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. 159856

Court of Appeals No. 342797

Court of Claims No. 14-000181-MZ

SUPPLEMENTAL BRIEF 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.

INTRODUCTION

This case arises because Cass County took a property worth $3.5 million to satisfy a tax deficiency of about $14,000, did so without providing any actual notice to either the property owner or the mortgage holder, and then refused to return any of the surplus value. The protections of due process did not prevent this, because the County Treasurer met the minimum requirements of procedural due process by providing constructive notice to the owner. But although the Treasurer had no problem making actual contact with the owner *after* the foreclosure, all of the Treasurer's *pre*-foreclosure attempts to provide notice were ineffective: she mailed notices, but she sent them to the property owner's old address; she published notice in the *Cassopolis Vigilant*, but the property owner lived near Chicago; she posted a notice on the property, but the notice was removed by a contractor and never brought to the owner's attention. And she never attempted to notify the mortgage holder, because she conducted her title search before the mortgage was recorded and did not notice when the mortgage was recorded in the County's own records.

Fortunately, the Legislature enacted a statute, MCL 211.78*l*, that provides a damages remedy in situations like this: § 78*l* provides that, after a judgment of foreclosure, "the owner of any extinguished recorded or unrecorded interest" in the foreclosed property "who claims that [it] did not receive any notice required under this act" may not recover possession of the property but may "bring an action to recover monetary damages as provided in this section." Unfortunately, the Court of Appeals interpreted § 78*l* to not apply if a property owner was on constructive notice, thereby rendering the statute useless: under the legislative scheme, a

foreclosure is supposed to be preceded by constructive notice, and a judgment of foreclosure may be constitutionally entered only if that constructive notice satisfies procedural due process.

This outcome is contrary to the statute's text and structure. The Court of Appeals reached this outcome only by overlooking basic rules of statutory construction: statutes must be read as a whole, not in isolated parts; statutes should not be interpreted in a manner that would render them useless; words in statutes must be interpreted in context and given their ordinary meaning; courts must apply statutory language without addition, subtraction, or modification. Perhaps even more surprisingly, this outcome is contrary to how this Court has already read § 78*l*: this Court has already recognized that § 78*l* exists for "those situations in which constitutional notice is provided, but the property owner does not receive actual notice." *In re Treasurer of Wayne Co for Foreclosure (Perfecting Church)*, 478 Mich 1, 10 (2007). "MCL 211.78*l* provides in such cases"—"cases where the foreclosing governmental unit complies with the [General Property Tax Act] notice provisions"—"a damages remedy that is not constitutionally required." *Id.*

Along the way, the Court of Appeals also misread § 78*l* by concluding that it did not apply to the mortgage holder (because the mortgage was not recorded early enough), overlooking the fact that § 78*l* expressly extends its cause of action to the holder of an "unrecorded interest."

For all these reasons, the interest holders respectfully ask this Court to grant the application, reverse, and remand for further proceedings.

STATEMENT OF FACTS

To avoid repeating the application's full factual statement, the following briefly summarizes the most relevant facts of this case.

2CC's lakefront property was worth approximately $3.5 million, more than 200 times the $14,743.24 tax debt. Appl'n 4, 5, 10, 11; App 6a, 22a, 23a, 27a; Tr. 121:15–18; R. 177:7–9.

While the Treasurer made multiple attempts to provide notice to 2CC, mostly by sending notices to an out-of-date address, Appl'n 5–7, she did not succeed in actually providing notice until after the foreclosure and after the redemption period expired, Appl'n 7–8. The Court of Claims did not cite any evidence that Antipov or any other 2CC personnel actually received any notice. App 6a–12a, 14a–15a. Instead, the Court of Claims concluded that the posting of notice on the property counted as constructive notice: "the Court concludes plaintiff is charged with having received this duly executed notice under the statute." App 16a. The Court of Appeals also did not base its holding on actual notice; instead, it recognized that the issue was whether the presence of constructive notice was sufficient to preclude a claim under § 78*l*. App 29a. And on that issue, the Court of Appeals held that "[c]onstructive 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 33a; see also App 36a ("In sum, 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. . . . [T]he trial court did not clearly err by *charging* 2CC *with* knowledge of the notice.") (emphasis added). As this case comes to the Court, the only issue is statutory construction.

ARGUMENT

I. The Legislature intended § 78*l* to provide a claim for property owners whose property was foreclosed without the owner receiving actual notice.

It is a basic principle of statutory interpretation that courts must examine statutes "as a whole, reading individual words and phrases in the context of the entire legislative scheme." *People v Comer*, 500 Mich 278, 287 (2017). This includes "consider[ing] the entire text, in view of its structure and of the physical and logical relation of its many parts." *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493 (2018). Here, the context of the entire legislative scheme and the logic of the statutory structure that precedes § 78*l* confirms the Legislature's intent: the Legislature intended § 78*l* to apply where the property-interest holder will have *already* been provided constructive notice, which means that the Legislature must have intended § 78*l* to create a cause of action for those who did not receive actual notice.

A. The statutory structure confirms that the Legislature intended § 78*l* to apply after constitutionally sufficient constructive notice has already been provided.

1. The Legislature designed the provisions of the General Property Tax Act that precede § 78*l* to provide at least constructive notice.

Long before § 78*l* comes onto the scene in a particular foreclosure, the General Property Tax Act will have already required the foreclosing treasurer to send out multiple notices, and those notices are sufficient to provide constructive notice of the foreclosure process. These notices begin when the county treasurer sends the property owner a tax bill. MCL 211.44(1). If the taxes remain unpaid after

this initial notice, then the treasurer must send multiple delinquency notices to inform the property owner of the deficient taxes and of the resulting interest, penalties, and fees. MCL 211.78b, 78c, & 78f. If the property owner does not pay the taxes despite these reminders, then the property on which the taxes have been delinquent for 12 months or more "is forfeited to the county treasurer for the amount of those unpaid delinquent taxes, interest, penalties, and fees." MCL 211.78g(1). But before this forfeiture is finalized through a foreclosure judgment, the treasurer must record the certificate of forfeiture, MCL 211.78g(2), and must send the property owner more notices: the treasurer must send both notice of the show-cause hearing (which provides an opportunity to explain why the forfeiture should not occur) and notice of the hearing on the petition for foreclosure (which provides another opportunity for the property owner to avoid the foreclosure), MCL 211.78i(2). And the statute also provides for notice by publication in a local newspaper, MCL 211.78i(5), MCL 211.78s(3)(b), and for notice to be posted on the property itself, through a personal visit to the property, MCL 211.78i(3)(d).

Under this statutory structure, all of these notice requirements apply *before* the foreclosure judgment and therefore precede any potential § 78*l* claim. Section 78*l*'s own plain language makes this clear: § 78*l* comes into operation only "[i]f a judgment of foreclosure is entered under section 78k" by a court. MCL 211.78*l*(1). Thus, under the framework the Legislature constructed in this statute, the Legislature expected a county treasurer to have provided the following notices before § 78*l* could possibly be invoked:

- notice by mail
    - of the tax bill,
    - of the tax delinquency,
    - of the show-cause hearing, and
    - of the foreclosure hearing;
- notice by recording the certificate of forfeiture;
- notice by publication; and
- notice by a personal visit to the property.

These notices provide constructive notice. In fact, the Legislature wrote into the statute itself that these steps qualify as constructive notice: "A person shall be *deemed to have been provided notice* and an opportunity to be heard if the foreclosing governmental unit followed the procedures for provision of notice by mail, for visits to forfeited property, and for publication under section 78i . . . ." MCL 211.78k(5)(f) (emphasis added). Therefore, under the statutory framework it created, the Legislature intended that § 78*l* would not apply until after constructive notice had already been provided.

2. The Legislature knew that § 78*l* would be useful only to a property owner who received constitutionally sufficient constructive notice, but not actual notice.

Further, § 78*l* is necessary only if the judgment of foreclosure is *constitutionally* valid, because if a judgment of foreclosure is entered without constitutionally sufficient notice, then the judgment of foreclosure is invalid and may be challenged without any need for § 78*l* to exist. As this Court has explained,

due process requires "'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.'" *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509 (2008), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314 (1950). If a foreclosure occurs without notice sufficient to satisfy due process, then there is no need for § 78*l*; the state and federal constitutions themselves provide a remedy, and a superior one at that. In *Sidun*, for example, this Court held that if a foreclosure occurs without constitutionally sufficient notice, then the property owner is not limited to money damages and may bring an action to set aside the foreclosure. 481 Mich at 518.

What is more, this Court has already recognized that the constructive-notice steps outlined above meet the due-process standard. *Perfecting Church*, 478 Mich at 10 ("In cases where the foreclosing governmental unit complies with the [General Property Tax Act] notice provisions, MCL 211.78k is not problematic."); accord *In re Petition of Cass Co Treasurer for Foreclosure*, No. 324519, 2016 WL 901700, at *7 (Mich Ct App, March 8, 2016) ("petitioner met the minimum requirements of due process in providing notice to [2CC and RFA]"). Given this context, the only reason it makes sense for the Legislature to have created § 78*l* is that it wanted to provide a cause of action for those who had been provided constitutionally sufficient notice, but who did not receive actual notice.

In some cases, a court must rely on the presumption that the Legislature knows the law when considering how background principles (like due-process

requirements) influence how a statute should be understood. But in the context of this case, there is no need to rely on that presumption, because here the Legislature expressly referred to the controlling due-process principles when setting out the foreclosure provisions. Here, the language of the General Property Tax Act affirmatively demonstrates that the Legislature was well aware that a foreclosure would be valid only if sufficient notice were provided, as the statutory provisions repeatedly refer to due-process principles. For example, § 78i(2) paraphrases the constitutional test set out in *Sidun*, using the phrases "reasonably calculated to apprise" and "reasonably calculated to inform"; similarly § 78i(5) repeats the phrase "reasonably calculated to apprise" when discussing the type of notice that should be provided. See *Sidun*, 481 Mich at 509 ("'notice reasonably calculated, under all the circumstances, to apprise interested parties'").

In addition to these three references to the controlling due-process test, the statute also expressly refers to the constitutional requirements of due process in three more places. For example, the statute expressly states that the Legislature intends for its statutory scheme to provide notice that meets due-process standards. MCL 211.78(2) ("It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States."); see also MCL 211.78i(10) (explaining that

proceedings will not be invalidated if due-process requirements have been satisfied). In fact, the Legislature provided that a foreclosing government may do the right thing on its own initiative: a county treasurer may cancel a foreclosure if it discovers that a property owner "was not provided notice sufficient to satisfy the minimum requirements of due process required under the state constitution of 1963 and the constitution of the United States." MCL 211.78k(9)(e); see also MCL 211.78(6) (providing that "[t]he foreclosure of forfeited property by a county is voluntary").

Read as a whole, including these six direct references to providing due process before a foreclosure, the statutory structure thus demonstrates that the Legislature intended that § 78*l* would apply only *after* a constitutionally valid foreclosure had already occurred —i.e., only after a foreclosure preceded by constructive notice reasonably calculated to apprise the property owner of the risk of foreclosure.

The Court of Appeals' incorrect reading of § 78*l* results from that court's failure to take the whole context of the statute into account. Indeed, the Court of Appeals did not discuss the statutory structure at all; instead, the bulk of its statutory analysis focused on a single word—the word "any" (more on this in a moment). App 29a–31a. But as this Court has explained, "[t]he law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions." *People v Feeley*, 499 Mich 429, 435 (2016).

As a result of this tunnel vision, the Court of Appeals held that § 78*l* does not apply if the property owner was afforded constructive notice, App 36a ("notice of any type or kind will suffice"). But that holding renders § 78*l* meaningless. In trying to avoid treating a single word—the word "any"—as surplusage, App 30a, the Court of Appeals committed a far worse mistake: it treated all 200 words of § 78*l* as if they were surplusage.

That approach is inconsistent with basic principles of statutory interpretation. As this Court has explained, "a fundamental rule of statutory construction is that the Legislature did not intend to do a useless thing." *City of S Haven v Van Buren Co Bd of Com'rs*, 478 Mich 518, 532 (2007) (per curiam); accord *Appeal of Apportionment of Wayne Co, Co Bd of Com'rs—1982*, 413 Mich 224, 259–60 (1982) ("It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect."); *Pigorsh v Fahner*, 386 Mich 508, 514 n 2 (1972) ("In the construction of statutes, courts should lean towards that construction which will give the statute force, validity, not to that construction which will nullify it."); see also *Quarles v United States*, 139 S Ct 1872, 1879 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute."); *Parker Drilling Mgt Services, Ltd v Newton*, 139 S Ct 1881, 1890 (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") (internal quotation marks omitted).

Contrary to these principles, if the Court of Appeals' reading of the statute is allowed to stand, then § 78*l* will be a useless thing; it will never do any work. If a foreclosure has occurred that was *not* supported by constitutionally sufficient constructive notice, then § 78*l* is useless, because, as already noted, the property owner has a cause of action under the state and federal Due Process Clauses, and a superior one at that, as the constitutional claims provide not just an avenue for damages, but also an avenue to recover possession and title of the property. *Sidun*, 481 Mich at 518; *Perfecting Church*, 478 Mich at 11. And if the foreclosure *was* supported by constitutionally sufficient constructive notice, then under the Court of Appeals' decision, § 78*l* would also do no work, because the presence of constructive notice would mean § 78*l* would never apply, even to those who never received actual notice. App 33a ("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*."). And the Treasurer has not thus far provided a single example where § 78*l* will apply under the Court of Appeals' interpretation.

The Treasurer does not shy away from arguing that § 78*l* adds nothing to the statute. She affirmatively argues that reading § 78*l* along with § 78(2) results in the conclusion that both "MCL 211.78*l* and 211.78(2) limit the claims that can be made by Plaintiffs/Appellees in this case to those regarding their receipt of due process . . . ." Treasurer's Answer, p 21. In other words, she asserts that § 78*l* allows only claims about a lack of due process. But properly reading both the *pre*-foreclosure provisions addressed in § 78(2) and the *post*-foreclosure provision of § 78*l* leads to

the opposite conclusion. Section 78(2) states that "[i]t is the intent of the legislature that the provisions of this act relating to the *return, forfeiture, and foreclosure* of property for delinquent taxes satisfy the minimum requirements of due process" and that "*those provisions* do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States." MCL 211.78(2) (emphasis added.) But § 78*l* is not one of "those provisions." Section 78*l* does not relate to the "return, forfeiture, and foreclosure" of the property; quite the opposite, it expressly disclaims any relationship to the *return* of the property by saying it does not authorize "an action for possession of the property against any subsequent owner," and it provides no mechanism for undoing the *forfeiture* of the property or the *foreclosure* because it applies only after "a judgment of foreclosure is entered" and because it authorizes only money damages, not a reversal of the foreclosure and forfeiture. In short, § 78*l* does not relate to the act's "return, forfeiture, and foreclosure" provisions but rather provides a separate *post*-foreclosure cause of action.

The Legislature did not include § 78(2) to negate the cause of action the Legislature itself was creating in § 78*l*; it did not give with one hand and take away with the other. Rather, § 78(2) was written to prevent *courts* from rewriting the return, forfeiture, and foreclosure provisions: it provides that the failure of a foreclosing government "to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be *construed* to create a claim or cause of action . . . unless the minimum requirements of due

process . . . are violated." MCL 211.78(2) (emphasis added.) This language about how those provisions are to "be construed" shows that the Legislature did not want the courts to create a cause of action for a government's failure to meet some technical requirement of the act, when due process was nonetheless provided. But for instances where a property owner did not receive any notice at all, the Legislature itself created a cause of action in § 78*l*. E.g., MCL 211.78*l*(1) (saying an owner of an extinguished interest may "bring an action to recover monetary damages as provided in this section"); MCL 211.78*l*(2) (referring to an "action to recover monetary damages under this section"); MCL 211.78*l*(3) (same); MCL 211.78*l*(4) (referring to "monetary damages recoverable under this section"); MCL 211.78*l*(5) (recognizing that this section creates a "right to sue for monetary damages under this section") (emphasis added). All of these parts of § 78*l* expressly create a cause of action, and yet the interpretation adopted by the Court of Appeals and supported by the Treasurer treat all of the provisions of § 78*l* as meaningless.

In short, the context in which § 78*l* applies demonstrates that the Legislature intended for § 78*l* to provide a claim for money damages to property owners who were provided constructive notice, but nevertheless did not "receive any notice." MCL 211.78*l*. In the context of the legislative scheme as a whole, the statute makes sense only if it applies to property owner who did not receive actual notice.

B. In this context, the phrase "did not receive any notice" means the property owner did not receive actual notice.

When § 78*l* is read in light of the statutory structure as a whole, it is best understood as referring to the absence of actual notice. This understanding is consistent with the specific text of § 78*l* and with how the words "did not receive any notice" are commonly used.

Start with the words "did not receive." As explained in the application, the word "receive" does not fit well with the concept of constructive notice. While "actual notice" is defined as "[n]otice given directly to, or *received* personally by, a party," "constructive notice" 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). Given that constructive notice is, by definition, a substitute for when someone does not actually receive notice, to say that someone has "received constructive notice" is a bit of an oxymoron—it is saying the person received something he did not actually receive.

Both the Court of Claims' decision and the Court of Appeals' decision implicitly acknowledge this awkward fit in multiple places, either by putting quotation marks around the word "received" or by using the words "charged with" to refer to "receiving" constructive notice:

- "the Court concludes that Antipov and 2 Crooked Creek 'received' the notice that was posted on the property," App 15a, 33a;

- "the Court concludes that 2 Crooked Creek 'received' for purposes of MCL 211.78l, the notice posted on the property," App 16a, 33a;
- "the Court concludes plaintiff is *charged with having received* this duly executed notice under the statute," App 16a (emphasis added), 33a;
- "there was sufficient evidence to support the trial court's determination that 2CC 'received the notice that was posted on the property' because it '*charged*' plaintiff '*with having received* this duly executed notice under the statute,'" App 35a (emphasis added);
- "the trial court did not clearly err by *charging* 2CC *with* knowledge of the notice," App 36a (emphasis added).

As these examples show, the lower courts in this case recognized that they were using the word "received" in a way that was not consistent with the word's ordinary meaning. See, e.g., *Grede v Bank of New York Mellon*, 598 F3d 899, 900 (CA 7, 2010) ("We put 'standing' in scare quotes because the usage is abnormal."do not see the word standing); https://dictionary.cambridge.org/us/dictionary/english/scare-quotes (defining "scare quotes" as quotation marks used "to show that the word is being used in a special way or in a way that may not be correct or true"); *Garner's Modern American Usage* 658 (Oxford 2003) (under "punctuation," listing one use of quotations marks as "when you mean so-called-but-not-really"). But when a court *admits* that it is not applying a word's ordinary meaning, that admission raises a warning flag that the court is not following the usual rules of statutory interpretation—that it is not following the rule that "[w]ords used by the Legislature must be construed and understood in accordance with their common, ordinary meaning." *In re Certified Question from United States Court of Appeals for Ninth Circuit (Deacon v Pandora Media, Inc)*, 499 Mich 477, 482 (2016). Had the Court of Appeals applied the ordinary meaning of "receive," it would have

recognized that the average English speaker would understand a statement that an individual did not receive any notice to mean that the individual did not actually receive the notice.

Consider next the word "any" in "any notice." According to the Court of Appeals, "[b]ecause 'any' is commonly understood to encompass a wide range of things,' the Legislature did not intend to limit the notice referenced in MCL 211.78*l* to actual notice." App 31a (quoting *Anzaldua v Band*, 457 Mich 530, 543 (1998)). But as with other words, context affects how the word "any" is understood. For example, if an advocate at oral argument says, "I'd be happy to respond to any questions the Court might have," everyone present would understand, from context, that counsel probably means any questions relating to the case, not any questions relating to counsel's health, to counsel's hobbies, or to some other aspect of counsel's personal life. In other words, context may supply a limitation to how broadly "any" sweeps in a particular instance.

Courts regularly recognize the importance of context when interpreting the word "any." For example, last year the U.S. Supreme Court, while acknowledging that "use of the word 'any' will sometimes indicate that Congress intended particular statutory text to sweep broadly," explained that "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). In light of the relevant context, the Court concluded that "the word 'any' cannot expand" the item it modifies in context. *Id.* Similarly, in *Kircher v Putnam Funds Trust*, 547 US 633, 643 (2006), the U.S. Supreme Court rejected a

suggestion that it read the word "any" broadly, explaining that "that suggestion would be persuasive only if we stopped reading right there, and we do not stop there; we do not read statutes in little bites." *Id.* at 643; see also *Home Depot USA, Inc v Jackson*, 139 S Ct 1743, 1750 (2019) ("although the term 'any' ordinarily carries an expansive meaning, 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") (cleaned up). And other courts also recognize the importance of context in properly interpreting the word "any." E.g., *Abel v Planning & Zoning Com'n of Town of New Canaan*, 297 Conn 414, 429 (2010) ("[W]hen a statute regulates conduct, the use of the phrase 'any person' does not plainly and unambiguously refer to persons outside the state's territorial jurisdiction because we presume that the legislature is aware of the constraints on its power to regulate conduct extraterritorially."); *New W Fisheries, Inc v State, Dep't of Revenue*, 106 Wash App 370, 377 (2001) ("Although the use of the word 'any' may broaden the scope of a statute, a focus on 'any' that ignores the immediately subsequent language renders that language superfluous.").

What is more, the phrase "any notice" in this context often means actual notice, as shown by how that very phrase has been used by the Court of Claims, the Court of Appeals, other courts, the Treasurer, and even this Court. The Court of Claims, for example, stated that "Antipov steadfastly denied receiving any notice at any time," App 14a, and the Court of Appeals quoted this statement too, App 32a. No one would understand that statement by either court as meaning that Antipov

steadfastly denied receiving *constructive* notice. Instead, it is clear that Antipov was denying receiving actual notice. The reason that this is clear is the context: Antipov was making a factual assertion, not a legal one, about whether the notices that were sent to his old address or posted on his property (but removed by a contractor) *actually* reached him. See *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.").

Another part of the Court of Appeals' opinion used the words "any notice" to mean the opposite of constructive notice, not to refer to multiple types of notice. The Court of Appeals reasoned 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 37a (emphasis added). The Court of Appeals was not saying that constructive notice exists because owners could always claim they were not provided constructive notice; instead, it was saying that constructive notice exists because owners could always claim they never received actual notice.

Other courts in contexts involving both actual notice and constructive notice also use the words "any notice" to mean actual notice. Indeed, it is not uncommon for courts to draw a direct contrast between "any notice" and constructive notice, which shows that they are using the words "any notice" to mean actual notice. E.g.,

Campbell v Dundee Cmty Sch, 2015 WL 4040743, at *6, *9 (ED Mich, July 1, 2015) (holding that "plaintiffs have not shown *any notice or constructive notice* of any abuse on the part of the DCS Board," after holding that the plaintiffs "have failed to show that DCS had actual knowledge") (emphasis added); *Kmart Corp v Kroger Co*, 2014 WL 229277, at *7 (ND Miss, January 21, 2014) ("Kmart does not argue that it provided *any notice* to Fulton that such measures should be taken; *instead*, Kmart seems to argue that Fulton had *constructive notice* . . . .") (emphasis added). And courts also use the words "any notice" as a substitute for actual notice when first discussing actual notice and then discussing constructive notice. E.g., *St George v Colonia Girls Softball League*, 2010 WL 2795330, at *8 (NJ Super Ct App Div, July 16, 2010) ("In short, there was no evidence that the League had *any notice* of the condition, and there was no evidence that the condition had existed for a sufficiently long period of time that the League had *constructive notice* of its presence.") (emphasis added); *Garvin v City of Philadelphia*, 354 F3d 215, 222 (CA 3, 2003) ("The district court noted that 'there is no evidence that the four newly named defendants had *any notice* of the suit.' It therefore focused its analysis on whether those parties had *constructive notice* of the filing of the action.") (citations omitted; emphasis added).

And even the Treasurer in this case has demonstrated 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 as the next section explains, this Court has also used "any notice" to mean "actual notice."

C. This Court's reading of § 78*l*'s plain language in *Perfecting Church* confirms how to read "any notice" in context.

This Court has also used the phrases "any notice" and "actual notice" interchangeably—and when talking specifically about § 78*l*. In *Perfecting Church*, this Court addressed § 78k(6), which deprived circuit courts of jurisdiction to alter a judgment of foreclosure if the property owner does not redeem or appeal the foreclosure judgment within 21 days, and held that this jurisdiction-stripping provision could not be applied in a constitutional manner to property owners who were not provided notice sufficient to satisfy due process. 478 Mich at 11. At the same time the Court recognized that a foreclosure is constitutionally valid only if the foreclosure satisfies due-process requirements, *id.*, this Court noted how § 78*l* fit into the statutory scheme. The Court recognized 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 that is not constitutionally required." *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 this Court understood the context to show that the Legislature intended the phrase "any notice" to mean "actual notice." See also *Gillie v Genesee Cty Treasurer*, 277 Mich App 333, 353 (2007) ("The Supreme Court noted that MCL 211.78*l* 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 *Perfecting Church*, 277 Mich at 10).

The Court of Appeals disregarded *Perfecting Church* by concluding that the language about § 78*l* in *Perfecting Church* was dicta. Appl'n App, 12. But even if the discussion of § 78*l* was not necessary to the holding, the discussion nonetheless shows how this Court read § 78*l* in its context as a part of a larger statutory scheme. Indeed, while the opinion had two separate concurrences in the result, neither concurrence disputed the majority's reading of § 78*l*. In short, *Perfecting Church* provides a compelling piece of evidence that the best reading of the words "any notice" in context is that they are synonymous with actual notice.

D. RFA, as the holder of an undischarged mortgage interest, was also entitled to notice.

Section 78*l*'s plain text extends its cause of action to all those who hold a property interest, regardless of whether that interest is recorded or unrecorded: "the owner of any extinguished recorded or *unrecorded* interest in [the foreclosed] property . . . may . . . bring an action to recover money damages as provided in this section." (Emphasis added). RFA fits within that plain text: it is the holder of an interest in the property (a mortgage), and that interest was first unrecorded (when the Treasurer ran a title search) but then recorded (for more than eight months before the foreclosure became final). Specifically, after recording the certificate of foreclosure with the County on April 12, 2013, the Treasurer conducted a title search, through an agent, on June 3, 2013; just weeks later, RFA recorded its mortgage with the County, on July 10, 2013. App 13a, 22a. So RFA's mortgage was unrecorded at the time of the title search, but it was on file in the County's own records for more than eight months before the redemption period expired (on March 31, 2014). App 24a.

In addition to § 78*l*'s plain text covering both recorded and unrecorded interests, another part of the statute expressly imposes a duty on the Treasurer to notify mortgage holders of delinquent taxes. Section 78a(4) provides 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." (Emphasis added.) Like the language in § 78*l*, this language does not require that the mortgage be recorded. And there is no dispute in this case that the Treasurer

never notified RFA, the holder of an undischarged mortgage, of the tax delinquency or pending foreclosure. Thus, RFA falls squarely within the text of § 78*l*: RFA is the owner of an "extinguished recorded or unrecorded interest in that property who claims that [it] did not receive any notice required under this act"—and the act requires that "the county treasurer shall notify . . . holders of undischarged mortgages," MCL 211.78a(4). RFA therefore may "bring an action to recover monetary damages" as provided in § 78*l*.

The Court of Appeals did not address either § 78*l*'s inclusion of the word "unrecorded" or § 78a(4)'s command to provide notice, despite RFA having raised these statutory-interpretation points in its briefing. (2CC's & RFA's 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).) Instead, the Court of Appeals concluded that the Treasurer had no duty to send RFA any notice of the foreclosure proceedings because the Treasurer recorded the certificate of foreclosure before RFA obtained its interest in the property, and so RFA's interest was not recorded when the Treasurer conducted her title search. App 36a (citing *First Nat'l Bank of Chicago v Dep't of Treasury*, 28 Mich App 571, 592 (2008) (O'Connell, J., dissenting), adopted by reference in *First Nat'l Bank of Chicago v Dep't of Treasury,* 485 Mich 980 (2009). According to the Court of Appeals, RFA was therefore on "constructive notice" "by way of the recorded certificate of forfeiture located in the property's chain of title." App 37a.

But the case that the Court of Appeals relied on, *First National*, does not answer the statutory-interpretation questions presented in this case, for a simple reason: it did not even address the relevant statutes. Neither the Court of Appeals' dissent or this Court's order addressed how to interpret either § 78*l* or § 78a(4), and the parties do not seem to have raised those statutes. E.g., Appellant's Br, *First Nat'l Bank of Chicago v Dep't of Treasury*, available at 2009 WL 2919827 (Mich); Appellee's Br, *First Nat'l Bank of Chicago v Dep't of Treasury*, available at 2009 WL 2919828 (Mich). Given that the proper interpretation of those statutes was neither briefed nor addressed in any of the *First National* opinions, the opinions are not binding on that issue. E.g., *Quinton v Gen Motors Corp*, 453 Mich 63, 74 (1996) ("It is well-settled that issues neither briefed nor argued cannot be definitively decided, and that the Court's pronouncements, especially dicta, without briefing and argument, are not stare decisis."); *Steel Co v Citizens for a Better Env't*, 523 US 83, 91 (1998) (addressing cases where jurisdiction was "assumed without discussion by the Court" and stating that "drive-by jurisdictional rulings of this sort . . . have no precedential effect").

First National, though, does cite § 78i(6), so it is worth explaining how that section differs from § 78a(4). Section 78i(6), when addressing "notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k," imposes a limitation that the interest holder is "entitled to notice under this section . . . if that owner's interest was *identifiable* by reference to any of the following sources *before the date* that the county treasurer records the certificate required

under section 78g(2)"—i.e., the certificate of forfeiture. MCL 211.78i(6) (emphasis added); see Appl'n App, p 13 (relying on this language in § 78i). But this identifiable-before-the-date limitation does not appear in § 78a(4), which addresses notice of delinquent taxes; in other words, § 78a(4)'s command that county treasurers notify mortgage holders of tax delinquencies is not limited to those who recorded their mortgage before the certificate of foreclosure was recorded. That textual difference by itself shows that the Legislature did not intend for the limitation in § 78i to apply to § 78a or to § 78*l*. E.g., *Hegadorn v Dep't of Human Services Dir*, 503 Mich 231, 261 (2019) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."), quoting *Russello v United States*, 464 US 16, 23 (2002).

And here the evidence is even stronger that the Legislature did not intend for the identifiable-before-the-date limitation to apply outside of § 78i: the Legislature expressly said it was talking only about "notice *under this section*"—i.e., notice under § 78i—in § 78i's text, thereby confirming that this limitation applies only in § 78i. MCL 211.78i (emphasis added). So *First National* does not help the Treasurer, because that case involved notice that was "[u]nder MCL 211.78i," 280 Mich App 579, and so, unlike the situation here, actually implicated § 78i's identifiable-before-the-date limitation. Here, in contrast, RFA was entitled to notice

of the tax delinquency under § 78a(4), and so RFA qualifies as having been entitled to notice required under the act.

The Treasurer may attempt to argue that § 78a(4) applies only to mortgage holders who have paid a $1.00 fee. To be sure, § 78a(4) does provide that any person who wishes to receive notice of a return of delinquent taxes for a particular property may pay a $5.00 fee to be notified, and it also provides that holders of undischarged mortgages may pay a $1.00 fee to be notified about delinquent taxes on a particular parcel. MCL 211.78a(4). But the fact that the Legislature gave *an option to mortgage holders* to take additional steps themselves, to increase the chances that they will actually be provided notice by a county treasurer, does nothing to reduce the *obligation* the Legislature imposed *on the Treasurer* to provide notice, as due process requires, to mortgage interests holders that might be deprived of a property interest. Consistent with this, the concluding sentence of § 78a(4)—the one that imposes the duty on county treasurers—does not limit the duty to those who have paid a fee. Rather, it says, "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). And this Court should not insert any such limitation into the statute; as this Court has recognized, courts "have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what [the court] may think might well have been incorporated." *Johnson v Recca*, 492 Mich 169, 187 (2012), quoting *Reichert v People's State Bank*, 265 Mich 668, 672 (1934).

In sum, for the Treasurer to argue that RFA was not entitled to notice under the statute on the ground that its interest was not recorded in time, she would have to rewrite three parts of the statute. First, she would need to delete the word "unrecorded" from § 78*l*, to argue that § 78*l* does not provide a cause of action to the holders of an unrecorded interest. But see MCL 211.78*l*(1) ("the owner of any extinguished . . . unrecorded interest" is entitled to "bring an action to recover monetary damages"). Second, she would need to delete the words "under this section" from § 78i(6), to argue that § 78i(6)'s identifiable-before-the-date limitation applies outside of § 78i and so excuses the Treasurer for her failure to provide notice based on RFA's mortgage that was recorded before the foreclosure. But see MCL 211.78i(6) ("entitled to notice under this section"). And third, she would need to insert the words "who have paid a fee" into § 78a(4), to escape her duty to provide notice to the holder of an undischarged mortgage. But see MCL 211.78a(4) ("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."). But taking any of those steps would be revising the statute, not interpreting it; this Court's duty "is to apply the language of the statute as enacted, without addition, subtraction, or modification." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101 (2002).

Rather than revising the existing statutory language, this Court should recognize that constructive notice cuts both ways. The Treasurer has been able to rely successfully on constructive notice to take a $3.5 million home, without

providing any actual notice to the interest holders. But the Treasurer apparently believes that she is not on notice of items that are actually in the County's own files—that is, she does not think the County was on actual notice of the mortgage, despite the County having recorded it in the County's own files. After all, when the County recorded RFA's mortgage, the certificate of forfeiture was already in the County's files, but the County did nothing to notify RFA of that fact. Indiana law is instructive on this point, for Indiana courts have held that local officials like a county treasurer are deemed to be on notice of their own files. E.g., *City of Elkhart v SFS, LLC*, 968 NE2d 812, 817 (Ind Ct App, 2012) ("[T]he auditor is deemed to be aware of the contents of the records maintained in its office, and due process requires the county auditor to search the records that it maintains."); *In re 2007 Tax Sale in Lake Co*, 926 NE2d 524, 528 (Ind Ct App, 2010) (same). Indeed, in this case RFA's mortgage was in the very county records that the Legislature identified as a source for identifying interest holders. MCL 211.78i(6)(a) ("Land title records in the office of the county register of deeds").

In the end, whether the Court focuses on the time period when RFA's mortgage was unrecorded or on the period when it was in the County's own files, RFA was entitled to notice under the act and should be allowed to bring its claim under § 78*l*.

II. The Court should grant the application to prevent § 78*l* from remaining a dead letter.

As explained in the application (at 3–4 and 13–15), this case merits this Court's review for three reasons: it presents an issue of jurisprudential significance, the decision below was clearly erroneous, and the decision below causes material injustice. MCR 7.305(B)(1), (3), (5)(a); cf. MCR 7.305(B)(2).

First, as to jurisprudential significance, the decision below rendered an entire section of the General Property Tax Act useless, and that sort of judicial nullification of a statute warrants this Court's review. Further, the Treasurer agrees that this case presents an important and frequently recurring issue. She has acknowledged that the Court of Appeals' now-published 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 38a. And she acknowledges that tax foreclosure is "a relatively common proceeding," and that "[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." Appl'n App 38a, 39a.

Second, the foregoing arguments demonstrate that the decision below was clearly erroneous.

Third, denying the property interest holders here the remedy that the Legislature created for situations just like theirs will be manifestly unjust. It would allow a county treasurer to take a $3.5 million property to satisfy tax debt of only

$14,743.24, even when the interest holders "did not receive any notice required under this act." MCL 211.78*l*(1). That is unjust.

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 *Perfecting Church*) 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. Further, because the bench trial was only partially completed (because the case was dismissed at the close of the plaintiffs' proofs) and because the Court of Claims' judge who was the fact finder has retired, this Court should remand for a new trial before the new fact finder.

Respectfully submitted,

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