19-1774

United States Court of Appeals
for the Second Circuit

SANDRA MADDOX and TOMETTA MADDOX HOLLEY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

- v. -

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,

Defendant-Appellant.

On appeal from the United States District Court
for the Western District of New York

AMICI CURIAE BRIEF OF AARP, AARP FOUNDATION AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

NACA

The National Association of Consumer Advocates is a non-profit membership organization. NACA is tax-exempt under section 501(c)(6)

of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF THE AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members—with 2.5 million members in New York alone—and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP supports laws and public policies giving all older individuals access to the courts to seek remedies for fraudulent, deceptive, unfair, discriminatory, and other harmful practices. Often, these claims are seeking protection against intangible or difficult-to-

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[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than Amici, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5). Counsel for Plaintiffs-Appellees have consented to the filing of this brief. Counsel for Defendant-Appellant does not object to this motion but reserves its right to object upon reviewing the motion papers.

prove injuries protected against by federal or state statutes. These may include procedural protections to avoid unwarranted foreclosure on reverse mortgages, rights of access to public transportation, statutory remedies relating to prescription medication sales practices, breach of fiduciary duty relating to pensions, and others.

AARP regularly files amicus curiae briefs in cases, like this one, to advise against overly restrictive application of the Article III standing and other gateway requirements that unnecessarily and improperly prevent access to remedies provided by statute. *See e.g., Thole v. U.S. Bank, N.A.* (supporting standing of plan beneficiary to assert claims for breach of fiduciary duty by administrator of defined benefit pension plan);[2] *Spokeo, Inc. v. Robins* (arguing that Congress is authorized to confer standing on plaintiffs by enacting statutes that create new rights);[3] *Campbell-Ewald v. Gomez,* (arguing that procedural cost shifting rule cannot be distorted into a substantive rule that unilaterally deprives a federal court of jurisdiction over a case filed as a

[2] Brief for AARP and AARP Foundation as Amici Curiae, Urging Reversal, *James Thole, et al v. U.S. Bank, National Assn., et al.*, 873 F.3d 617 (2017 8th Cir.) (No. 16-1928).

[3] Brief of Amici Curiae Public Citizen, Inc., AARP, and MFY Legal Services, Inc. In Support of Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) 2015 U.S. S. Ct. Briefs LEXIS 3132.

class action);[4] *Cottrell v. Alcon* (supporting plaintiffs standing to pursue remedies for unfair sales practices that increase cost of prescription medication).[5]

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation whose members are private and public sector attorneys, legal service attorneys, and law professors and students whose primary practice involves the protection and representation of consumers.

NACA's mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and to serve as a voice for its members by curbing unfair and abusive business practices that adversely affect consumers. Specific areas of concern include abusive practices by financial institutions in the extension of credit and unlawful practices by credit card companies and banks that impose excessive and

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[4] Brief of Public Justice, P.C. and AARP, As Amici Curiae In Support Of Respondent, *Campbell-Ewald Company v. Jose Gomez*, 135 S. Ct. 2311 (2105) (No. 14-857), 2015 U.S. S. Ct. Briefs LEXIS 3018.

[5] Brief of AARP and AARP Foundation in Support of Appellant/Petitioner, *Cottrell, et al v. Alcon Laboratories, et al.*, 874 F.3d 154 (2017 3d Cir.) (No. 16-2015).

unreasonable fees and charges on cardholders that increase the cost of credit.

Consistent with its goal of promoting justice for consumers in the credit arena, NACA has frequently appeared as *amicus curiae* before a number of federal and state appellate courts. For example, NACA appeared as *amicus curiae* before the United States Supreme Court in *Heintz v. Jenkins*,[6] in support of the contention that the federal Fair Debt Collection Practices Act ("FDCPA"),[7] applies to lawyers regularly engaged in consumer debt collection. The Court unanimously adopted the position urged by NACA. NACA has also advocated before Congress and federal administrative agencies the interests of consumers in the areas of home ownership, automobile lemon laundering, predatory lending, and consumer credit.

NACA is dedicated to the continued use of class actions to provide relief for classes of consumers who are damaged by the same or similar unlawful practices. NACA has been recognized as an advocate of appropriate consumer class actions and an opponent of bad settlement practices. To provide guidance to consumer attorneys about the best

[6] *Heintz v. Jenkins*, 514 U.S. 291 (1995).
[7] Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*

and most ethical ways of handling class actions, NACA created, in 1997, the *Standards and Guidelines for Litigating and Settling Consumer Class Actions*.[8] To ensure that the advice contained in the *Guidelines* remained current, they have been revised twice.[9]

Amici have a strong interest—in this case and in general—in ensuring that people injured by violations of state and federal statutes are not denied remedies because their access to the courts is improperly barred by overly-restrictive standing requirements. Amici submit this brief to address broad policy considerations, in addition to those addressed by plaintiffs or the district court, that mandate affirming the district court's decision.

SUMMARY OF ARGUMENT

Amici respectfully submit that this Court should reject Defendant-Appellant Bank of New York Mellon Trust Company, N.A.

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[8] *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375 (1997).

[9] NACA, *Standards and Guidelines for Litigating and Settling Consumer Class Actions* (3d ed. 2014), accessible at https://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action%20Guidelines%20Updated%20May%202014.pdf [last accessed Dec. 26, 2019].

("BONY")'s argument that Plaintiffs-Appellees Sandra Maddox and Tometta Maddox Holley (collectively, the "Maddoxes") lack standing to assert their state statutory claims in federal court.[10]

BONY argues that the Maddoxes cannot even enter the courthouse without first alleging they individually suffered—and continue to suffer—actual tangible injury such as financial losses or reduced creditworthiness. This distorts injury in fact standing principles, conflating standing with a showing of damages at the trial-on-the-merits stage. At the pleadings stage, the court's role is to determine whether a "litigant[ ] is empowered to maintain a lawsuit in federal court to seek redress for a legal wrong."[11] Defenses on the merits are irrelevant at the pleading stage to plaintiffs' standing.

Spokeo reiterates that violation of a legally protected interest—a "right"—may itself satisfy requirements to confer standing. Both federal law and state law—including state statutes—"can create interests that

[10] New York Real Property Law ("RPL") §275(1) and Real Property Actions and Proceedings Law ("RPAPL") §1921(1),
[11] *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

support standing[.]"[12] Courts in this regard look to the source of the law, whether common law or statute, to determine the scope of the interest protected.[13] It is not up to the court to introduce an actual harm requirement where Congress or a state has not imposed one.[14] *Spokeo* rejects BONY's argument that Courts should require a one-size-fits-all tangible harm requirement. In some cases it is sufficient for plaintiff to allege the "invasion of a legally protected interest" without more.[15]

BONY's further asserts that by recording the satisfaction of the Maddoxes' mortgage two months before they filed suit, it essentially destroyed their standing. This argument is premised on their rejected standing arguments—claiming that the legal injury caused by their

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[12] *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001) (citing *FMC Corp. v. Boesky*, 852 F.2d 981, 992 (7th Cir. 1988)).
[13] *See, e.g., Tennessee Elec. Power Co. v. Tennessee Val. Auth.*, 306 U.S. 118, 137 (1939) ("[T]he right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).
[14] *See Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 112, 65 S.Ct. 1464, 1471, 89 L.Ed. 2079 (1945) ("Whenever . . . law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.").
[15] *Spokeo,* 136 S. Ct. at 1548.

statutory violation is not worthy of the federal court's attention,[16] and their highly speculative and unreasonably optimistic merits–based argument—disguised as a standing challenge—that they erased all injury and any risk of harm when they eventually got around to recording the mortgage satisfaction. Common knowledge, the evidence considered by the New York State Legislature, and the policy choices made to protect property owners are all to the contrary. Other structural, historical, and policy choices are also contrary to their claims.

BONY's further effort to marginalize the Maddoxes' injury by brushing off its admitted violation as "merely procedural" is at odds with *Spokeo.* There, the Supreme Court merely noted that plaintiffs may lack standing where the violation involves a procedural protection "divorced from any concrete harm."[17] Although some violations of

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[16] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014); *Warth v. Seldin*, 422 U.S. 490, 498-500, 95 S.Ct. 2197, 2205-07, 45 L.Ed.2d 343 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing….'" (*quoting Linda R. S. v. Richard D.* 410 U.S. 614, 617 n.3, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)).

[17] *Spokeo*, 136 S. Ct. at 1550.

private rights possibly can be "divorced of any harm," or be "merely technical" in nature, this is not that case.[18] This s*upports* the Maddoxes' standing. The very purpose of the New York mortgage satisfaction statutes is ensure mortgagees timely record mortgage satisfaction. While motivated by the desire to protect mortgagors from foreseeable harm, the New York State Legislature specifically directed its statutory enforcement efforts toward the delinquent mortgagees because that is the best way to prevent any harmful consequences.

Where, as here, Plaintiffs invoke the diversity jurisdiction of the court, *see* 28 U.S.C. § 1332, to decide questions arising under state law, the court must apply the law consistently with the statutory interpretation followed by the state courts.[19] *Nicklaw*[20] and other cases cited by BONY either misconstrue *Spokeo* or failed to respect New York's interpretation of the satisfaction statutes.

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[18] *Id.* at 1549.
[19] *See York*, 326 U.S. 99, 112, 65 S.Ct. at 1471 ("Whenever . . . law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.").
[20] *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016).

ARGUMENT

I. BONY'S ATTEMPT TO REQUIRE TANGIBLE "HARM" IN THE "INJURY IN FACT" REQUIREMENT IS A DRAMATIC DEPARTURE FROM STANDING DOCTRINE AND IMPROPERLY CONFLATES STANDING WITH THE MERITS.

Under Article III of the United States Constitution, a litigant has standing to bring a lawsuit in federal court only when he or she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[21] Injury-in-fact is an "invasion of a legally protected interest" that is (1) "concrete and particularized" and (2) "actual or imminent, not conjectural or hypothetical."[22] A concrete injury is one that "must actually exist."[23] An intangible legal injury can be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[24] A particularized injury is one that "must affect the plaintiff in a personal and individual way."[25]

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[21] *Spokeo, Inc.*, 136 S. Ct. at 1547.
[22] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted).
[23] *Spokeo*, 136 S.Ct. at 1548.
[24] *Id.* at 1549 (the invasion of the plaintiff's legal right is harm").
[25] *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. at 2148 n. 1.

BONY's argument that the Maddoxes lack standing because they did not allege tangible harm is fatally flawed. Harm is not now, and never has been, an element of standing law because it is not even and element of injury. The invasion of a right, i.e., a legal injury, is distinct from the "disadvantage that may flow from" an action.[26] When the law protects an interest, the law grants the owner of that interest a right. A right is a "legally enforceable claim that another will do or will not do a given act."[27] In the legal analysis of standing, the terms "harm" and "injury" are clearly distinguishable. A legal injury is the "violation of another's legal right, for which the law provides a remedy." [28] Harm, by contrast, is "material or tangible detriment."[29]

Requiring a showing of tangible harm to establish standing would conflict with a rich history of federal courts protecting legal interests at common law and through statutory enactment that do not traditionally require a showing of actual harm to seek relief. "[O]ur contemporary

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[26] *Warth*, 422 U.S. at 503 n.13; *see, e.g., In re Google Cookie Placement Consumer Privacy Litig.,* 806 F.3d 125, 134 (3d Cir. 2014) (finding that injury-in-fact "does not demand that a plaintiff suffer any particular type of harm to have standing").
[27] Right, *Black's Law Dictionary* (10th ed. 2014).
[28] Injury, *Black's Law Dictionary*.
[29] Harm, *id.*

decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement."[30]

Intangible injuries, such as "risk of real harm," can be both concrete and particularized.[31] The Supreme Court instructs that courts should look at both "history and the judgment of Congress" to determine whether an intangible violation is sufficiently concrete to establish standing.[32] "[B]oth history and the judgment of Congress play important roles" when "determining whether an intangible harm constitutes injury in fact."[33] In addition, *Spokeo* reiterated that Congress plays a vital role in "identifying and elevating intangible harms" to cognizable legal injuries.[34]

Although *Spokeo* specifically addressed a federal statute and the deference to Congress that the separation of powers dictates, *Spokeo* does not thereby encourage federal courts to ignore the principles of

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[30] *Spokeo*, 136 S.Ct. at 1552 (Thomas, J., concurring).
[31] *Id.* at 1549.
[32] *Id.*
[33] *Id.*
[34] *Id.*

federalism that protect the same authority reserved to the states.[35] Deference must be given to the New York State Legislature's choices as well.[36] "If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors."

As the Supreme Court noted in *Spokeo*, common law, too, can be instructive in determining whether an alleged intangible harm can constitute injury in fact.[37] The New York legislature's creation of mortgagor statutory remedies for a mortgagee's failure timely to record satisfaction of a mortgage note is clearly grounded in the common law. Real property and reputational rights are considered fundamental and are protected at common law.[38] For example, New York provides a

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[35] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning,* 136 S. Ct. 1562, 194 L. Ed. 2d 671 (2016) (Limited federal court jurisdiction helps to maintain balance between the state and federal judiciaries).
[36] Article III's standing requirements also apply to state-law claims brought in federal court. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019).
[37] *Spokeo*, 136 S.Ct. at 1549.
[38] *See id.* at 1551 (Private rights include "rights of personal security (including security of reputation), property rights, and contract rights.").

common law cause of action to quiet title sounding in equity.[39] Moreover, New York common law recognizes an equitable action to confirm satisfaction of a mortgage.[40] Similarly, the torts of defamation and slander of title are recognized as causing a real injury that is judicially cognizable.

New York has codified and expanded upon these common law causes of action through various provisions of the Real Property Law ("RPL") and the Real Property Actions and Proceedings Law ("RPAPL"). For example, the RPAPL authorizes a statutory cause of action to quiet title and expands the available relief to encompass money damages "for the withholding of such property."[41] The state provision complements, rather than replaces, the traditional common law remedy.[42]

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[39] *See Meyer v. Wilcox*, 136 N.Y.S. 337, 337 (Sup. Ct., Kings County 1912) (affirming availability of equitable relief "to remove a cloud upon [plaintiff's] title" and noting authority to do so arises out of traditional powers of the Court of Chancery).

[40] *Griswold v. Onondaga Cty. Sav. Bank*, 48 Sickels. 301, 93 N.Y. 301 (1883); *People ex rel. Adams v. Sigel*, 46 How. Pr. 151 (N.Y. Super. 1873).

[41] RPAPL §§ 1501, 1521(1).

[42] *See Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 417 (S.D.N.Y. 2010) ("Plaintiffs may choose to seek an equitable common law action to quiet title despite the existence of the RPAPL statute, or they may bring both claims.").

Similarly, the New York legislature has created a statutory cause of action for failure to record satisfaction of a mortgage.[43] The statutory scheme differs from the common law cause of action in that it sets forth statutory damages for a mortgagee's failure to record satisfaction of a mortgage, in addition to providing equitable relief.

In sum, a straightforward statutory interpretation clearly reveals New York State Legislature's decision to hold mortgagee's accountable when they fail to comply with the 30 day statutory deadline, because they injure mortgagor's fundamental property and reputational rights in concrete ways.

BONY's admission that it violated the statute by recording the satisfaction of the Maddoxes' mortgage over ten months late satisfies the "particularized" requirement. Its further concession that the Maddoxes would have a valid claim for monetary damages in the New York courts satisfies the redressable requirement. No additional allegation is required to seek and obtain relief for the injury caused by that failure.[44]

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[43] *See* RPL § 275; RPAPL § 1921.

[44] Defendant has not argued—nor could it—that any other jurisprudential doctrine prohibits consideration of this case.

BONY seeks to block the Maddoxes continued assertion of risk of harm. Of course, they have already been harmed. Any incorrect credit information circulating about them puts them at real risk of serious harm. BONY's argument purports to be a standing argument, but is actually a conclusory, merits-based claim. It is highly debatable, if not improbable, that BONY's simple act of recording the mortgage satisfaction after a ten month delay could possibly eliminate the risk that inaccurate information is now circulating about them, which little hope of ever correcting it. Moreover, the land records not reflect a significant mismatch between the date the Maddoxes repaid their mortgage and the date they repaid it. What is clear is that BONY's purported standing argument is speculative at best, and that this is not the time to resolve it.

At the pleading stage, consideration of the merits is improper on a motion to dismiss for lack of standing.[45] "The contours of the injury-in-fact requirement, while not precisely defined, are very generous,"

[45] *See Bond v. United States*, 564 U.S. 211, 219 (2011) ("[T]he question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." (internal quotation marks and citation omitted)).

requiring only that claimant "allege[] some specific, 'identifiable trifle' of injury[.]"[46] Plaintiffs alleged that the BOP illegally caused them economic injury and a loss of control over dealership activities. On a motion to dismiss, this much is sufficient.[47] The court must accept plaintiff's allegations as true and draw all inferences in plaintiffs' favor.[48] Any doubts must be resolved in favor of finding standing. "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a de facto injury merely from having his personal, legal rights invaded."[49] Standing to raise a state law claim in federal court is satisfied where plaintiff's pleading adequately alleges a cause of action based on defendant's violation of statute that provides plaintiff a remedy.

II. "NO HARM, NO FOUL" IS NOT THE LAW OF NEW YORK.

Defendant argues that Plaintiff, to obtain standing, must allege that they are *continuing* to experience tangible harm at the time the suit is filed. That is, BONY can deprive them of standing by belatedly

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[46] Injury-in-fact is not Mount Everest. *See Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982)

[47] *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005)

[48] *Warth*, 422 U.S. at 501. ("[S]tanding in no way depends on the merits of the plaintiff's contention."); *Id.* at 500.

[49] *Spokeo*, 136 S.Ct. at 1551 (Thomas, J., concurring).

doing its duty before suit is filed. The very notion that standing can be vitiated in this "no harm, no foul" fashion is antithetical to the purpose and structure of the New York satisfaction statutes. BONY's violation of the recording statutes injured the plaintiffs' protected property and reputational interests on the 31st day after they satisfied their mortgage note. That is the day by which BONY had to satisfy its obligation to record the mortgage satisfaction and the day on which the Maddoxes' claim accrued.[50] Not only is BONY's late recording irrelevant to plaintiffs' standing, it is not even a valid defense. BONY's "no harm, no foul" defense should be rejected because it is akin to a bank robber claiming it did not rob a bank because it eventually returned the stolen money.[51]

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[50] *Key Bank v Del Norte, Inc.*, 251 A.D.2d 740, 673 N.Y.S.2d 788 (3d Dep't 1998) (claim accrued on April 13, 1989, when full amount of payment was tendered to bank along with written request that mortgagors' designee be sent satisfaction of mortgage, and proceeding was commenced on December 7, 1996).

[51] *See Kelsey v. Pfaudler Process Fermentation Co.*, 51 Hun. 636, 3 N.Y.S. 723, 724-25 (Sup. Ct., Gen. Term, 5th Dep't 1889) ("violation of this duty not only creates liability of the forfeiture before mentioned, but subjects the delinquent officers or agents to liability to criminal prosecution. Laws 1848, c. 40, § 25. HN2 For its practical application, this statute is entitled to such construction as will render it effectual to accomplish the purposes for which it evidently was designed. Every

The New York Legislature and state courts, at times, recognize defenses to liability for noncompliance, such as defense for "mistake of fact" regarding the mortgage.[52] The state courts in other contexts also have recognized defenses where it is inequitable to hold the mortgagee liable where ongoing litigation regarding the mortgage makes recording the satisfaction impossible.[53] Conversely, there would be no point to a statute that requires recording of a mortgage satisfaction within a 30 day deadline that also hold harmless those who miss the deadline.

This interpretation is also evident from the history of the statutes in question. The New York Legislature amended Section 275 of the RPL and Section 1921 of the RPAPL in 2005 to protect its citizens from the consequences that regularly result from improper documentation of mortgage satisfaction. Before the amendment, the provision required that satisfaction of a mortgage be recorded with the county recording

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failure, on request, of the opportunity to inspect the book, may not constitute a refusal or neglect to exhibit it for that purpose.").

[52] *In re Application of Saxton*, 4 A.D.2d 135, 164 N.Y.S.2d 61 (4th Dep't 1957).

[53] *Farmingdale Realty Trust v Real Props. MLP Ltd. Pshp.,* 225 A.D.2d 656, 640 N.Y.S.2d 566 (2d Dep't 1996) (defendants did not improperly refuse to execute satisfaction pieces under CLS RPAPL § 1921 because mortgagee was unable to perform, and approval of California court was required to release mortgage liens).

officer within 45 days of that satisfaction, but did not set forth any penalties for failure to comply with this requirement. The 2005 amendment reduced the recording time to 30 days and imposed escalating penalties for failure to record up to a maximum of $1,500 per mortgage.

In passing the 2005 amendments to these provisions, the New York State Legislature acted within the scope of its authority to protect its citizens from harmful business practices.[54] As reflected in the bill jacket, the state legislature recognized that failure to timely record satisfaction of a mortgage could create significant problems for a mortgagor.[55] The legislature further sought to protect homeowners in recognition of the difficulty they face when third parties predictably rely on the inaccuracy reflected in the land records caused by the mortgagee's violation. In this era of big data, publicly available information is quickly gathered, stored, analyzed, and disseminated to influence opportunities and decisions that affect one's daily life.

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[54] *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs." (internal quotation marks and citation omitted)).

[55] *See* New York Bill Jacket, 2005 S.B. 48, Ch. 467 (Joint Appendix A-117-29).

Inaccurate information may be all but impossible to correct and remediate. The legislature made the logical decision to enhance homeowners' right to prevent this foreseeable cascade of horrors. Such interests are especially heightened in states, such as New York, in which interests in real property are prioritized by the timing of recording in the land records.

Additional support that the New York State Legislature sought to protect the interest of the mortgagor in a timely satisfaction is that statutory damages are not the only remedies available to protect mortgagors from dilatory mortgagees. For example, Section 1921 of the RPAPL provides for an order to require a delinquent mortgagee to defend and indemnify an injured mortgagor against any subsequent consequential injuries.[56] Importantly, the remedy is available even where, as here, the consequences of the violation have not yet manifested. Yet the injury to the property and reputational interests is entitled to protection.

[56] *See* RPAPL § 1921 (providing that "mortgagee agrees to defend and hold harmless the mortgagor by reason of the inability or failure of the mortgagee to furnish the note or mortgage within the time period prescribed in this subdivision").

Similarly, common law remedies were recognized for intrusions upon real property or reputational rights absent any element of harm, such as defamation, slander, injurious falsity, and other sorts of dignitary interests that naturally flow from the publication of inaccurate information.[57] The remedies acknowledged the violation of a legally protected right, not the consequences of the injury.[58] Moreover, such remedies protected mortgagors well before technology exponentially magnified the speed and reach of communications.

New York's policy decision to enhance and complement the common law remedies available to property owners with an additional private right of action and statutory damage remedies explicitly recognizes that the violation of the law, without more, is the injury in

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[57] *Kelsey*, 3 N.Y.S. at 725 (injuries to emotional and dignitary interests are among those that count as injuries in fact) *See, e.g.*, Wright and Miller, 13A *Fed. Prac. & Proc. Juris.* § 3531.4 (3d Ed., 2015) ("Other more-or-less abstract interests that support standing include individual reputation, privacy, and dignity.").

[58] *Kelsey*, 3 N.Y.S. at 725 ("It is, however, contended that, as the statute provides that the penalty shall be forfeited and paid 'to the party injured,' an injury to the plaintiff by such refusal or neglect was essential to his recovery. The penalty is imposed as a punishment for the violation of duty, and its recovery is not dependent upon a pecuniary loss as the consequence. When damages are the result of such refusal or neglect they also may be recovered. The denial of the right is the injury contemplated, and is sufficient for the purpose of the remedy" (internal citations omitted)).

fact. No additional allegation of "harm" is necessary to satisfy Article III's injury in fact requirement. As it was under the common law, the injury in fact is presumed upon occurrence of the violation of those rights. The New York Legislature clearly recognized that untimely recording of mortgage satisfactions foreseeably result in significant problems, such as lowered credit scores or credit denials. The Legislature also acknowledged that mortgagors would likely face great difficulty correcting such problems or obtaining remedies.[59] But the focus of the satisfaction statutes is not directed at such consequences, and does not purport to provide the means to correct or remedy those problems. The statutes are targeted at the mortgagee, to protect mortgagors from being subject to such risks in the first place.

III. FEDERAL COURTS SITTING IN DIVERSITY SHOULD APPLY THE SUBSTANTIVE LAW OF THE STATE FROM WHICH THE LEGAL RIGHT ARISES AND DEFER TO THE STATE COURT INTERPRETATION.

[59] *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) (holding that the FCRA allows for recovery when there are no measurable damages); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury.").

BONY is essentially asking this Court to substitute its own policy analysis for that of New York State Legislature as to the nature and seriousness of the injury arising out of untimely recording of a mortgage satisfaction. BONY does not dispute that it violated the law or that the Maddoxes would have a claim in the state courts without alleging that they experienced any of the consequences that motivated the Legislature to amend the statutes in 2005. BONY merely urges this Court to treat the injury as less concrete or deserving of legal protection than New York has determined it to be.

When a federal court presides over state law claims by virtue of diversity jurisdiction, it owes deference to the state legislature's determination with respect to the injuries that state legislatures identify and should not substitute its own policy judgment.[60] Nothing in *Spokeo* alters the constitutional obligation of federal courts sitting in diversity to apply substantive state law.

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[60] *See Smith v. Allstate Ins. Co.*, 403 F.3d 401, 409 (6th Cir. 2005) (rewriting state legislation in a diversity case "does violence not only to notions of judicial deference to legislative policy decisions, but also to notions of federal-state comity"); *Cournoyer v. Massachusetts Bay Transp. Auth.*, 744 F.2d 208, 211 (1st Cir. 1984) ("In this diversity case, we will not second guess the wisdom of a state statute or its interpretation by the state's highest court.").

The need to defer to state law in diversity cases is one of the animating principles behind *Erie Railroad Co. v. Tompkins*.[61] *Erie* rejected the previously dominant view that federal courts were empowered to determine the substance of the law "even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority."[62] Instead, federal courts sitting in diversity are tasked with applying state substantive law.[63]

The same principle of respect for state law that undergirds *Erie* also supports a deferential review of injuries to legally protected interests as identified by state legislatures.[64] The Supreme Court has recognized that the need to "avoid[] disregard of State law in diversity cases in the federal courts" is "important to our federalism."[65] Where a state legislature has identified an injury and created a new cause of

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[61] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
[62] *York*, 326 U.S. at 102, 65 S.Ct. at 1466; *see Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rules of common law applicable in a state . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").
[63] *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659 (1996).
[64] See F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 Nw. U. L. Rev. 57, 86-87 (2015).
[65] *York*, 326 U.S. at 110, 65 S.Ct. at 1470.

action to remedy that injury, a federal court should respect the policy judgment that caused the state legislature to act.

Defendant's attempt to marginalize the Maddoxes' injury by referring to the unlawful late filing as a "mere procedural violation" does not find support in *Spokeo*. The Court's "bare procedural violation" dicta[66] simply recognizes that that there could be procedural statutes that never were designed to prevent tangible harms or violations of concrete rights, i.e., "a bare procedural violation, divorced from any concrete harm.[67] But the New York satisfaction statutes clearly fall outside that category. In the Maddoxes' case, the complaint satisfied *Spokeo* by correctly alleging (1) that the New York mortgage satisfaction statutes is a class of statutory right that does protect against concrete harm, and (2) that BONY had violated the statute in his case. That should be sufficient for standing purposes, and the district court agreed.

BONY points to the Eleventh Circuit's opinion in *Nicklaw v. Citimortgage, Inc.*, in which the Court asserted that New York's common law cause of action to confirm satisfaction of a mortgage was

[66] *Spokeo,* 136 S.Ct. at 1550.
[67] *Id.*

not an appropriate antecedent of New York's statutory scheme because they implicate different remedies.[68] In the Eleventh Circuit's view, the common law only provides a remedy "while title to property was wrongfully clouded," *i.e.*, before satisfaction of a mortgage is recorded.[69]

But the Eleventh Circuit's analysis conflates the remedies available under common law and statute with the *right to seek* a remedy for the injury. New York expanded the remedies available to mortgagors, aimed at the same injury that gave rise to actions in common law. When it comes to fitting remedies to injuries, "there are many ways to skin a cat,"[70] and the state legislature's expansion of available remedies does not mean that it is addressing a different injury than was traditionally recognized as a real and cognizable pursuant to Article III under the common law. Moreover, common law remedies extended to protect rights far broader that removing clouds from titles.

Nicklaw's focus on the remedies available under common law runs contrary to the Supreme Court's emphasis in *Spokeo* on the *harms* that

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[68] *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016).
[69] *Id.*
[70] *ClearOne Commc'ns, Inc. v. Bowers*, 509 Fed. Appx. 798, 801 (10th Cir. 2013) (not for publication).

common law causes of action attempted to redress.[71] The vital distinction between the injury a litigant suffers and the availability of remedies to address that injury is built into the Article III standing analysis.[72]

Finally, it is respectfully submitted that the Eleventh Circuit incorrectly predicted how the New York would interpret New York's policy decision to craft a statutory remedy at law to overlay the equitable remedies traditionally available under the common law. One does not invalidate the other. Moreover, the Eleventh Circuit court's decision is not precedential:

> Federal courts have a duty to properly decide questions of state law. It's a duty "from which [courts] may not shrink."[73] … And it makes no difference whether one panel has already spoken on the issue. … We are, after all, merely predictors of state law. … We speculate about how the state judiciary might answer these unsettled questions. But stare decisis does not turn unsettled questions of state law into settled ones. And federal courts must

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[71] *See Spokeo*, 136 S.Ct. at 1549 (stressing the need "to consider whether an alleged intangible *harm* has a close relationship to a *harm* that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." (emphasis added)).

[72] *See Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136 (identifying redressability through a judicial remedy as separate from the existence of a cognizable injury under Article III).

[73] *Rutherford*, 575 F.3d at 624 (Clay, J., dissenting).

always be free to seek answers from the only judicial body capable of providing them.[74]

This Court, which frequently certifies questions to the New York Court of Appeals, is well aware of these dynamics.

CONCLUSION

Because the District Court properly determined that the Maddoxes have standing to litigate their claims under the FDCPA, there is no basis for reversal. Accordingly, we respectfully request that this Court affirm the order denying BONY's motion to dismiss.

Dated: February 25, 2020
New York, New York

/s/ Brian L. Bromberg
Brian L. Bromberg

[74] *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1003 (6th Cir. 2019) (citations omitted).

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Dated: New York, New York
February 25, 2020

Respectfully submitted,

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