

# KLAFTER | LESSER

TWO INTERNATIONAL DRIVE • SUITE 350 • RYE BROOK, NY 10573  
914-934-9200 • www.klafterlesser.com

July 26, 2021

The Honorable Judges of the United States  
Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

Re: *Maddox v. The Bank of New York Mellon*  
*Trust Co. No. 19-1774-cv*

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

This Court has directed the parties to address the question of whether and how the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 2021 WL 2599472 (U.S. June 25, 2021), applies to this case. Plaintiffs submit that *Ramirez* does apply and that it strongly reinforces the correctness of this Court's holding that Plaintiffs have standing. Therefore, the Court should deny Defendant's Petition for Rehearing *En Banc*.

This Court held in the instant case that Plaintiffs have standing because:

The interests are similar to those traditionally actionable at common law, where defamation actions and slander of title suits gave victims recourse. We think these are most appropriately viewed as substantive wrongs to the borrower and that no more than the Bank's noncompliance is needed to support the Maddoxes' claim of injury in fact.

*Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 997 F. 3d 436, 440 (2d Cir. 2021).

All nine Justices in *Ramirez* agreed that under the standard elucidated in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the 1,853 class members whose inaccurate credit reports were disseminated by TransUnion "have demonstrated *concrete reputational harm* and thus

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 2

have Article III standing to sue on the reasonable-procedures claim.” (Emphasis added).

As the majority, citing *Spokeo*, explained:

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. *Id.* [578 U.S. 330], at 340–341. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. [Citations omitted]

*Ramirez*, 2021 WL 2599472 at \*7.

Further, the Supreme Court explained that the types of reputational harms that confer standing should not be limited to the precise injuries recognized at common law, but rather should be construed more broadly. The Court stated:

In looking to whether a plaintiff’s asserted harm has a “close relationship” to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a “potential terrorist” bears a close relationship to the harm from being labeled a “terrorist.” In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.

*Id.* 2021 WL 2599472, at \*11.

The Supreme Court’s analysis applies with equal force here. This Court, also applying *Spokeo*, likewise found reputational harm arising from Defendant’s failure to timely record a satisfaction of mortgage:

In addition, the right to timely recordation of discharge has close ties to traditional reputation-based harms actionable at common law. A mortgage recorded with the county clerk conveys to the world that the borrower owes a debt secured by a property. Correspondingly, a lender’s delay in recording a mortgage satisfaction creates the false appearance that the borrower has not paid his debt. This harms the borrower’s reputation by,

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 3

among other things, making him look less creditworthy than he is. This type of reputational harm—*i.e.*, one that flows from the publication of false information—is well established as actionable at common law.

*Maddox*, 997 F. 3d at 436. This Court’s decision that there is a concrete injury fully accords with common law, inasmuch as it is a “fundamental principle that the existence of some damage, at least nominal damage, is always presumed from the publication of the libel itself.” *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 30, 137 N.E.2d 1, 20 (1956). Just as the Supreme Court found standing for the 1,853 absent class members based on presumed reputational harm, this Court likewise properly found standing for Plaintiff.

In *Ramirez*, 2021 WL 2599472 \*7, the Supreme Court cited *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), as an illustration of why intrusion upon seclusion is a concrete injury as a common law antecedent to the federal Telephone Consumer Protection Act. That decision, written by then-Circuit Court Judge Barrett, emphasized how legislatively-created rights need not be exactly identical to their common-law antecedents, but only need be “a modern relative of a harm with long common law roots.” Thus, when courts perform a *Spokeo/Ramirez* analysis to consider “analogiz[ing] to harms recognized by the common law, [they] are meant to look for a ‘close relationship’ in kind, not degree,” which is precisely what this Court did in considering N.Y. Real P. Law § 275 and N.Y. Real P. Actions & Proc. L. § 1921. In *Maddox*, 997 F. 3d at 439-40, this Court observed, “Although not every state law violation may give rise to an Article III injury in fact, the Supreme Court’s teachings lead us to conclude that a state

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 4

legislature, like Congress, may recognize legal interests whose violation resembles wrongs traditionally cognizable at common law such as to allow their vindication by wronged persons in federal court, provided other requisites of federal jurisdiction are met.” *Accord id.* at 445-47 (explicating point). Just as in *Gadelhak*, the Spreme Court’s statement that a plaintiff must show “physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts,” *Ramirez*, 2021 WL 2599472, at \*2206, has likewise been met here.<sup>1</sup>

To the extent that this Court also considered “the significant absence of the separation of powers concerns that arise when federal courts are called on to adjudicate congressionally created rights,” 997 F.3d at 443, *Ramirez’s* discussion of such concerns does not bear on this Court’s views on standing in federal court to enforce rights recognized under state law. *See id.* at \*9.

In *Ramirez*, the Supreme Court also held that, in contrast to the 1,853 class members whose internal credit files were disseminated, 6,332 class members lacked standing as their files were not disseminated. Publication of the false information was “a fundamental requirement of an ordinary defamation claim” at common law (*Id.* at \*12 n. 6). Here, the inaccurate information that Plaintiffs’ mortgage had not been satisfied, and

---

<sup>1</sup> Defendant has cited *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), as supposedly evidencing a Circuit split, but it does not because that decision only addressed the argument that “the common law action of quiet title could be viewed as a precursor to the New York statutes,” *id.* at 1003, and did not consider whether – as this Court found – the New York recording statutes are analogous to an action for defamation and slander of title.

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 5

thus the defamation of title, was maintained in the public record at the county recorder's office for nearly 11 months -- until Defendant belatedly submitted a satisfaction for recording.

Finally, Plaintiffs would concede that *Ramirez* has cast doubt on this Court's alternative holding that they would have standing "[e]ven were we to characterize the satisfaction-of-mortgage statutes as "procedural" because "the violation presents a 'material risk of [concrete] harm,'" citing *Spokeo*, 136 S. Ct. at 1549-50. 997 F. 3d 436 at 447-48. But that was an alternative basis for holding that Plaintiffs possess Article III standing. Rather, and more importantly, *Ramirez* clearly demonstrates that this Court correctly held that Plaintiffs have standing because the New York statute creates substantive rights analogous to ones recognized at common law.

Based on the foregoing, the Court should deny Defendant's Petition for Rehearing *En Banc* and promptly remand this case to the district court.

Respectfully submitted,



Seth R. Lesser

Charles Marshall Delbaum  
National Consumer Law Center  
Seven Winthrop Square  
Boston, Massachusetts 02110  
Eric Lechtzin  
Edelson Lechtzin LLP  
3 Terry Drive

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 6

Suite 205  
Newtown, PA 18940

*Attorneys for Plaintiffs/Appellees*

Cc: All Counsel of Record (via ECF)

The Honorable Judges of the United States  
Court of Appeals For the Second Circuit  
July 26, 2021  
Page 7