ed. 2019).....15

59A C.J.S. Mortgages § 1324.....9

Rep. Jay Ramras, Sponsor Statement: HB 108—Property Foreclosures and
Executions (Mar. 27, 2009).....9, 10, 12

William A. Reppy, Jr. *Some Issues Raised by Alaska’s Recording Act*,
27 Alaska L. Rev. 196 (2010).....7

Restatement (Third) of Property (Mortgages) § 7.4.....9

John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure—
Washington Mutual Savings Bank v. United States*, 115 Wash.2d 52, 793 P.2d 969,
clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990), 67 Wash. L. Rev.
235, 248 (1992).....13

AUTHORITIES PRINCIPALLY RELIED UPON

AS 25.27.230. Assertion, Recording, and Effect of Lien.

- (a) The agency shall assert a lien upon the real or personal property of the obligor in the amount of the obligor's liability if an arrearage occurs under a support order being enforced by the agency.
- (b) A lien recorded under this section has no effect against earnings, or bank deposits or balances, unless it states the amount of the obligor's liability under this chapter and unless the lien is served in accordance with AS 25.27.240.
- (c) The lien shall attach to all real and personal property of the obligor and be effective on the date of recording of the lien with the recorder of the recording district in which the property attached is located. A lien against earnings shall attach and be effective upon filing with the recorder of the recording district in which the employer does business or maintains an office or agent for the purpose of doing business. A lien filed at the offices of the Commercial Fisheries Entry Commission in Juneau against a limited entry permit issued under AS 16.43 is considered to have been filed against the permit in all recording districts in which the permit holder uses the permit.
- (d) Whenever a lien has been recorded under this section and there is in the possession of any person, political subdivision, or department of the state having actual notice of the lien any property that may be subject to the lien, that property may not be paid over, released, sold, transferred, encumbered, or conveyed unless
 - (1) a written release or waiver signed by a representative of the agency has been delivered to the person, political subdivision, or department of the state; or
 - (2) a decision has been made in a hearing held under AS 25.27.170 or by a superior court ordering release of the lien on the grounds that no debt exists or that the debt has been satisfied.
- (e) A lien arising in another state under the child support laws of that state shall be given full faith and credit in this state. The lien may be asserted in this state upon the real or personal property of the obligor in the amount of the obligor's liability by complying with the requirements of this section.

- (f) A lien recorded under this section is a judgment lien and may be enforced by execution under AS 09.35 in the full amount of the obligor's liability at the time of execution.

AS 25.27.250. Order to Withhold and Deliver.

- (a) Without prior notice to the obligor, the agency may issue to any person, including an entity, political subdivision, or state agency, an order to withhold and deliver property under this section; the order may be issued
 - (1) immediately upon issuance of an income withholding order that provides for immediate income withholding under AS 25.27.062(a);
 - (2) immediately after an arrearage occurs under a support order described in AS 25.27.150(a);
 - (3) at the expiration of 30 days after the date of service of a notice and finding of financial responsibility under AS 25.27.160; or
 - (4) at the expiration of 30 days after service of a decision establishing paternity and financial responsibility under AS 25.27.165.
- (b) All real or personal property belonging to the obligor is subject to an order to withhold and deliver, including, but not limited to, earnings that are due, owing, or belonging to the debtor. In calculating the amount to be withheld and delivered under an order issued under this section, the agency shall give credit to the obligor for the cost to the obligor of medical and dental insurance for the children and educational payments for the children to the extent that the insurance coverage and educational payments are required in the applicable child support order and are actually paid for by the obligor.
- (c) The agency may issue an order to withhold and deliver when it has reason to believe that there is in the possession of a person, political subdivision, or department of the state property that is due, owing, or belonging to the obligor.
- (d) The order to withhold and deliver shall be served upon the person, political subdivision, or department of the state possessing the property electronically or in the manner provided for service of liens under AS 25.27.240. The order must state the amount of the obligor's liability and must state in summary the terms of AS 25.27.260 and 25.27.270.

- (e) Any person, political subdivision, or department of the state served with an order to withhold and deliver is required to make true answers to inquiries contained in the order under oath and in writing within 14 days after service of the order, and is further required to answer all inquiries subsequently put.
- (f) If a person, political subdivision, or department of the state upon whom service of an order to withhold and deliver has been made possesses property due, owing, or belonging to the obligor, that person, subdivision, or department shall withhold the property immediately upon receipt of the order and shall deliver the property to the agency (1) if the property is earnings of an employee who is subject to a child support order being enforced by the agency, within seven business days after the amount would, but for this section, have been paid or credited to the employee; or (2) in the case of all other property, within 14 business days after the date of service of the order. The agency shall hold property delivered under this subsection in trust for application against the liability of the obligor under AS 25.27.062, 25.27.120, or 25.27.160 or for return, without interest, depending on final determination of liability or nonliability under this chapter. The agency may accept a good and sufficient bond to secure payment of past, present, and future support conditioned upon final determination of liability in lieu of requiring delivery of property under this subsection.
- (g) Delivery to the agency of the money or other property due, owing, or belonging to the obligor shall satisfy the requirement of the order to withhold and deliver. Delivery of money due and owing to the obligor under any contract of employment, express or implied, or held by any person, political subdivision, or department of the state, and subject to withdrawal by the obligor, shall be delivered by remittance payable to the order of the agency.
- (h) *[Repealed, § 148(a) ch 87 SLA 1997.]*
- (i) An order to withhold and deliver under this section has priority over all other attachments, executions, garnishments, or other legal process brought under state law against the same property unless otherwise ordered by the court. Exemptions under AS 09.38 do not apply to proceedings to enforce the payment of child support under AS 25.27.230 — 25.27.270; however, net disposable earnings are exempt from execution as provided in 15 U.S.C. 1673(b). In this subsection, “net disposable earnings” has the meaning given in 15 U.S.C. 1672.
- (j) A person, political subdivision, or department that fails to comply with an order to withhold and deliver served under this subsection is subject to penalties under AS 25.27.260. A person, political subdivision, or department may, for

each payment made under an order to withhold and deliver, deduct \$5 from other wages or salary owed to the obligor.

AS 34.20.080. Sale at Public Auction.

- (a) The sale authorized in AS 34.20.070 shall be made under the terms and conditions and in the manner set out in the deed of trust. The proceeds from a sale shall be placed in a trust account until they are disbursed. However, the sale shall be made
 - (1) at public auction held at the front door of a courthouse of the superior court in the judicial district where the property is located, unless the deed of trust specifically provides that the sale shall be held in a different place, except that a trustee may also accept bids by telephone, the Internet, and electronic mail if the trustee has taken reasonable steps to ensure that the bidding methods using the telephone, the Internet, or electronic mail are fair, accessible, and designed to result in money that is immediately available for disbursement; and
 - (2) after public notice of the time and place of the sale has been given in the manner provided by law for the sale of real property on execution.
- (b) The attorney for the trustee or another agent of the trustee may conduct the sale and act in the sale as the auctioneer for the trustee. The trustee may set reasonable rules and conditions for the conduct of the sale. Sale shall be made to the highest and best bidder. The beneficiary under the trust deed may bid at the trustee's sale. Except as provided by (g) of this section, the trustee shall execute and deliver to the purchaser a deed to the property sold.
- (c) The deed must recite the date and the book and page of the recording of default, and the mailing or delivery of the copies of the notice of default, the true consideration for the conveyance, the time and place of the publication of notice of sale, and the time, place, and manner of sale, and refer to the deed of trust by reference to the page, volume, and place of record or to the place of record and the serial number assigned to the deed of trust by the recorder.
- (d) After the sale an affidavit of mailing the notice of default and an affidavit of publication of the notice of sale shall be recorded in the mortgage records of the recording district where the property is located.
- (e) The trustee may postpone sale of all or any portion of the property by delivering to the person conducting the sale a written and signed request for the

postponement to a stated date and hour. The person conducting the sale shall publicly announce the postponement to the stated date and hour at the time and place originally fixed for the sale. This procedure shall be followed in any succeeding postponement, but the foreclosure may not be postponed for more than 12 months unless a new notice of the sale is given under (a)(2) of this section. A sale may be postponed for up to 12 months from the sale date stated in the notice of default under AS 34.20.070(b) without providing a basis for challenging the validity of the foreclosure process because of the length of time the foreclosure has been pending.

- (f) After delivery of a deed under (b) of this section, the trustee shall distribute any cash proceeds of the sale in the following order to
 - (1) the beneficiary of the deed of trust being foreclosed until the beneficiary is paid the full amount that is owed under the deed of trust to the beneficiary;
 - (2) the persons who held, at the time of the sale, recorded interests, except easements, in the property, that were subordinate to the foreclosed deed of trust; the distribution under this paragraph shall be made according to the priority of the recorded interest, and a recorded interest with a higher priority shall be satisfied before distribution is made to the recorded interest that is next lower in priority; however, if a person holds a recorded interest that is an assessment, the person is entitled only to the amount of the assessment that was due at the time of the sale; in this paragraph, “recorded interest” means an interest, including a lease, recorded under AS 40.17;
 - (3) the trustor in the trust deed if the trustor is still the owner of the property at the time of the foreclosure sale, but, if the trustor is not still the owner of the property at the time of the foreclosure sale, then to the trustor’s successor in interest whose interest appears of record at the time of the foreclosure sale.
- (g) The trustee may withhold delivery of the deed under (b) of this section for up to 10 days after the sale. If, during the 10 days, the trustee determines that the sale should not have proceeded, the trustee may not issue the deed but shall
 - (1) inform the beneficiary, the otherwise successful bidder, and the trustor of the trust deed or the trustor’s successor in interest that the sale is rescinded; and

- (2) return to the otherwise successful bidder money received from the otherwise successful bidder as a bid on the property; return of this money is the otherwise successful bidder's only remedy if the trustee withholds delivery of the deed under (b) of this section.
- (h) If a trustee rescinds a sale under (g) of this section and the obligation secured by the deed of trust remains in default, the trustee may, at the request of the beneficiary, reschedule the sale for a date that is not less than 45 days after the date of the rescinded sale. Not less than 30 days before the rescheduled sale date, the trustee shall
 - (1) mail notice of the rescheduled sale date by certified mail to the last known address of each of the persons identified by AS 34.20.070(c); and
 - (2) publish and post the notice of the rescheduled sale date as provided by law for the sale of real property on execution.
- (i) Unless a sale is rescinded under (g) of this section, the sale completely terminates the rights of the trustor of the trust deed in the property.
- (j) If a sale is rescinded under (g) of this section, the deed of trust foreclosed in the rescinded sale is restored to the validity and priority it would have had as though the sale had not occurred.

JURISDICTIONAL STATEMENT

Amici adopt the Petitioner's Jurisdictional Statement.

STATEMENT OF INTERESTS

The Alaska Bankers Association is a non-profit organization representing the interests of seven Alaska state and national member banks in matters of public policy and law. The Alaska Credit Union League is a non-profit organization representing 10 Alaska-domiciled credit unions. Both the Alaska Bankers Association and Alaska Credit Union League engage routinely in and provide expertise regarding legislative and regulatory policy issues, and advocate for laws, rules, and regulations promoting sound banking and credit union policies.

The Alaska Bankers Association and Alaska Credit Union League represent the primary in-state mortgage lenders in an industry that generates home mortgages totaling over \$4 billion annually in the state of Alaska. Alaska mortgage lenders rely on Alaska's race-notice recording, lien priority, and foreclosure statutes as the basic tools of secured lending supporting their decisions to finance a variety of transactions involving real estate. Although this petition involves one nonjudicial foreclosure and a judgment lien, the implications of the lower court decisions are alarming to lenders. The decisions effectively created a new "super priority" for an unrecorded, post-sale administrative order, which may be applied in circumstances extending well beyond this case.

With leave from the superior court, the Alaska Bankers Association and Alaska Credit Union League participated in the appeal proceedings below as amici curiae. [R. 741-

42; R. 747-59] With leave from this Court, the Alaska Bankers Association filed a statement supporting Alaska USA’s petition for hearing.

The Credit Union National Association (CUNA) is the largest trade association in the United States serving America’s credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,000 federal and state credit unions, which collectively serve 130 million members nationwide. CUNA’s mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

STATEMENT OF THE ISSUES

Does AS 25.27.250(i) authorize the State of Alaska, Child Support Services Division (CSSD) to enforce an administrative order to withhold and deliver surplus proceeds from a nonjudicial foreclosure sale that would otherwise be distributed to a more senior lien holder pursuant to the statutory requirements for distribution of surplus sale proceeds provided in AS 34.20.080?

STATEMENT OF THE CASE

This case involves competing claims to surplus funds from a nonjudicial foreclosure sale of real property mortgaged by Troy R. Lewis in Eagle River. On one side, Petitioner Alaska USA Federal Credit Union held a recorded judgment lien against Lewis and expected to receive the full \$34,590.31 from the surplus funds to satisfy its recorded judgment. On the other side, Respondent CSSD held a recorded judgment lien against Lewis for \$14,241.35 in delinquent child support payments—although importantly,

CSSD's judgment lien was recorded after Alaska USA's. The following timeline provides an overview of the undisputed material facts leading up to Alaska USA's complaint:

- **January 4, 2017** Alaska USA records a judgment lien against Lewis in the amount of \$32,693.42, plus interest¹ [Exc. 01-04]
- **September 19, 2017** CSSD records a child support lien against Lewis in the amount of \$14,241.35 [Exc. 05]
- **December 2017** Sayer Law Group, P.C., acting as trustee, commences nonjudicial foreclosure of a deed of trust naming Wells Fargo as beneficiary and encumbering Lewis's real property in Eagle River [*See* Exc. 06]
- **April 4, 2018** Sayer holds a foreclosure sale in which the property was sold for \$168,000; after paying the outstanding amount owed to Wells Fargo, there was a surplus in the amount of \$34,590.31 held by Sayer [Exc. 55]
- **April 19, 2018** Sayer issues a "Notice of Surplus Funds" to Alaska USA and CSSD explaining that there were surplus proceeds from the foreclosure sale and that "all claimants will be paid in order of priority" [Exc. 67]
- **June 13, 2018** Sayer issues a "Notice of Intent to Distribute Surplus Funds," stating that it "intends to distribute the surplus funds being held in the amount of \$34,590.31 to Alaska USA who has the first recorded Judgment Lien" [Exc. 28]
- **June 26, 2018** CSSD serves Sayer with an "Order to Withhold Property for Child Support" under AS 25.27.250 and letter stating that the surplus funds "must first be distributed to CSSD for payment of Mr. Lewis' child

¹ At the time of foreclosure sale, Alaska USA's judgment totaled \$38,783.68. [*See* Exc. 28]

support arrear. Any funds remaining after the arrears are paid may be released to Alaska USA” [Exc. 71-72]

- **July 19, 2018**

Sayer sends a check to Alaska USA in the amount of \$9,162.11, which Sayer indicated “represents the balance of the surplus after paying the priority lien from the foreclosure sale . . . we have determined that although the Alaska USA lien was recorded earlier, the CSSD lien has priority pursuant to AS 25.27.230(d)” [Exc. 74]

On October 30, 2018, Alaska USA filed a complaint in district court seeking \$34,590.31 from Sayer for breach of fiduciary duties to disperse all the surplus proceeds to Alaska USA according to the order of priorities in AS 34.20.080(f). [Exc. 14-20] Sayer filed a counterclaim for interpleader of the funds and a third-party complaint against CSSD. [Exc. 181-87] Alaska USA and CSSD filed cross motions for summary judgment regarding their claims to the surplus funds. [Exc. 43-52; 206-20]

On October 15, 2020, the district court granted CSSD’s motion for summary judgment and denied Alaska USA’s. [Exc. 376-84] The district court concluded “that the surplus funds were subject to AS 25.27.250, and a withholding order from CSSD issued pursuant to that statute has priority over the earlier recorded judgment of [Alaska USA].” [Exc. 384] In reaching that conclusion, the district court erroneously assumed that AS 25.27.250(i) “is more specific and explicit” than the general order of priorities statutes, AS 09.30.020 and AS 34.20.080. [Exc. 382] And, according to the district court, because “[n]o case law is cited for the proposition that that a person defaulting on a deed of trust gives up a right to claim any surplus money from the proceeds of a sale,” here, “Lewis had

an interest in the funds from the surplus of the sale” that was properly subject to the withholding order. [Exc. 383]

Alaska USA appealed the district court’s decision to the superior court. [See Exc. 410] The Alaska Bankers Association and Alaska Credit Union League filed an amici brief supporting Alaska USA and urging the superior court to reverse the district court’s erroneous interpretation of AS 34.20.080. [R. 747-59] The amici explained that the policy and purpose underlying AS 34.20.080 supports distributing the surplus funds according to the order of priorities—with Alaska USA receiving the funds first because it held a more senior judgment lien than CSSD. [R. 750-54] The amici also pointed out that allowing CSSD to withhold child support payments from Alaska USA instead of the obligor, Lewis, raised the specter of an unconstitutional taking. [R. 754-59]

The superior court affirmed the district court’s decision in a written order originally issued on April 15, 2022 and subsequently re-adopted after oral argument. [Exc. 419; 446-47] Like the district court, the superior court also concluded that there was a conflict between the relevant statutes, AS 25.27.250 and AS 34.20.080. [Exc. 416] Relying exclusively on general principles of statutory interpretation (and without addressing amici’s arguments), the superior court determined that because the CSSD statutes “are both narrower and more specific, intending to modify a general rule,” CSSD’s “interest is intended to reign supreme over all others.” [Exc. 418]

Alaska USA timely filed a petition for hearing, which this Court granted.

STANDARD OF REVIEW

This Court exercises its independent judgment when reviewing a lower court decision on a petition for hearing.² Questions of statutory interpretation are questions of law to which this Court applies its independent judgment.³ Statutes are interpreted “according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.”⁴ As this Court explained in *Nelson v. Municipality of Anchorage*:

When construing a statute, this court presume[s] that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous. [A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another. If one statutory ‘section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general. [I]f two statutes conflict, then the later in time controls over the earlier.’⁵

ARGUMENT

The amici urge this Court to reverse the decisions below and remand the case with instructions to enter judgment in favor of Alaska USA. The superior court and district court

² *Alaska Pub. Def. Agency v. Superior Court*, 450 P.3d 246, 251 (Alaska 2019).

³ *Id.*

⁴ *Id.* at 252 (quoting *Grimm v. Wagoner*, 77 P.3d 423, 427 (Alaska 2003)).

⁵ 267 P.3d 636, 642 (Alaska 2011) (internal citations and quotation marks omitted).

erred in interpreting CSSD's enforcement statutes, providing CSSD with a new, previously unknown "super priority" over Alaska USA's senior judgment lien. The decisions below undermine the long-established law in Alaska regarding race-notice recording, lien priority, non-judicial foreclosure law.⁶ They jeopardize the predictability and security of the order of priorities, which Alaska's lenders rely on when deciding whether to enter into secured real estate transactions. The result in this case is that Alaska USA's funds were used to pay child support on behalf of Lewis.

I. Surplus Proceeds that Are Required by AS 34.20.080(f) to Be Distributed to Holders of Recorded Interests Following a Foreclosure Sale Are Not the Property of the Obligor and Are Not Subject to a CSSD Withholding Order.

The simplest answer to the question presented in this case is that CSSD may not issue a withholding order for surplus funds from the nonjudicial foreclosure sale because those funds did not belong to the obligor, Lewis. Under AS 25.27.250(b), "all real or personal property *belonging to the obligor* is subject to an order to withhold and deliver," (emphasis added); however, under AS 34.20.080, the foreclosure "sale completely terminates the rights of the trustor of the trust deed in the property"⁷ and the trustee is required to distribute the surplus proceeds to other lien holders according to the priority of

⁶ See generally William A. Reppy, Jr. *Some Issues Raised by Alaska's Recording Act*, 27 Alaska L. Rev. 196 (2010) (describing the history of Alaska's race-notice recording system and the priority of recorded interests, and noting that Alaska's race-notice recording system has been firmly established since at least 1884).

⁷ AS 34.20.080(i).

the recorded interest.⁸ Thus, once the foreclosure sale occurred on April 4, 2018, Lewis had no property interests in the surplus proceeds that were due and payable to Alaska USA as the priority lien holder. Consequently, CSSD had no authority to order Sayer to withhold those funds from Alaska USA on June 16. The amici respectfully submit that neither the superior court nor the district court may have fully appreciated the importance of lien priority based on recording, the orderly distribution of surplus proceeds for non-judicial foreclosure sales in Alaska, or the duties of a foreclosure trustee under AS 34.20.080.

As this Court explained in *Thomas v. Joseph Casteel Trust*, in the event of default, Alaska law authorizes nonjudicial foreclosure proceedings to sell real property that was pledged as collateral to secure payment of a financial obligation.⁹ At a nonjudicial foreclosure sale, “[t]he property is sold subject to encumbrances senior to the deed of trust, but junior encumbrances are extinguished by the sale.”¹⁰ The “sale and conveyance transfers all title and interest that the party executing the deed of trust had in the property sold at the time of its execution.”¹¹ Importantly, the foreclosure sale “completely terminates” the debtor’s interests in the property.¹²

⁸ See AS 34.20.080(f)(2).

⁹ 496 P.3d 403, 405 (Alaska 2021).

¹⁰ *Id.* at 406.

¹¹ AS 34.20.090(a).

¹² AS 34.20.080(i).

Alaska follows the long-established common law rule that proceeds from nonjudicial foreclosure sales are distributed to lienholders in order of priority.¹³ According to the Restatement (Third) of Property (Mortgages): “When the foreclosure sale price exceeds the amount of the mortgage obligation, the surplus is applied to liens and other interests terminated by the foreclosure in order of their priority and the remaining balance, if any, is distributed to the [debtor].”¹⁴ For judgment creditors, such as Alaska USA, the recorded judgment is a lien on the real property of the judgment debtor, with the earlier recorded judgment holding a higher priority than later, junior judgment lienholders.¹⁵ CSSD liens are considered judgment liens and are treated as any other judgment lien when determining the order of priorities.¹⁶

In 2010, the Legislature codified the common law distribution process, amending Alaska’s nonjudicial foreclosure sale statute to “clarify[y] how proceeds from a foreclosure auction are to be disbursed.”¹⁷ House Bill 108, codified at AS 34.20.080(f), provided that the proceeds of a nonjudicial foreclosure sale go first to pay the secured creditor (the “trust

¹³ Cf. *Brand v. First Fed. Sav. & Loan Ass’n*, 478 P.2d 829, 830-33 (Alaska 1970) (discussing Alaska’s lien priority statutes in the context of judicial foreclosure).

¹⁴ Restatement (Third) of Property (Mortgages) § 7.4; *see also* 59A C.J.S. Mortgages § 1324 (“As a general rule, the holder of a junior lien extinguished by the foreclosure of a mortgage is entitled to satisfaction out of the surplus proceeds of the foreclosure sale.”).

¹⁵ AS 09.30.010-.020.

¹⁶ *See* AS 25.27.230(f) (“A lien recorded under this section is a judgment lien”); *Thomas*, 496 P.3d at 407 (“CSSD’s liens were subordinate to Frelin’s deed of trust, with the CSSD lien in the most junior position.”).

¹⁷ Rep. Jay Ramras, Sponsor Statement: HB 108—Property Foreclosures and Executions (Mar. 27, 2009), available at http://www.akleg.gov/basis/get_documents.asp?session=26&docid=3698.

beneficiary”) “until the trust beneficiary is paid the full amount that is owed under the deed of trust.”¹⁸ If there are surplus proceeds remaining, the funds must be distributed to junior lienholders “according to the priority of the recorded interest, and a recorded interest with a higher priority shall be satisfied before distribution is made to the recorded interest that is next lower in priority.”¹⁹ The Legislature understood that the codification “benefit[s] lenders, borrower, and title insurance companies by bringing clarity and certainty to the foreclosure process.”²⁰

However, contrary to the Legislature’s intended clarity, both the superior court’s and the district court’s decisions interjected confusion into the nonjudicial foreclosure process. The lower courts misapplied the canons of statutory construction to erroneously conclude that CSSD is entitled to a super priority over other lienholders. That result is not required by a plain reading of the statutes and there is no indication that result was intended by the Alaska Legislature when it enacted AS 25.27.250.

First, the lower courts assumed incorrectly that the CSSD statutes are in conflict with AS 34.20.080. The lower courts embraced CSSD’s theory that under AS 25.27.250(i), a withholding order “has priority over all other attachments, executions, garnishments, or other legal process brought under state law against the same property unless otherwise ordered by the court.” CSSD argued that the Legislature intended CSSD to have a “super

¹⁸ Ch. 20, § 10, SLA 2010 (codified at AS 34.20.080(f)(1)).

¹⁹ AS 34.20.080(f)(2).

²⁰ Rep. Jay Ramras, Sponsor Statement: HB 108—Property Foreclosures and Executions (Mar. 27, 2009), available at http://www.akleg.gov/basis/get_documents.asp?session=26&docid=3698.

priority,” and therefore CSSD’s withholding order should be treated as a more senior lien than Alaska USA’s—hence the apparent conflict between the plain meaning of AS 34.20.080(f) and the intent of the CSSD statutes.

But AS 25.27.250(i) is not inconsistent with AS 34.20.080(f) because after a nonjudicial foreclosure sale, the child support obligor does not retain any property interest in the surplus proceeds unless there are sufficient funds remaining after paying the holders of recorded liens in order of priority.²¹ Both CSSD and the lower courts overlooked AS 34.20.080(i), which provides that the foreclosure sale “completely terminates” the debtor’s interest in the property.²² Once the nonjudicial foreclosure sale took place, and in the absence of sufficient proceeds, Lewis, the obligor, no longer retained any property interests that were subject to a withholding order under AS 25.27.250(i). The only potential interest that Lewis had in the proceeds was in surplus remaining after the holders of recorded interests were fully satisfied.²³ Here, there were no surplus proceeds “due, owing, or belonging”²⁴ to Lewis. Thus, the two statutes do not conflict; CSSD and the courts below simply applied AS 25.27.250 incorrectly to the facts of this case.

²¹ AS 34.20.080(i).

²² The debtor only has an interest in any surplus proceeds following a sale where the sale proceeds exceed the mortgage debt and expenses of sale and (1) there are no other recorded interest holders other than the trust beneficiary or (2) the surplus exceeds the amount of the other liens. Importantly, the debtor’s interest in the proceeds, if any, is determinable and vests immediately upon execution of the sale.

²³ AS 34.20.080(f)(2).

²⁴ AS 25.27.250(b).

Second, even if the CSSD and nonjudicial foreclosure statutes are in conflict with one another, the lower courts misapplied the canons of statutory construction in reconciling that conflict. The lower courts assumed incorrectly that CSSD’s statutes are “narrower and more specific” than the nonjudicial foreclosure statute and failed to consider that the nonjudicial foreclosure statute was adopted later in time and “controls.”²⁵ When the Legislature enacted AS 34.20.080, it could have specified explicitly that CSSD was entitled to a “super priority,” but it did not. The Legislature left undisturbed, and explicitly adopted, the common law rule that junior lienholders are entitled to surplus proceeds according to the order of priorities. CSSD’s statutes existed at the time the Legislature enacted AS 34.20.080(f) but were never mentioned in the legislative history for the foreclosure statutes.²⁶ The legislative history of AS 34.20.080 makes it clear that the Legislature was focused on providing “clarity and certainty” to the nonjudicial foreclosure process.²⁷ If the Legislature had intended to create an exception directing some of the surplus proceeds to be used to pay child support obligations ahead of other recorded interest, it could have done so explicitly, but it did not.

Alaska’s nonjudicial foreclosure process and orderly distribution of proceeds from sales represents sound legislative policy and promotes the health and safety of

²⁵ *Nelson*, 267 P.3d at 642.

²⁶ *See* AS 25.27.250 (last modified by Ch. 132, SLA 1998). There is also no indication that the Legislature intended to modify Alaska’s race-notice recording system or AS 40.17.080.

²⁷ Sponsor Statement from Rep. Jay Ramras, HB 108 (Mar. 27, 2009), available at http://www.akleg.gov/basis/get_documents.asp?session=26&docid=3698.

Alaska’s secured lenders. “Stability and certainty in the law are important to lenders because real property financing generally involves long-term obligations. . . . It is true that a clear and unequivocal interpretation of the law that is contrary to current expectations would have provided a new set of expectations for future transactions.”²⁸ Creditors in Alaska have historically operated under the established legal framework now provided by AS 34.20.080(f). As mortgages routinely have terms of up to 30 years, changing the law on priorities and allowing priority for unrecorded liens would affect a broad range of existing and future mortgages. The lower court decisions in this case creating a CSSD “super priority” undermine the nonjudicial foreclosure process and cast doubt and confusion where the Legislature intended to create “clarity and certainty.”

II. CSSD’s Misinterpretation of AS 25.27.250 Represents Unsound Public Policy.

The amici join Alaska USA in recognizing the unquestioned importance of ensuring that child support is paid by the responsible obligors in Alaska. [Pet. Br. 4] On the other hand, there is also an important governmental interest in maintaining the predictability and clarity of the nonjudicial foreclosure process. Here, CSSD’s erroneous interpretation of AS 25.27.250(i) represents a direct threat to the nonjudicial foreclosure process with implications that extend beyond CSSD’s attempt to claim surplus proceeds ahead of a

²⁸ John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*—Washington Mutual Savings Bank v. United States, 115 Wash.2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990), 67 Wash. L. Rev. 235, 248 (1992).

senior judgment lienholder in this case. The result is that Alaska USA's funds were wrongfully used to satisfy Lewis's child support obligations.

Under CSSD's theory of AS 25.27.250(i), which was adopted by the lower courts, CSSD may issue a withholding order to seize surplus proceeds following any nonjudicial foreclosure sale. [See Exc. 218] According to CSSD, following the nonjudicial foreclosure sale, "Mr. Lewis had a sufficient interest in the surplus funds, and although other competing interests might have taken priority, until those interests have been settled, his interest does not vanish for the purpose of the CSSD order." [CSSD Response to Petition for Hearing at 11; see also Exc. 218] But CSSD's assertion that "Mr. Lewis had an interest in the surplus funds until the ultimate distribution" [CSSD Response to Petition for Hearing at 11] is pure fantasy. CSSD ignores the fact that once the foreclosure sale took place, Lewis's interests in the property were "completely terminate[d]"²⁹ and there were insufficient proceeds to satisfy the recorded liens. If the sale terminates the obligor's interests in the property, then there was no real property interest for CSSD's "super priority" lien to attach. Furthermore, the lienholders' and Lewis's expectation interests in the surplus proceeds were determinable, or "settled," immediately upon execution of the sale, and certainly by June 13 when Sayer issued the "Notice of Intent to Distribute Funds" showing that Lewis was not entitled to any of the funds under AS 34.20.080(f). In reality, CSSD is attempting to redirect funds that by law must be distributed to recorded interest holders.

²⁹ AS 34.20.080(i).

Most importantly, CSSD’s erroneous legal position that it may issue a withholding order under AS 25.27.250 to claim surplus proceeds up until distribution of those proceeds could be applied not only to judgment lienholders but any recorded interest in the property, including the deed of trust beneficiary. There is no reasoning offered by CSSD, or cited in the 1987 Attorney General Opinion on which CSSD relies,³⁰ that differentiates between recorded judgment lienholders and other recorded interests in nonjudicial foreclosure sale proceeds.

As the amici pointed out to the superior court, CSSD’s legal position is not only unsound policy, it also raises the specter of an unconstitutional taking of Alaska USA’s property. Alaska USA’s recorded judgment lien is a property interest.³¹ Once the foreclosure sale took place, and Sayer issued its “Notice of Surplus Funds,” Alaska USA had an expectation interest in receiving \$34,590.31. CSSD’s withholding order had the effect of depriving Alaska USA of its entire expectation interest, and Alaska USA’s lien on the property had already been terminated by the foreclosure sale, leaving Alaska USA with a complete deprivation of its property interest.³²

³⁰ See CSSD Response to Petition for Hearing at 8 (citing 1987 Inf. Op. Att’y Gen., 1987 WL 121173, * 3 (Jul. 22, 1987)).

³¹ See Black’s Law Dictionary (“lien”) (11th ed. 2019).

³² See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (concluding that real estate lien was compensable property interest under the Fifth Amendment); *United States v. Lawton*, 110 U.S. 146, 150 (1884) (“To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law, or to take his property for public use without just compensation.”).

If this Court reverses the lower court decisions, CSSD is not left without recourse to secure child support payments owed by the responsible obligors. CSSD may record a child support lien that attaches to real property owned by the obligor and stand in line with other creditors holding recorded interests.³³ If a nonjudicial foreclosure of the obligor's real property is commenced, CSSD is entitled to surplus proceeds as a judgment lienholder, according to the established waterfall order of priorities under AS 34.20.080(f). Here, CSSD had recorded a child support lien against Lewis and could have received surplus proceeds from the sale if any funds remained after satisfying Alaska USA's lien.³⁴ But what CSSD may not do is interrupt the nonjudicial foreclosure process or the orderly distribution of surplus proceeds to recorded interest holders following a foreclosure sale.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the superior court and district court and remand with instructions for the lower courts to enter judgment in favor of Alaska USA. This Court should conclude that the surplus proceeds from the nonjudicial foreclosure sale that are required by AS 34.20.080(f) to be distributed to holders of recorded interests are not the property of Lewis and are not subject to a CSSD withholding order.

³³ AS 25.27.230; 15 AAC 125.410.

³⁴ *See* AS 25.27.090. An interesting result of applying CSSD's logic is that the withholding order, in this case entered post-sale, has priority over its own recorded lien, rendering the authority to record a lien superfluous. *See*, 267 P.3d at 642 ("When construing a statute, this court presume[s] that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.").

Dated this 29th day of March, 2023, at Anchorage, Alaska.

LANDYE BENNETT BLUMSTEIN LLP
Attorneys for Amici Curiae

/s/ Andrew Erickson

Bruce A. Moore, Alaska Bar No. 8611124
Andrew Erickson, Alaska Bar No. 1605049