STATE OF MICHIGAN
IN THE SUPREME COURT

2 CROOKED CREEK LLC, an Indiana limited liability company, and RUSSIAN FERRO ALLOYS, INC., an Indiana corporation,

Plaintiffs-Appellants,

v

TREASURER OF THE COUNTY OF CASS,

Defendant-Appellee.
_____/

Michigan Supreme Court No.

Court of Appeals No. 342797

Court of Claims No. 14-000181-MZ

APPLICATION FOR LEAVE TO APPEAL OF 2 CROOKED CREEK LLC AND RUSSIAN FERRO ALLOYS, INC.

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QUESTION PRESENTED

1. Does MCL 211.78*l* allow the owner of a property interest that was extinguished by a tax-foreclosure judgment to bring an action for money damages if the foreclosing government provided the owner with constructive notice before the foreclosure, but not with actual notice?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Court of Claims' answer: No.

   Court of Appeals' answer: No.

STATUTE INVOLVED

MCL 211.78*l*

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

(2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

(3) An action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k.

(4) Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the interest in the property held by the person bringing the action under this section on that date, less any taxes, interest, penalties, and fees owed on the property as of that date.

(5) The right to sue for monetary damages under this section is not transferable except by testate or intestate succession.

STATEMENT OF JURISDICTION

The appellants, 2 Crooked Creek LLC and Russian Ferro Alloys, Inc., seek leave to appeal the March 14, 2019 decision of the Court of Appeals, App 2–19, which held that the owner of an extinguished property interest cannot bring an action for damages under MCL 211.78*l* if the government provided constructive notice of the foreclosure proceedings. This application is timely because the appellants filed a timely motion for reconsideration (on April 3, 2019), and the Court of Appeals denied reconsideration, App 38, on May 17, 2019. MCR 7.305(C)(2)(c).

This Court has jurisdiction by statute and court rule. MCL 600.215(3); MCR 7.303(B)(1).

INTRODUCTION

It is a basic rule of statutory construction that statutes should be construed to give meaning to every single word. So what does that say about a decision that renders not just a single word as meaningless, but an entire statutory provision? Yet that is what happened here. The Court of Appeals adopted an interpretation that renders meaningless the more than 200 words of MCL 211.78*l*.

The Legislature wrote § 78*l* to address a specific problem: the entry of a tax-foreclosure judgment against a property owner without the owner having received any notice of the foreclosure proceedings. This action arises only in a specific context: § 78*l* applies *only after* a judgment of foreclosure has occurred, MCL 211.78*l*(1), and a judgment of foreclosure may occur in a constitutional manner (as the Legislature would know) *only if* the foreclosing government has provided the property owner with constructive notice—specifically, "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Sidun v Wayne County Treasurer*, 481 Mich 503, 509 (2008) ("[D]ue process does not require that a property owner receive actual notice before the government may take his property."); *Reed v Breton*, 475 Mich 531, 550 (2006) ("The Legislature is presumed to know the law."). In other words, the Legislature created this cause of action precisely for instances in which the property owner *must* have already been afforded constructive notice. Yet the Court of Appeals interpreted § 78*l* to not apply if the property owner has been provided constructive notice.

This case warrants review for multiple reasons. It is jurisprudentially significant because it involves the interpretation of a state statute that applies to all tax foreclosures in Michigan. MCR 7.305(B)(3). Indeed, the Cass County Treasurer emphasized the importance and recurring nature of this question in her letter asking the Court of Appeals to publish its decision.

Further, the decision below is clearly erroneous—it defeats the Legislature's intent to create a remedy that comes into play only after constructive notice has occurred, which shows the Legislature's intent was to create a remedy for those who had not received actual notice. And this is particularly troubling because this Court has read the plain text of § 78*l* as applying in "those situations in which constitutional notice is provided, but the property owner does not receive *actual* notice." *In re Petition of Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 10 (2007) (emphasis added); *id.* ("MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required."). And it is troubling because the lower courts also dismissed a mortgage holder's claims on the theory that because the mortgage was not recorded, the mortgage holder was not entitled to notice, despite the fact that § 78*l* expressly applies to "unrecorded" interests and the fact that § 78a(4) expressly requires that notice "shall" be given to "holders of undischarged mortgages."

This clear error has caused material injustice, MCR 7.305(B)(5)(a): Cass County has taken a property worth $3,500,000 from an owner who never received any notice of the foreclosure proceedings, and, after deducting the roughly $15,000

in taxes owed, will keep all the excess from the tax sale. This Court should grant the application and reverse the Court of Appeals.

STATEMENT OF FACTS

2CC buys a lakefront parcel and starts building a house

In 2010, 2 Crooked Creek (2CC) bought a vacant parcel of land on Diamond Lake in Cass County. It purchased this lakefront property, located at 61320 Crooked Creek Road, for a substantial amount of money—for $820,000. App 6. Its plan was to build a vacation home on the parcel for Sergei Antipov, who resides in Oak Brook, Illinois. Antipov is the owner and manager of Kava Management Company, LLC, which in turn is the manager of 2CC. App 6.

In the real-estate agreement, 2CC listed its company address as 36 Bradford Lane, Chicago, Illinois 60523, and the deed was recorded in July 2010 using that same address for 2CC. App 6. But this address contained an error: instead of Chicago, it should have said Oak Brook, as Antipov resided at the time at 36 Bradford Lane, Oak Brook, Illinois 60523. App 7 n 15.

In June 2011—over a year and a half before Cass County commenced foreclosure proceedings for the lakefront property in 2013—Antipov moved out of the Bradford Lane address to a different location in Oak Brook (50 Baybrook, Oak Brook, Illinois). App 10. Because he had his mail forwarded for a year, mail sent to the Bradford Lane address would have reached him through mid-2012. App 27.

By 2013, the registered agent's address for 2CC, identified in both the recorded real-estate agreement and the recorded deed as an Indiana company, could

be found in less than a minute in a search on the Indiana Secretary of State's online business entity database, as there was only one result for "2 Crooked Creek, LLC" in the database. (2CC Court of Appeals Brief, Exhibits J-14 & J-15; Tr. 174:8–11.)

Cass County begins sending foreclosure notices to 2CC

In 2013, the Cass County Treasurer began tax-foreclosure proceedings on the lakefront property because 2CC had not paid its 2011 property taxes. App 21. The amount 2CC owed in property taxes was $14,743.24. App 23.

Beginning in January 2013, the Treasurer, through her agent, Title Check, sent various notices to 2CC. App 21. Title Check sent a notice of forfeiture on January 14, 2013, by certified mail, to the Bradford Lane address. App 21. As already noted, Antipov had not lived at that address since June 2011 (a year and a half earlier), and the letter was returned marked "Unclaimed—Unable to Forward." App 21. Title Check also recorded a certificate of forfeiture (on April 12, 2013) and sent a notice—again to Antipov's old address—by first-class mail on May 5, 2013. App 21.

Russian Ferro Alloys takes a mortgage on the property

As these events were transpiring, 2CC had been improving the property by building a home there, at a cost of almost $2.6 million. App 27. The increased value of the property was reflected in a mortgage taken on the property for $3,500,000 between Russian Ferro Alloys and 2CC's parent company, Kava Holdings, LLC. App 22.

With the construction of the house nearing completion, App 27, the mortgage agreement occurred on May 28, 2013. App 22. Just days later (on June 3), Title Check, as a part of the foreclosure proceedings, completed a title search on the property, finding only the deed and the real-estate agreement. App 22. Because the mortgage was not recorded until July 10, 2013, Russian Ferro Alloys' mortgage did not appear in that title search. App 22.

Cass County continues with foreclosure proceedings

Cass County's agent, Title Check, continued attempting through various methods to notify 2CC of the tax-foreclosure proceedings.

A Title Check representative visited the lakefront property and posted a notice of a show-cause hearing and a judicial-foreclosure hearing by the property's front door. (2CC Court of Appeals Brief, Exhibit J-8.) The contractor who was building the house on the property, James Frye of Shoreline Development Co., saw the posted notice and then took it down. App 22, 34. While Frye attested that he contacted a representative of 2CC about the notice, both Antipov and Anderson attested that Frye did not contact either of them, and they were the only representatives of 2CC. App 22. (2CC has sued Frye for removing the notice and failing to inform it of the notice; an appeal in that case is also pending before the Court of Appeals, in *2 Crooked Creek LLC v Frye & Shoreline Development Co.*, No. 341274.)

In addition to the posted notice, Title Check also sent more notices to the Bradford Lane address. On August 20, 2013 (two years after Antipov moved from

that address), Title Check sent notice of the upcoming hearings to Bradford Lane by first-class mail. App 23. On December 6, 2013, it sent a notice to Bradford Lane by certified mail, which was again returned, this time "Refused—Unable to Forward." App 23.

Title Check also published notices on December 19, 2013, on December 26, 2013, and January 2, 2014, in the *Cassopolis Vigilant*, a weekly newspaper circulated in Cass County. App 23.

When the February 18, 2014 hearing on the petition for foreclosure occurred, no one from 2CC appeared. Finding that the Treasurer had provided 2CC with constructive notice sufficient to satisfy due process through Title Check's efforts at providing notice, the trial court entered a judgment of foreclosure, which provided that title in the foreclosed property would vest in Cass County, with no further right of redemption, unless the delinquent balance was paid by March 31, 2014. App 23–24.

2CC learns that it has lost title by tax foreclosure

On April 18, 2014, over two weeks after the foreclosure had already become final, Title Check's general manager (Martin Spaulding) called 2CC's agent and asked if 2CC would be attending the auction for the property. App 24. This post-foreclosure telephone call was the first time 2CC learned about the foreclosure proceedings. App 24. Title Check was able to locate 2CC's agent's phone number, which raised the question why Title Check had not located and used that telephone number to contact Anderson between January 2013 and March 31, 2014, while the

foreclosure was not yet final. App 24. As Antipov later testified, "he would have paid the taxes because what was due was 'nothing compared to the value of the property.'" App 27. Antipov's testimony that he would have paid was confirmed by that fact that "he did remit the funds when he found out about it, but the check was returned as unaccepted." App 27.

PROCEEDINGS BELOW

Having lost a property it paid millions for as a result of failing to pay about $15,000 in taxes, 2CC turned to the courts for relief.

In a separate case, the Court of Appeals holds that the Treasurer gave 2CC and RFA constructive notice

First, 2CC and RFA moved to set aside the judgment in Cass Circuit Court based on a deprivation of due process, but the trial court denied that motion, and the Court of Appeals affirmed. *In re Petition of Cass Cty Treasurer for Foreclosure*, No. 324519, 2016 WL 901700 (Mich Ct App, March 8, 2016). The Court of Appeals held that the minimum requirements of due process had been met, because the County had provided "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at *5, quoting *Sidun v Wayne County Treasurer*, 481 Mich 503, 509 (2008). The Court of Appeals reasoned that this constructive notice was sufficient, as "due process does not require that a property owner receive actual notice before the government may take his property." *Id.*, quoting *Sidun*, 481 Mich at 509.

In this case, the Court of Claims holds that constructive notice precludes relief under § 78*l*

2CC and RFA also brought this case in the Court of Claims, seeking monetary damages under MCL 211.78*l*. Section 78*l* provides that "the owner of any extinguished recorded or unrecorded interest" in a foreclosed property "who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section." In the Court of Claims, "Antipov testified that he never received any notice regarding the tax forfeiture or foreclosure—all of which was sent to 36 Bradford Lane—nor did he have any indication of the same." App 11. Similarly, "Anderson testified that neither he nor [Russian Ferro Alloys] received notice of the foreclosure or tax delinquency, despite the fact that RFA held a mortgage interest in the property." App 12.

Judge Talbot, sitting as a judge of the Court of Claims, held that § 78*l* did not provide relief to either 2CC or Russian Ferro Alloys. As to the latter, the court concluded that Russian Ferro Alloys was not entitled to any notice under the General Property Tax Act because it did not have an interest *recorded* before the date on which the certificate of forfeiture was recorded. App 13–14. The court did not address the fact that § 78*l*'s language expressly allows "the owner of any extinguished . . . *unrecorded* interest" to "bring an action to recover monetary damages as provided in this section." MCL 211.78*l* (emphasis added). The court also did not address the plain language of § 78a, which requires that "[t]he county

treasurer *shall* notify the person or *holders of undischarged mortgages* if delinquent taxes on the property or properties are returned within that year." MCL 211.78a(4) (emphasis added).

As to 2CC, the court did not credit Antipov's testimony that he did not receive any notice because Antipov testified that he had received mail and property-tax bills for other properties despite his move. App 15. Though thus giving no weight to Antipov's testimony denying that he received actual notice, the court did not cite any evidence affirmatively showing that Antipov had received actual notice. App 14–15. The court then concluded that the property owner had been given constructive notice: "Antipov and 2 Crooked Creek 'received' the notice that was posted on the property." App 15; see also App 16 ("[T]he Court concludes that 2 Crooked Creek 'received' for purposes of MCL 211.78*l*, the notice posted on the property. . . . [T]he Court concludes plaintiff is *charged with* having received this duly executed notice under the statute.") (emphasis added).

As to damages, the Court of Claims concluded that 2CC "failed to present any evidence of its damages": "there is no testimony in the record that established the fair market value of 2 Crooked Creek's interest in the property at the time of the foreclosure." App 18. The Court did not think that Antipov's testimony about purchasing the property for $820,000 and then paying $2.6 million to build the house on it counted as relevant evidence, even though Antipov testified that the value of the property with the new house (which was nearly complete in April 2014, i.e., within a month of the foreclosure) was $3.5 million, and even though Anderson

also testified as to the value of the property, saying it was worth approximately $3,420,000. (Tr. 121:15–18; Tr. 177:7–9.) This evidence was insufficient, according to the Court of Claims, because no one "offered any testimony concerning 2 Crooked Creek's interest in the property at the time of foreclosure as that interest had been affected by the note and mortgage held by RFA, i.e., the equity held by 2 Crooked Creek or the value of the interest held." App. 19.

The Court of Appeals affirms and holds that § 78*l* does not apply when the government has provided constructive notice

On appeal, RFA and 2CC argued that § 78*l* "requires that the owner of the interest in the property receive *actual* notice; constructive notice is insufficient." App 29. The Court of Appeals disagreed. In its view, the Legislature's decision to use the term "any" notice instead of the term "actual" notice meant that "any notice" referred to both constructive and actual notice. App 30. It concluded that "the Legislature did not intend to limit the notice referenced in MCL 211.78*l* to actual notice." App 30. "Instead, when the Legislature stated that an owner must claim that it 'did not receive any notice required under the act,' it referred to the situation when an owner received no notice whatsoever." App 30. The Court of Appeals addressed this Court's statement in *In re Treasurer of Wayne County*, which observed that in "situations in which constitutional notice is provided, but the property owner does not receive actual notice," "MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required." 478 Mich at 10. But the

Court of Appeals concluded that this Court's reading of § 78*l*'s plain language was dicta. App 31.

Summarizing its holding, the Court of Appeals held that "MCL 211.78*l* does not require a lack of actual notice, but a lack of any notice, meaning notice of any type or kind will suffice." App 36. And it rested its holding on its view that constructive notice was sufficient: "Here, where there was evidence in the record that the foreclosure notice was posted to the property during a time when 2CC was exercising control and dominion over the property by the building of a home, the trial court did not clearly err by charging 2CC with knowledge of the notice." App 36.

The Court of Appeals, like the Court of Claims, also concluded that RFA's failure to record its mortgage before the Treasurer's agent ran a title check meant that RFA was not entitled to notice. The Court of Appeals did not address § 78a(4)'s requirement that the Treasurer "shall notify" "holders of undischarged mortgages" of the return of delinquent taxes and did not address the fact that § 78*l*(1) applies to the owners of "unrecorded" interests, App 36–37, despite the fact that RFA raised both of these statutory-interpretation points in its brief. (2CC COA Brief, p 37 (explaining that the Court of Claims' "interpretation impermissibly reads the 'unrecorded interest in that property' language in MCL 211.78*l*(1) completely out of the statute" and quoting § 78a(4)'s notice requirement).) Also, the Court of Appeals did not rely on the Court of Claims' conclusion that 2CC had failed to present evidence of the fair market value of its interest at the time of foreclosure.

In their motion for reconsideration, 2CC and RFA pointed out that the Court of Appeal's reading of the statute turns MCL 211.78*l* into a dead letter. Section 78*l* applies only if there has already been a judgment of foreclosure entered, and a judgment of foreclosure may be constitutionally entered only if the foreclosing government has provided the property owner with at least constructive notice, so every individual to which § 78*l* applies will have been provided constructive notice, which means that § 78*l* will never do any work. The Court of Appeals denied reconsideration.

ARGUMENT

I. The proper interpretation of MCL 211.78*l* is an issue of jurisprudential significance and ongoing public importance.

As both this Court and the U.S. Supreme Court have noted, notice is especially important "when, as here, the subject matter of the [notice] concerns such an important and irreversible prospect as the loss of a house." *Sidun*, 481 Mich 503, 517 (2008) (alteration in original), quoting *Jones v Flowers*, 547 US 220, 230 (2006). Because notice is so important, this Court has previously granted leave to address what level of notice is *constitutionally* required in the context of tax foreclosures. *Sidun*, 481 Mich at 506; *In re Treasurer of Wayne Co*, 478 Mich at 4. The question of what notice is *statutorily* required is just as important to property owners in Michigan, because a statute may provide protections extending beyond the constitutional minimums. *In re Treasurer of Wayne Co*, 478 Mich at 10 ("Indeed, MCL 211.78l provides in such cases a damages remedy that is not constitutionally

required."); accord *Gillie v Genesee Cty Treasurer*, 277 Mich App 333, 353 (2007) ("The Supreme Court noted that MCL 211.78l provides 'a damages remedy that is not constitutionally required.' This is because statutory notice rights can be violated, giving rise to an action for money damages, yet minimum due process may have been satisfied.") (quoting *In re Treasurer of Wayne Co*, 277 Mich at 10). Because this case involves the interpretation of an important statute, one that applies to all tax foreclosures across the state, it warrants review by this Court. MCR 7.305(B)(3).

In its letter requesting publication of the Court of Appeals' opinion, App 39–40, the Cass County Treasurer agreed that this case presents an issue that is both important and frequently recurring. In her words, the opinion "provides an important holding regarding what notice is required to be given regarding foreclosures under the [General Property Tax Act] to owners and interest holders as well as when damages can be awarded." App 39. As she acknowledged, tax foreclosure is "a relatively common proceeding," and "[g]iven the unfortunate frequency with which tax foreclosures occur, there undoubtedly will be a number of cases that arise involving similar facts to the case at hand regarding notice." App 39, 40. And as the letter also acknowledged, "it is understandable that interest would be high" among the public in advancing arguments like those of the property owner here. App 40. In short, while this case is not a case against the state, the parties all agree that it presents a recurring issue of significant public interest with a statewide impact, because each county is applying the same state statute on a

regular basis. This Court should grant the application and resolve the proper interpretation of this important statute.

II. The Court of Appeals' decision was clearly erroneous and nullifies the Legislature's intent by converting § 78*l* into a dead letter.

A. The statutory structure demonstrates that the Legislature intended § 78*l* to provide a damages remedy for property owners who had been provided constructive notice, but who had not received actual notice.

The Court of Appeals' decision in this case has turned MCL 211.78*l* into a dead letter. The Legislature created § 78*l* for a purpose: to provide a right to money damages to individuals whose property interests were extinguished by a foreclosure if those individuals "did not receive any notice" before the foreclosure judgment entered. But if the Court of Appeals' interpretation were correct, it would mean the Legislature enacted a statutory provision that it knew would never do any work, and that result—concluding that the Legislature intended for a statute to be a nullity—warrants review by this Court. See *Quarles v United States*, No. 17-778, 2019 WL 2412905, at *5 (US, June 10, 2019) ("We should not lightly conclude that Congress enacted a self-defeating statute."). After all, quietly nullifying a statute undermines a legislative enactment just as much as overtly invalidating it would. See MCR 7.305(B)(1).

The Legislature wrote § 78*l* to apply *only if* there has already been a judgment of foreclosure entered, MCL 211.78*l*(1), and, as the Legislature is presumed to know, a judgment of foreclosure may be constitutionally entered *only if* the property owner had at least constructive notice that the foreclosure was going to

occur. E.g., *Jones v Flowers*, 547 US 220, 226 (2006) (requiring, before tax foreclosure proceedings, constructive notice that is reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections, and reversing because the constructive notice used was not adequate); *Sidun*, 481 Mich at 509; *Reed*, 475 Mich at 550 ("The Legislature is presumed to know the law."). That means that every individual to which this statute applies (every "owner of any extinguished recorded or unrecorded interest in that property") will have already been given a high level of constructive notice—notice reasonably calculated to reach the individual—by the point at which § 78*l* could apply. The only way, then, that the Legislature could have intended for § 78*l* to operate is if § 78*l* requires something *beyond* constructive notice reasonably calculated to reach the person—and the only thing beyond that type of constructive notice is *actual* notice.

Given this statutory context, the Court of Appeals' interpretation of "any notice" in § 78*l* violates "the fundamental rule of construction that every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 364 (1990). In trying to avoid treating a single word—the word "any"—as surplusage, App 30, the Court of Appeals committed a far worse error: it rendered the whole provision as surplusage. See *Parker Drilling Mgt Services, Ltd v Newton*, No. 18-389, 2019 WL 2412907, at *5 (US, June 10, 2019) (rejecting an interpretation because it "deprives much of the statute of any import, violating the cardinal

principle of interpretation that courts must give effect, if possible, to every clause and word of a statute") (quotation marks omitted). That approach also violated the rule that statutes must be construed as a whole, considering "the entire text, in view of its structure and logical relation of its many parts." *Mont v United States*, 2019 WL 2331305, at *5 (US, June 3, 2019), quoting A. Scalia & B. Garner, *Reading Law* 167 (2012) (quotations omitted). That outcome cannot be reconciled with the Legislature's intent, expressed in the more than 200 words that make up § 78*l*, to provide an action for money damages to individuals who have received a lawful foreclosure judgment—i.e., a judgment already supported by constructive notice.

B. The phrase "any notice" in this context means actual notice, as evidenced by how the Court of Appeals, the County, and even this Court have used the term.

The Court of Appeals reached this outcome by holding that constructive notice is sufficient to qualify as "any notice": "Constructive notice is a legally accepted form of notice and, therefore, sufficient to fall within the confines of 'any notice' under MCL 211.78*l*." App 33. But while the phrase "any notice" in the abstract, divorced from context, could be read very broadly, the phrase "any notice" is often read to mean actual notice.

Indeed, one need look no further than the opinions below to see examples of this. The Court of Claims stated, for example, that "Antipov steadfastly denied receiving any notice at any time," App 14, and the Court of Appeals quoted this statement too, App 32. No one would understand that statement by either court as meaning that Antipov steadfastly denied receiving *constructive* notice. Instead, the

context shows that Antipov was denying receiving any *actual* notice; after all, the existence of constructive notice is a legal question, not a factual one that would be resolved by Antipov's testimony. E.g., *Thomas v City of Flint*, 123 Mich 10, 34 (1900) ("Constructive notice, on the other hand, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.").

Similarly, the Court of Appeals explained later in its opinion that "[c]onstructive notice exists" because owners who record their interests after the government does a records check "could always claim they received no notice because they would never receive *any notice* other than the recorded certificate of forfeiture, of which they could remain forever ignorant based on their own failure to review the records." App 37 (emphasis added). This explanation directly contrasts constructive notice with "any notice," recognizing that individuals who say they did not receive "any notice" mean that they did not receive actual notice. Put another way, the Court of Appeals was not saying that constructive notice exists because owners could always claim they never received constructive notice; that statement would make no sense. Instead, it was saying constructive notice exists because owners could always claim they never received actual notice.

Demonstrating that this is a common way to use those words, the Treasurer has also used the phrase "any notice" to mean "actual notice." In her brief in the Court of Appeals, the Treasurer argued that 2CC's argument "seems to begin and end with Mr. Antipov's testimony that he did not receive *any notice* of tax foreclosure proceedings." (Treasurer's COA Br, p 27 (emphasis added).) In the very

next sentence, the Treasurer showed that she understood that argument to be an argument about actual notice: "[2CC's] position is flawed as a matter of law to the extent it argues 'proving' (presumably only through Mr. Antipov's own self-serving testimony) [2CC] did not receive *actual notice* is sufficient to demonstrate it did not receive the notice that is required under the Tax Foreclosure Act and our Constitution." *Id.* (emphasis added).

And this Court too has used the phrases "any notice" and "actual notice" interchangeably—and when talking specifically about § 78*l*. Addressing both § 78k and § 78*l*, this Court noted that the intervening parties in *In re Treasurer of Wayne County* "accurately construe these provisions" and then explained that § 78*l* provides "an action for monetary damages based on a claim that the property owner did not receive *any notice*." 478 Mich at 8 (emphasis added). Then, just a few paragraphs later, this Court addressed "situations in which constitutional notice is provided, but the property owner does not receive *actual notice*," and said that "MCL 211.78*l* provides in such cases a damages remedy." *Id.* at 10 (emphasis added). This Court, consistent with the statute's structure, equated "any notice" with "actual notice." In short, context matters, and here the context demonstrates that the Legislature intended the phrase "any notice" to mean "actual notice."

Another part of § 78*l*'s text points in the same direction. Section 78*l* applies to any owner "who claims that he or she did not *receive* any notice required under this act" (emphasis added), and the word "receive" does not fit well with the concept of constructive notice. Indeed, while "actual notice" is defined as "[n]otice given

directly to, or *received* personally by, a party," "constructive notice" in contrast is defined by reference to a presumption or imputation that the law treats as a substitute for actual receipt—it is "[n]otice *arising by presumption* of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice *presumed* by law to have been acquired by a person and thus *imputed* to that person." Black's Law Dictionary (10th ed) (emphasis added). That is probably why the Court of Claims put quotations marks around the word when saying that "Antipov and 2 Crooked Creek 'received' the notice that was posted on the property," App 15, and when concluding that "2 Crooked Creek 'received' for purpose of MCL 211.78*l*[] the notice posted on the property," App 16.

None of this denies that the word "any" often has a broad meaning. But not always. For example, just this year the U.S. Supreme Court explained that "although the term 'any' ordinarily carries an 'expansive meaning,'" limits that are apparent from context still apply. *Home Depot USA, Inc v Jackson*, 2019 WL 2257158, at *6 (US, May 28, 2019) (citation omitted) ("the context here demonstrates that Congress did not expand the types of parties eligible to remove a class action under § 1453(b) beyond § 1441(a)'s limits"). Similarly, just last year the U.S. Supreme Court made the same point: "use of the word 'any' will sometimes indicate that Congress intended particular statutory text to sweep broadly," "[b]ut whether it does so necessarily depends on the statutory context . . . ." *Nat'l Ass'n of Mfrs v Dep't of Def*, 138 S Ct 617, 629 (2018) (citation omitted). Here, the context

shows that the Legislature was drafting this provision to apply after constructive notice had already been provided, so it must have intended to give an action for money damages to those who had not received actual notice.

C. The Court of Appeals' interpretation also treats the word "unrecorded" as surplusage.

Given that the Court of Appeals' interpretation has turned the entirety of § 78*l* into surplusage, perhaps it might seem like a small thing to complain that it also reads the word "unrecorded" out of the statute. But because that was the mechanism by which the Court of Appeals concluded that RFA's claim failed, it is worth addressing.

Section 78*l* specifically grants a damages remedy to holders of unrecorded interests: "the owner of any extinguished . . . *unrecorded* interest in that property who claims that he or she did not receive any notice required under this act . . . may . . . bring an action to recover monetary damages as provided in this section." MCL 211.78*l*(1) (emphasis added). The Court of Appeals concluded that RFA was not entitled to any notice "required under this act" because RFA did not record its mortgage before Title Check ran its records search. App 36–37. But the Court of Appeals never addressed express language in the act that requires a county treasurer to notify mortgage holders: "The county treasurer *shall* notify the person or holders of undischarged mortgages if delinquent taxes on the property or properties are returned within that year." MCL 211.78a(4) (emphasis added). This

provision expressly requires the Treasurer to give notice to RFA, the holder of an undischarged mortgage; it is notice "required under this act." MCL 211.78*l*.

To be sure, § 78a(4) also contains language allowing any person (including those with unrecorded property interests and holders of undischarged mortgages) to pay a fee to be given notice. But the fact that the statute offers a *permissive* option to anyone to request notice does not diminish its *mandatory* requirement that the treasurer "shall" provide notice to "holders of undischarged mortgages." Section 78a(4) does not say "[t]he county treasurer shall notify . . . holders of undischarged mortgages *who have paid a fee or recorded the mortgage*"; its mandatory language does not include the italicized limitation, and courts may not read limitations into statutes that are not there. Under § 78*l*, then, RFA, as "the owner of any extinguished . . . *unrecorded* interest" is entitled to "bring an action to recover monetary damages" because it "did not receive" the notice "required under the act" by § 78a(4). MCL 211.78*l*(1) (emphasis added).

* * *

A court's "primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Neal v Wilkes*, 470 Mich 661, 665 (2004). Here, it is not a plausible interpretation to conclude that the Legislature intended to adopt a provision that it knew would never apply. But the Court of Appeals' interpretation means that it will not make sense for a single person to seek damages under § 78*l*. If the government *did not* provide constructive notice, then the foreclosure was unconstitutional in the first place, so (as the Legislature would know) there is no

need for § 78*l*; individuals in that scenario can challenge the foreclosure on constitutional grounds. Indeed, basing the suit on the Due Process Clause itself would be a superior approach because under that clause, they could get back not just their money (§ 78l's limited remedy), but also their property. *Sidun*, 48 Mich at 518 (concluding that the property owner is not limited to money damages, as opposed to title to the property, where "an owner has been deprived of due process"). But if the government *did* provide constructive notice and that meant a person "received" notice, then that person—under the Court of Appeals' interpretation in this case—already received "any notice" and so cannot recover under MCL 211.78*l*.

By reading § 78*l* to not apply in the only circumstance the Legislature could have been contemplating (i.e., when the government has provided an individual with constructive notice but not with actual notice), the Court of Appeals turned § 78*l* into mere surplusage. Nullifying a statute is an error of jurisprudential significance that warrants review by this Court.

III. In addition to being clearly erroneous, the Court of Appeal's decision will cause material injustice.

The Court of Appeals' decision in this case allows a local treasurer to take a property worth $3.5 million to recover $14,743.24 in back taxes from a property owner who never received any notice of the foreclosure proceedings, even though the Legislature created a mechanism specially designed to provide at least some recourse to a property owner in this situation. That is unjust.

The Court is already addressing one component of this material injustice—the fact that the foreclosing government often decides to keep the excess value from the property, beyond what is owed to the government in taxes, penalties, and the like, instead of returning that value to the property owner. *Rafaeli, LLC v Oakland County*, No. 156849 (leave granted Nov. 21, 2018). But not only does that injustice implicate the protections of the Takings Clauses of the U.S. and Michigan Constitutions, it also implicates the statutory protections set out in § 78*l*. That type of injustice is present here—to the tune of almost $3.5 million, an amount that is more than 200 times the underlying tax liability. And the fact that the property owner is being denied the remedy the Legislature crafted for this specific situation makes matters worse.

IV. The Court of Claims alternate ground for dismissing 2CC's claim is also wrong, and so not an alternate ground for affirmance.

One last point. The Court of Claims ruled that 2CC failed to present any evidence of the fair market value of its interest in the property at the time of foreclosure because 2CC entered into a mortgage with RFA before the foreclosure, thus giving part of 2CC's interest to RFA. App 18. In other words, the Court of Claims thought it could not tell what percentage of interest in the property 2CC held and what percentage RFA held. But this argument, which the Court of Appeals did not rely on, App, 37, does not provide an alternate ground for affirmance, because if this Court agrees that 2CC and RFA are each allowed to bring an action under § 78*l*—because each holds an extinguished property interest and yet neither

received actual notice—then this issue goes away. That is because both 2CC and RFA brought claims under § 78*l*, which means that 100% of the value of the property is accounted for between the two plaintiffs. So the record evidence that the property was worth $3.5 million—such as evidence that 2CC bought it for $820,000 and then spent $2.6 million constructing a house there or that there is a mortgage for $3.5 million—is evidence of the value of the property sufficient to show *each* plaintiff suffered at least some damages. (2CC Court of Appeals Brief, Exhibit J-1; Tr. 110:2–6; Exhibit J-6; Tr. 177:7–9.) And that is all that is necessary to satisfy the damages element of a claim. E.g., *Berrios v Miles, Inc*, 226 Mich App 470, 478–79 (1997) ("[W]here injury to *some degree* is found, we do not preclude recovery for lack of precise proof [of damages]. We do the best we can with what we have.") (emphasis added; citations and quotations marks omitted).

By concluding that 2CC's interest in a property that it spent about $3.5 million to purchase and construct a home that was never lived in is of such uncertain value that a claim for its taking cannot survive involuntary dismissal, the Court of Claims reached a holding that is unsupported by the record and clearly erroneous. This objection by the Court of Claims is really about how the money would be divided between the two plaintiffs if they have valid claims; it is not that there is a question whether either suffered at least some damages, and so it would not justify upholding the decision below.

CONCLUSION AND RELIEF REQUESTED

For these reasons, this Court should grant the application, reverse the decision of the Court of Appeals, hold (to borrow from this Court's words in *In re Treasurer of Wayne County*) that "MCL 211.78*l* provides . . . a damages remedy" in "those situations in which constitutional notice is provided, but the property owner does not receive actual notice," 478 Mich at 10, and remand for further proceedings.

Respectfully submitted,

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