IN THE SUPREME COURT OF TEXAS

No. 15-0437

TERESA GAROFOLO, APPELLANT,

v.

OCWEN LOAN SERVICING, L.L.C., APPELLEE

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE BOYD, joined by JUSTICE JOHNSON, dissenting in part.

I do not agree with the Court's answer to the Fifth Circuit's second question, and instead conclude that the parties' agreement expressly gives the borrower a contractual right to forfeiture of all principal and interest paid upon the lender's "failure to correct [a] failure to comply" with its obligations under the loan. Though the Court is concerned about such a "harsh forfeiture remedy," *ante* at ___, it is the remedy the text requires and to which both parties agreed. To reach the opposite conclusion, the Court adds words to the parties' contract and to the Constitution's language, and rewrites both to achieve the result it believes "common sense suggests." Although the Court's result may comport with "common sense," or at least with the Court's view of "common sense," it is not what the parties agreed to or what the Constitution requires. I therefore respectfully dissent in part.[1]

[1] In answer to the Fifth Circuit's first certified question, the Court concludes that article 16, section 50(a)(6) of the Texas Constitution does not create a *constitutional* right to contractual performance or a *constitutional* remedy for a contractual breach. I agree, for the reasons the Court explains, and I join that portion of the Court's opinion.

I.
Contractual Forfeiture

The relevant constitutional language protects a homestead from foreclosure "for the payment of all debts except for . . . an extension of credit that . . . is made on" certain specified conditions. TEX. CONST. art. XVI, § 50(a)(6)(Q). One condition is that the lender must give the borrower a recordable release of lien within a reasonable time after the borrower pays off the note. *Id.* art. XVI, § 50(a)(6)(Q)(vii). Another is that the lender or holder of the note "shall forfeit all principal and interest . . . if the lender or holder fails to comply with [its] obligations . . . and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified . . . of the lender's failure to comply by":

> (a) paying to the owner an amount equal to any overcharge paid by the owner under or related to the extension of credit if the owner has paid an amount that exceeds an amount stated in the applicable Paragraph (E), (G), or (O) of this subdivision;
> (b) sending the owner a written acknowledgement that the lien is valid only in the amount that the extension of credit does not exceed the percentage described by Paragraph (B) of this subdivision, if applicable, or is not secured by property described under Paragraph (H) or (I) of this subdivision, if applicable;
> (c) sending the owner a written notice modifying any other amount, percentage, term, or other provision prohibited by this section to a permitted amount, percentage, term, or other provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by this section and is not subject to any other term or provision prohibited by this section;
> (d) delivering the required documents to the borrower if the lender fails to comply with Subparagraph (v) of this paragraph or obtaining the appropriate signatures if the lender fails to comply with Subparagraph (ix) of this paragraph;
> (e) sending the owner a written acknowledgement, if the failure to comply is prohibited by Paragraph (K) of this subdivision, that the accrual of interest and all of the owner's obligations under the extension of credit are abated while any prior lien prohibited under Paragraph (K) remains secured by the homestead; or
> (f) if the failure to comply cannot be cured under Subparagraphs (x)(a)–(e) of this paragraph, curing the failure to comply by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with

> any modifications necessary to comply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section . . . .

Id. § 50(a)(6)(Q)(x).

Consistent with the first required condition, the lender and borrower in this case agreed to a security instrument that requires the lender to give the borrower a recordable release of lien within a reasonable time after termination and full payment of the loan. *Ante* at ___. And consistent with the second condition, the agreement requires the borrower to give the lender notice of the lender's failure to comply with an obligation, allows the lender "60 days after receipt of notice to comply with the provisions of Section 50(a)(6)," and provides that "only after lender has failed to comply, shall all principal and interest be forfeited by Lender, as required by Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution in connection with failure by Lender to comply with its obligations." *See ante* at ___ n.7.

For purposes of this appeal from the dismissal of the borrower's claims under federal rule 12(b)(6), we must accept as true the borrower's allegations that: (1) the holder failed to comply with its obligations under the loan by failing to give the borrower a recordable release of lien within a reasonable time after the borrower paid off the note; (2) the borrower gave the holder proper notice of its failure to comply with that obligation; and (3) within 60 days after receiving that notice, the holder did not "correct the failure to comply" by taking any of the actions listed in section 50(a)(6)(Q)(x)(a)–(f). *Ante* at ___. The Fifth Circuit's second question asks whether, under these facts, the security instrument requires the lender to forfeit all principle and interest. Or, to use the security instrument's own language, "shall all principal and interest be forfeited by Lender,

as required by Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution in connection with failure by lender to comply with its obligations?"

The Court concludes that the security instrument does not require the holder to forfeit all principal and interest unless one or more of the six corrective measures listed in subsections (a)–(f) of section 50(a)(6)(Q)(x) would "actually correct the lender's failure to meet its obligations." *Ante* at ___. The Court then concludes that the corrective measure in subsection (f), on which the borrower relies, would not have "actually corrected" the holder's failure to deliver the release of lien, and it would therefore be "ridiculously futile" and "irrelevant" for the holder to perform subsection (f)'s requirements. *Ante* at ___. Because the security agreement only permits forfeiture "as required by Section 50(a)(6)(Q)(x)," the Court concludes that forfeiture is not available here. *Ante* at ___. I disagree for four separate reasons: (1) subsection (f) expressly provides that it applies if the corrective measures in subsections (a)–(e) will not cure the holder's breach, so it must apply here; (2) subsection (f) "corrects" the underlying deficiency for purposes of avoiding forfeiture and motivates the holder to timely deliver the release of lien; (3) it is not "ridiculously futile" or "irrelevant" for the holder to perform the actions subsection (f) requires; and (4) even if the holder could not "correct" its breach by performing subsection (f)'s requirements, the agreement would expressly require forfeiture, not excuse it.

A. Subsection (f) is a "catch-all" provision.

Section 50(a)(6)(Q)(x) requires a holder to forfeit all principal and interest if the holder "fails to comply" with an obligation and, in response to a notice of breach, the holder fails to "correct the failure to comply . . . by" taking the steps described in one of its six subsections. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(a)–(f). The last of those six subsections—subsection (f)—

expressly and specifically applies "if the failure to comply cannot be cured under" subsections (a)–(e). *Id.* § 50(a)(6)(Q)(x)(f). As the Court notes, subsection (f) is thus a "catch-all provision." *Ante* at ___. By its express terms, it applies whenever the other corrective measures would not cure the holder's failure to comply with one or more of its constitutionally authorized obligations, which includes the obligation to provide a release of lien. As a catch-all provision, it "acts as a safety net" by providing the holder a means to "correct [a] failure to comply," and thereby avoid forfeiture, when none of the other means will do. *See, e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (holding that the "'catchall' provisions" in section 502(a) of the federal Employee Retirement Income Security Act "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy"). If a holder cannot avoid forfeiture by curing its breach under subsections (a)–(e), subsection (f) provides the holder a safety net to avoid forfeiture.

Based on its plain language, subsection (f) is a catch-all provision that, *for purposes of avoiding forfeiture*, in fact catches all. When "the failure to comply cannot be cured" by performing the acts that subsections (a)–(e) require, then performing the acts that subsection (f) requires will, by definition, "correct the failure to comply" for purposes of avoiding forfeiture. Because subsection (f) is a catch-all provision, there is no failure to comply that cannot be corrected *as a means to avoid forfeiture*. I disagree with the Court's conclusion that the catch-all provision "cannot apply to *every* deficiency not addressed by the other five corrective measures," *ante* at ___, because that conclusion ignores subsection (f)'s express instruction that it applies if subsections (a)–(e) cannot cure the failure to comply.

B. Subsection (f) "corrects" the deficiency.

Despite the Constitution's plain language that provides a holder can correct its failure under subsection (f) if subsections (a)–(e) will not "cure" the failure to comply, TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(f), the Court concludes that subsection (f) does not apply when a holder fails to deliver a release of lien because the steps described in subsection (f) will not "*actually* correct" the failure to comply. *Ante* at ___ (emphasis added). But section 50(a)(6)(Q)(x) simply does not say that the corrective measures apply only when they "actually correct" a failure to comply. The text plainly says that—for purposes of avoiding forfeiture—the lender can "correct" the failure to comply "by" performing one of the six corrective measures, and that subsection (f) applies when subsections (a)–(e) would not "cure" the failure to comply. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(f). The Court confuses the text's distinct uses of the terms "correct" and "cure," and rewrites the text by adding the word "actually" when the text does not use that word at all.

Section 50(a)(6)(Q)(x) expressly describes how a lender can "correct" a failure to comply for purposes of avoiding forfeiture: the lender can "correct the failure to comply . . . *by*" performing one of the six corrective measures. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x). The Court concludes that the six corrective measures "do not speak to every manifestation of a lender's failure to comply with its obligations," *ante* at ___, but because subsection (f) is a catch-all provision, we should not expect the list of corrective measures to specifically identify every possible failure to comply. "After all, the very purpose of a catch-all provision . . . is to avoid the necessity of listing each matter . . . falling within it." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 292 (2011). Instead of listing every potential breach that subsections (a)–(e) do not address, subsection (f) permits the holder to "correct" all remaining deficiencies, for purposes of avoiding forfeiture, by

refunding or crediting $1,000 to the borrower and offering to refinance the loan on fully compliant terms. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(f).

As the Court notes, "'We strive to give constitutional provisions the effect their makers and adopters intended,' while 'avoid[ing] a construction that renders any provision meaningless or inoperative.'" *Ante* at ___ (quoting *Stinger v. Cendant Mortg. Co.*, 23 S.W.3d 353, 355 (Tex. 2000)). But to "give effect to the plain intent and language of the framers of the amendments and of the people who adopted them," we must "begin[] with and giv[e] primacy to the language that was adopted." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011). A plain reading of the adopted language reveals the framers' intent, but the Court rewrites this language to effectuate its own intent. The Court confuses the term "correct" with "cure," adds the word "actually," and renders inoperative the language that says subsection (f) applies if subsections (a)–(e) do not. The Court says "common sense *suggests*" its interpretation, *ante* at ___ (emphasis added), but our assessment of "common sense" does not permit us to ignore the adopted language. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012) (noting that "judicial revision of . . . texts to make them (in the judges' view) more reasonable" presents "a slippery slope").

Maybe we could ignore or "rewrite" the language if it produces an "absurd" result, but the Court does not rely on the absurdity doctrine here because that doctrine "is reserved for truly exceptional cases, and mere oddity does not equal absurdity." *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013). And "pointing out a quirky application is quite different from proving it was quite impossible that a rational Legislature could have intended it." *Id.* at 630–31. Perhaps applying the plain language of subsection (f) creates a less reasonable result than our

"common sense" dictates, but even the Court does not contend that it produces an absurd result. *Id.* ("[T]he [absurdity] bar . . . is high, and should be.").

C. "Futility" and "Irrelevance"

Applying its common sense, the Court concludes that lenders and holders who fail to deliver a release of lien as promised should not have to comply with subsection (f) to avoid forfeiture because paying the borrower $1,000 and offering to refinance the note would be "ridiculously futile" and "irrelevant." *Ante* at ___. Instead, the Court believes the language should permit the holder to avoid forfeiture simply by delivering the release of lien. In fact, under the Court's construction, the lender can always avoid forfeiture when it fails to deliver a lien release, even by doing nothing at all, because the forfeiture remedy simply does not apply to a failure to deliver a release. *Ante* at ___. But this is not what the text says.

In any event, the holder's compliance with subsection (f) is not as futile or irrelevant as the Court suggests. While subsection (f) does not expressly or directly require the holder to "correct" or "cure" its failure to deliver the release of lien by actually delivering the release of lien, it serves to motivate the holder to avoid the failure in the first place, thus preventing the obligation to pay the borrower $1,000 and offer to refinance. Within sixty days of receiving notice that it has failed to deliver a release of lien, the holder must pay the borrower $1,000 and offer to refinance, or the holder is subject to forfeiture. If the holder pays the $1,000 and offers to refinance, but does not deliver the release of lien, it will avoid forfeiture but remain in breach of its obligation to deliver the release of lien.[2] Certainly, at that point, the borrower can sue for specific performance to obtain

[2] Conversely, if the holder delivers the release of lien within 60 days of receiving the notice but does not pay the $1,000 and offer to refinance, it must forfeit all principal and interest paid. Under subsection (f), the holder can only avoid forfeiture by paying the $1,000 and offering to refinance.

the release. Regardless, at a minimum, subsection (f) provides the holder a catch-all method to "correct" a failure to comply when the five other methods will not "cure" it, and by doing so motivates the holder to avoid the deficiency all together.

D. The end result is forfeiture.

Finally, even if the holder's compliance with subsection (f) were futile, irrelevant, or otherwise inapplicable, the result under the plain language of the security instrument would be to *require* forfeiture, not excuse it. The Court asserts that, if the holder cannot actually correct its failure to comply "by" performing one of the six corrective measures, then "forfeiture is simply unavailable." *Ante* at ___. But it is the lender's failure to comply with its obligations that triggers the forfeiture remedy—not its failure to correct its failure to comply. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x). If the holder fails to comply with its obligations, the corrective measures give the holder an opportunity to "correct the failure to comply" by performing the actions listed in one of the following subsections. *Id.* And if the holder does not correct its failure to comply "by" performing one of the listed corrective measures, the holder "shall forfeit all principal and interest." *Id.* If a holder that has breached its obligations and has received the borrower's notice of noncompliance does not or cannot timely perform one of the listed corrective measures, the result, according to the Constitution's plain language, is not that the forfeiture remedy is unavailable, but that the opportunity to *avoid* forfeiture is unavailable.

II.
Conclusion

The Court holds today that section 50(a)(6) of article XVI of the Texas Constitution does not create a constitutional right to contractual performance or a constitutional remedy for a contractual breach, and I agree. The Court also holds, however, that the constitutional provisions

incorporated into the parties' contract do not give the borrower a contractual right to forfeiture of all principal and interest because those provisions do not "actually correct" the holder's breach and are "ridiculously futile" for the holder to perform. *Ante* at ___. But even if the parties' agreed remedy seems unfair or insufficiently sensible, our duty is to enforce the parties' agreement (and the Constitution's language) as written. Based on the Constitution's plain language, I disagree with the Court's second conclusion and, therefore, respectfully dissent in part.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: May 20, 2016