

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

BOBBIE HARRIS,  
*Plaintiff-Appellant,*

and

UNITED STATES OF AMERICA,  
*Intervenor-Plaintiff-Appellant,*

v.

MEXICAN SPECIALTY FOODS, INC., d/b/a LA PAZ  
RESTAURANTE & CANTINA,  
*Defendant-Appellee.*

---

JULIE BEST GRIMES,  
*Plaintiff-Appellant,*

and

UNITED STATES OF AMERICA,  
*Intervenor-Plaintiff-Appellant,*

v.

RAVE MOTION PICTURES BIRMINGHAM LLC, *et al.*,  
*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

---

BRIEF FOR THE UNITED STATES

---

GREGORY G. KATSAS  
*Assistant Attorney General*

ALICE H. MARTIN  
*United States Attorney*

DOUGLAS N. LETTER  
SCOTT R. McINTOSH  
*Attorneys, Appellate Staff*  
*Civil Division, Room 7259*  
*Department of Justice*  
*950 Pennsylvania Avenue, N.W.*  
*Washington, D.C. 20530*  
*202-514-4052*

*Counsel for the United States*

---

---

*Harris & United States v. Mexican Specialty Foods*

**Certificate of Interested Persons and**

**Corporate Disclosure Statement**

The Department of Justice, through undersigned counsel, certifies that the following persons and entities have an interest in the outcome of this case:

1. Acker, Honorable William M. Jr., United States District Judge;
2. Angwin, Edward E., representing Harris;
3. Angwin Law Firm, representing Harris;
4. Butler, Thomas J., firm representing Mexican Specialty Foods;
5. Crane-Hirsch, Daniel Kadane, Attorney, Department of Justice, representing the United States in the court below;
6. Gupta, Deepak, representing Harris on appeal;
7. Harris, Bobbie, Plaintiff/Appellant;
8. Hood, Jack B., Assistant United States Attorney, representing the United States in the court below;
9. Jones, Joshua D., representing Mexican Specialty Foods;
10. Martin, Alice H., United States Attorney;

*Harris & United States v. Mexican Specialty Foods*

**Certificate of Interested Persons and**

**Corporate Disclosure Statement (cont'd)**

11. Maynard, Cooper, & Gale, P.C., firm representing Mexican Specialty Foods;
12. McIntosh, Scott, Attorney, Appellate Staff, Civil Division, representing United States on appeal;
13. Mexican Specialty Foods, Inc., d/b/a/ La Paz Restaurante & Cantina, Defendant/Appellee;
14. Vance, Joyce White, Assistant United States Attorney, Chief, Appellate Division; and
15. United States of America, Plaintiff-Intervener/Appellant.

---

Scott R. McIntosh  
Attorney, Appellate Staff, Civil Division  
Department of Justice

*Grimes & United States v. Rave Motion Pictures*

**Certificate of Interested Persons and**  
**Corporate Disclosure Statement**

The Department of Justice, through undersigned counsel, certifies that the following persons and entities have an interest in the outcome of this case:

1. Acker, Honorable William M. Jr., United States District Judge;
2. Aughtman, Jay, representing Grimes and Long;
3. Beasley, Allen, Crow, Methvin, Portis, & Miles P.C., representing Grimes;
4. Black, Dylan C., representing Rave;
5. Boston Ventures, LP, Defendant/Appellee;
6. Bradley, Arant, Rose, & White, representing Rave;
7. Brandt, William Perry, representing Rave;
8. Bryan Cave L.L.P., representing Rave;
9. Crane-Hirsch, Daniel Kadane, Attorney, Department of Justice, representing the United States in the court below;
10. Friesen, Joletta M., representing Rave;

*Grimes & United States v. Rave Motion Pictures*

**Certificate of Interested Persons and**

**Corporate Disclosure Statement (cont'd)**

11. Gewin, James W., representing Rave;
12. Grimes, Julie Best, Plaintiff/Appellant;
13. Gupta, Deepak, representing Grimes on appeal;
14. Hood, Jack B., Assistant United States Attorney, representing the United States  
in the court below;
15. Jones, Alexander W. Jr., representing Grimes and Long;
16. Jones, Joshua D., representing Boston Ventures;
17. Long, Nimrod W.E., III, Plaintiff;
18. Martin, Alice H., United States Attorney;
19. McIntosh, Scott, Attorney, Appellate Staff, Civil Division, representing the  
United States on appeal;
20. Pritchard, McCall & Jones, L.L.C., representing Grimes and Long;
21. Pritchard, William S., III, representing Grimes and Long;
22. Rave Motion Pictures Birmingham, L.L.C., Defendant/Appellee;
23. Rave Motion Pictures Birmingham II, L.L.C., Defendant/Appellee;

*Grimes & United States v. Rave Motion Pictures*

**Certificate of Interested Persons and**

**Corporate Disclosure Statement (cont'd)**

24. Rave Motion Pictures Birmingham III, L.L.C., Defendant/Appellee;
25. Rave Reviews Cinemas, L.L.C., Defendant/Appellee;
26. Selden, A. Inge, III, representing Boston Ventures;
27. Tuley, Scarlett M., representing Grimes;
28. Vance, Joyce White, Assistant United States Attorney, Chief, Appellate Division;
29. United States of America, Plaintiff-Intervener/Appellant; and
30. Zerger, Heather S. Esau, representing Rave.

---

Scott R. McIntosh  
Attorney, Appellate Staff, Civil Division  
Department of Justice

## **STATEMENT REGARDING ORAL ARGUMENT**

The United States requests that the Court hear oral argument in these appeals. These appeals involve the constitutionality of a provision of the Fair Credit Reporting Act that authorizes consumers to recover statutory damages for willful violations of the Act. The decision of the district court holds that the statutory damages provision of the Act is unconstitutional on its face and as applied. The district court's invalidation of an Act of Congress is a grave matter, both in its own right and in terms of its adverse effect on the operation of the Fair Credit Reporting Act. The United States believes that oral argument would assist the Court in reviewing the district court's decision.

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATES OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENTS. ....	C-1
STATEMENT REGARDING ORAL ARGUMENT.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES. ....	2
STATEMENT OF THE CASE.....	3
I.    Prior Proceedings and Decision Below. ....	3
II.   Statement of Facts.....	4
A.   Statutory Background.....	4
1.    The Fair Credit Reporting Act (FCRA).....	5
2.    The Fair and Accurate Credit Transactions Act (FACTA). . . .	7
B.   The Present Litigation.....	10
C.   Standard of Review.....	15
SUMMARY OF ARGUMENT.....	15

ARGUMENT.....	19
SECTION 616(a)(1)(A) OF THE FAIR CREDIT REPORTING ACT	
IS CONSTITUTIONAL. ....	19
I. The District Court Should Not Have Reached the Constitutionality of the Statutory Damages Provision Prior to Any Determination of Liability or Award of Damages.....	19
II. The Statutory Damages Provision Is Not Unconstitutionally Vague.....	23
III. Awards of Statutory Damages in These Cases, If Any, Will Not Be Unconstitutionally Excessive. ....	30
A. Statutory Damages under Section 616(a)(1)(A) Are Not Punitive.....	31
B. Awards of Statutory Damages in These Cases Would Not Be Unconstitutionally Excessive in Any Event.....	36
C. Statutory Damages under Section 616(a)(1)(A) Are Not Subject To, and in Any Event Do Not Violate, Constitutional Limitations on Punitive Damages.....	44
CONCLUSION.....	50
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Arcilla v. Adidas Promotional Retail Operations, Inc.</i> , 488 F. Supp. 2d 965 (C.D. Cal. 2007). . . . .	33, 41
* <i>Ashwander v. TVA</i> , 297 U.S. 288, 56 S. Ct. 466 (1936). . . . .	18, 20
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559, 116 S. Ct. 1589 (1996). . . . .	42, 43, 44, 45, 46, 47
<i>Day v. Liberty Nat. Life Ins. Co.</i> , 122 F.3d 1012 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1119 (1998).. . . . .	19
<i>Douglas v. Cunningham</i> , 294 U.S. 207, 55 S. Ct. 365 (1935).. . . . .	32
<i>DIRECTV, Inc. v. Brown</i> , 371 F.3d 814 (11th Cir. 2004). . . . .	23
<i>Davis v. The Gap, Inc.</i> , 246 F.3d 152 (2d Cir. 2001).. . . . .	31
<i>Ehrheart v. Lifetime Brands, Inc.</i> , 498 F. Supp. 2d 753 (E.D. Pa. 2007). . . . .	33
<i>Exxon Shipping Co. v. Baker</i> , 128 S. Ct. 2605 (2008).. . . . .	24
<i>Feltner v. Columbia Picture Television, Inc.</i> , 523 U.S. 340, 118 S. Ct. 1279 (1998). . . . .	28
<i>Fitzgerald Pub. Co. v. Baylor Pub. Co.</i> , 807 F.2d 1110 (2d Cir. 1986). . . . .	28
<i>Follman v. Village Squire, Inc.</i> , 542 F. Supp. 2d 816 (N.D. Ill. 2007). . . . .	33
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399, 86 S. Ct. 518 (1966).. . . . .	24, 27

---

\* Authorities chiefly relied upon are marked with an asterisk.

<i>Helms v. ConsumerInfo.com, Inc.</i> , 236 F.R.D. 561 (N.D. Ala. 2005).....	41
<i>Johansen v. Combustion Engineering, Inc.</i> , 170 F.3d 1320 (11th Cir.), <i>cert. denied</i> , 528 U.S. 931 (1999).....	44
<i>Killingsworth v. HSBC Bank Nev., N.A.</i> , 507 F.3d 614 (7th Cir. 2007).....	33
<i>Klay v. Humana, Inc.</i> , 382 F.3d 1241 (11th Cir. 2004).....	40, 41
<i>Krey v. Castle Motor Sales, Inc.</i> , 241 F.R.D. 608 (N.D. Ill. 2007).....	41
<i>Loving v. United States</i> , 517 U.S. 748, 116 S. Ct. 1737 (1996).....	29
<i>Lowry's Reports, Inc. v. Legg Mason, Inc.</i> , 302 F. Supp. 2d 455 (D. Md. 2004).....	46, 47
<i>Matthews v. United Retail, Inc.</i> , 248 F.R.D. 210 (N.D. Ill. 2008).....	41
<i>Memorial Hospital v. Heckler</i> , 706 F.2d 1130 (11th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1023 (1984).....	39
<i>Missouri v. Hunter</i> , 459 U.S. 359, 103 S. Ct. 673 (1983).....	31
<i>Mistretta v. United States</i> , 488 U.S. 361, 109 S. Ct. 647 (1989).....	24, 29
<i>Murray v. GMAC Mortg. Corp.</i> , 434 F.3d 948 (7th Cir. 2006).....	33, 41
<i>Parker v. Time Warner Entertainment Co.</i> , 331 F.3d 13 (2d Cir. 2003).....	40, 47
<i>Ramirez v. Midwest Airlines, Inc.</i> , 537 F. Supp. 2d 1161 (D. Kan. 2008).....	33, 41
<i>Safeco Ins. Co. of America v. Burr</i> , 127 S.Ct. 2201 (2007).....	5
<i>Seniors Civil Liberties Ass'n v. Kemp</i> , 965 F.2d 1030	

	(11th Cir. 1992).....	26
*	<i>Spector Motor Service v. McLaughlin</i> , 323 U.S. 101, 65 S. Ct. 152 (1944). ....	18
*	<i>St. Louis Iron Mountain &amp; Southern Railway Co. v. Williams</i> , 251 U.S. 63 (1919). ....	passim
	<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i> , 538 U.S. 408, 123 S. Ct. 1513 (2003).....	42, 43, 47
	<i>Stuckey v. Northern Propane Gas Co.</i> , 874 F.2d 1563 (11th Cir. 1989).....	34
	<i>TXO Production Co. v. Alliance Resources Corp.</i> , 509 U.S. 443 (1993). ....	43
*	<i>United States v. Batchelder</i> , 442 U.S. 114, 99 S. Ct. 2198 (1979). ....	25, 26, 27, 45
	<i>United States v. Brown</i> , 364 F.3d 1266 (11th Cir.), <i>cert. denied</i> , 543 U.S. 879 (2004). ....	14
	<i>United States v. Schooner Peggy</i> , 5 U.S. (1 Cranch) 102 (1801). ....	39
	<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489, 102 S. Ct. 1186 (1982).....	26
	<i>Wyzykowski v. Department of Corrections</i> , 226 F.3d 1213 (11th Cir. 2000).....	20
	<i>Zamarippa v. Cy's Car Sales, Inc.</i> , 674 F.2d 877 (11th Cir. 1982).....	33
*	<i>Zomba Enterprises, Inc. v. Panorama Records, Inc.</i> , 491 F.3d 574 (6th Cir. 2007), <i>cert. denied</i> , 128 S. Ct. 2429 (2008).....	46

Statutes and Rules

\* Credit and Debit Card Receipt Clarification Act of 2007,  
Pub. L. No. 110-241, 122 Stat. 1565 (June 3, 2008). . . . . 13

\* Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* . . . . . passim

\* Fair and Accurate Credit Transactions Act of 2003,  
Pub. L. No. 108-159, 117 Stat. 1952 (2003).. . . . . passim

15 U.S.C. § 1681. . . . . 5

15 U.S.C. § 1681(b). . . . . 5

15 U.S.C. § 1681c(g)(1). . . . . 9

15 U.S.C. § 1681c(g)(2). . . . . 9

15 U.S.C. § 1681c(g)(3). . . . . 10

15 U.S.C. § 1681n. . . . . 5

\* 15 U.S.C. § 1681n(a)(1)(A). . . . . passim

15 U.S.C. § 1681n(1)-(2) (1970). . . . . 6

15 U.S.C. § 1681n(a)(1)(B). . . . . 6

15 U.S.C. §§ 1681n-1681p. . . . . 5

15 U.S.C. § 1681o(a)(1). . . . . 7, 31

15 U.S.C. § 1681p. . . . . 2

15 U.S.C. § 1681s(a)-(b). . . . . 5

17 U.S.C. § 504(c)(2). . . . . 23

28 U.S.C. § 1291. . . . . 2

28 U.S.C. § 1331. . . . . 2

28 U.S.C. § 2403(a). . . . . 11

47 U.S.C. § 605(d)(3)(C)(i)(II). . . . . 23

Fed. R. Civ. P. 23. . . . . 40

Fed. R. Civ. P. 23(b)(3). . . . . 10, 39, 41

Other Materials

Federal Trade Commission, *2006 Federal Identity Theft Survey Report* (Nov. 2007). . . . . 8

H.R. Rep. 108-263 (2003).. . . . . 7

President’s Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* (April 2007).. . . . . 7

S. Rep. No. 108-166 (2003). . . . . 7

39 Weekly Comp. Pres. Doc. 1746, 2004 U.S.C.C.A.N. 1755 (Dec. 4, 2003). . . . . 9

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**No. 08-13510-BB and No. 08-13616-BB (consolidated)**

---

**BOBBIE HARRIS,  
*Plaintiff-Appellant,***

**and**

**UNITED STATES OF AMERICA,  
*Intervenor-Plaintiff-Appellant,***

**v.**

**MEXICAN SPECIALTY FOODS, INC., d/b/a LA PAZ  
RESTAURANTE & CANTINA,  
*Defendant-Appellee.***

---

**JULIE BEST GRIMES,  
*Plaintiff-Appellant,***

**and**

**UNITED STATES OF AMERICA,  
*Intervenor-Plaintiff-Appellant,***

**v.**

**RAVE MOTION PICTURES BIRMINGHAM LLC, *et al.,*  
*Defendants-Appellees.***

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA**

---

**BRIEF FOR THE UNITED STATES**

---

**STATEMENT OF JURISDICTION**

These suits arise under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, as amended by the Fair and Accurate Credit Transactions Act of 2003. The

subject matter jurisdiction of the district court was asserted under 15 U.S.C. § 1681p and 28 U.S.C. § 1331. The district court issued separate orders dismissing the complaints in both cases on May 28, 2008. Those orders constitute the final decisions of the district court.

The present appeals are within the jurisdiction of this Court under 28 U.S.C. § 1291. The private plaintiff in *Harris* (No. 08-13510) filed a notice of appeal on June 17, 2008. The private plaintiff in *Grimes* (No. 08-13616) filed a notice of appeal on June 24, 2008. The United States, which intervened as a plaintiff in both cases to defend the constitutionality of the Fair Credit Reporting Act, filed notices of appeal in both cases (No. 08-14018 and No. 08-14019) on July 23, 2008. All of the notices of appeal were filed within the time allowed by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

### **STATEMENT OF THE ISSUES**

Section 616(a)(1)(A) of the Fair Credit Reporting Act provides that persons who commit “willful” violations of the Act are liable to consumers for actual damages or, in the alternative, statutory damages of not less than \$100 and not more than \$1,000. In the proceedings below, the district court held that the statutory damages provision of Section 616(a)(1)(A) is unconstitutional on its face and as applied. The questions presented are:

1) Whether the district court erred in deciding the constitutionality of the statutory damages provision prior to trial, when the defendants have not been found to have committed willful violations of the Act and when no award of statutory damages has been made.

2) Whether the statutory damages provision is unconstitutionally vague.

3) Whether awards of statutory damages in these cases, if any are made, would be unconstitutionally excessive.

## **STATEMENT OF THE CASE**

### **I. Prior Proceedings and Decision Below**

These cases are private suits under the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act (FACTA). In order to reduce the risk of identity theft, FACTA prohibits merchants from printing credit and debit card numbers and expiration dates on customer receipts. The Fair Credit Reporting Act provides a private right of action for violations of that provision. If a jury finds that the violations were willful – but not otherwise – the plaintiff may recover statutory damages of not less than \$100 and not more than \$1,000 per violation in lieu of actual damages. The plaintiffs in these cases allege that the defendants have committed willful violations of FACTA. The plaintiffs seek statutory damages and other relief

on behalf of the classes of customers whose card numbers and/or expiration dates were unlawfully printed by the defendants.

At this stage of the litigation, no classes have been certified, no trials have taken place, no finding of willfulness has been made, and no statutory damages have been awarded. Nevertheless, the district court has granted summary judgment to the defendants on the ground that willfulness will be found, statutory damages will be awarded and when they are, they will violate the defendants' rights under the Due Process Clause. In so doing, the court has held that the provision of the Fair Credit Reporting Act that authorizes the recovery of statutory damages is unconstitutional on its face and as applied. The United States, which intervened to defend the constitutionality of the statute, now appeals from that decision, as do the private plaintiffs in both cases.

## **II. Statement of Facts**

### **A. Statutory Background**

These cases arise under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, and the Fair and Accurate Credit Transactions Act, which amends the FCRA. The FCRA provides the judicial procedures and remedies that govern the present suits, while FACTA establishes the substantive requirements that govern the

defendants' actions. We therefore begin by summarizing the relevant provisions of these two statutes.

### **1. The Fair Credit Reporting Act (FCRA)**

Congress enacted the Fair Credit Reporting Act in 1970 “to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.” *Safeco Ins. Co. of America v. Burr*, 127 S.Ct. 2201, 2205 (2007); see 15 U.S.C. § 1681 (Congressional findings and statement of purpose). In general terms, the FCRA seeks to protect “the confidentiality, accuracy, relevancy, and proper utilization” of consumer credit, personnel, insurance, and other consumer information. 15 U.S.C. § 1681(b). Toward those ends, the FCRA regulates the contents, dissemination, and use of consumer reports; gives consumers the right to review the contents of their files and dispute information believed to be inaccurate; and provides consumers with notice when adverse actions are taken on the basis of their consumer reports.

The requirements of the FCRA are enforced by several federal agencies, chief among them the Federal Trade Commission. See 15 U.S.C. § 1681s(a)-(b). In addition, the FCRA authorizes consumers to bring private suits for negligent or willful violations of the Act and its implementing regulations. *Id.* §§ 1681n-1681p. Section 616 of the FCRA (15 U.S.C. § 1681n) prescribes the private remedies for

willful violations, while Section 617 (15 U.S.C. § 1681o) specifies the remedies for negligent violations.

Originally, Section 616 enabled consumers to recover two kinds of damages for willful violations: actual damages and punitive damages. See 15 U.S.C. § 1681n(1)-(2) (1970). However, the Consumer Credit Reporting Reform Act of 1996 amended Section 616 to provide the additional remedy of statutory damages. See Pub. L. No. 104-208, Div. A, Title II, Subtitle D, § 2412(a)-(c), 110 Stat. 3009-426, 3009-446 (codified at 15 U.S.C. § 1681n(a)). The statutory damages provision of Section 616 is the focus of these appeals.

In its amended form, Section 616 authorizes consumers to recover “an amount equal to the sum of”:

(1)(A) any actual damages sustained by the consumer as a result of the failure [to comply with the statute and regulations] *or damages of not less than \$100 and not more than \$1,000*; \* \* \*

(2) such amount of punitive damages as the court may allow; and

(3) \* \* \* the costs of the action together with reasonable attorney’s fees as determined by the court.

*Id.* § 1681n(a)(1)(A), (2)-(3) (emphasis added).<sup>1</sup>

---

<sup>1</sup> Section 616(a)(1)(B) provides slightly different statutory damages when “a natural person \* \* \* obtain[s] a consumer report under false pretense or knowingly without a permissible purpose.” 15 U.S.C. § 1681n(a)(1)(B). That provision is not at issue in this case.

As the quoted language indicates, a consumer may recover actual damages “or,” at his option, statutory damages, not both. Thus, an award of statutory damages serves as an alternative to the recovery of actual damages. The choice between actual and statutory damages has no effect on the availability of punitive damages, which may be awarded upon an appropriate showing in either case. Proof of willfulness is a prerequisite for the recovery of statutory damages and punitive damages; neither remedy is available for violations that are merely negligent. See *id.* § 1681o(a)(1).

## **2. The Fair and Accurate Credit Transactions Act (FACTA)**

a. The Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, 117 Stat. 1952 (FACTA), was enacted in 2003 to modernize the Fair Credit Reporting Act. Among other things, FACTA addresses a consumer credit problem that had not been addressed in the FCRA but that “has reached almost epidemic proportions in recent years”: “the emergence and impact of identity theft.” H.R. Rep. 108-263, p. 25 (2003) (House FACTA Report); S. Rep. No. 108-166, p. 8 (2003) (Senate FACTA Report).

Identity theft occurs when a perpetrator assumes a consumer’s identity and engages in fraudulent transactions in the consumer’s name. See House FACTA Report at 25; President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* (April 2007) (Presidential Task Force Report) (available online at

<http://www.idtheft.gov/reports/StrategicPlan.pdf>). An identity thief may exploit the victim's identity in a variety of ways, including making use of the victim's existing credit accounts or creating and using new accounts in the victim's name. Presidential Task Force Report at 18-21. The victims are left with "the difficult, time consuming and potentially expensive task of repairing the damage that has been done to their credit, their savings, and their reputation." Senate FACTA Report at 8. Even when financial institutions absorb direct financial losses from identity theft, "victims may have to expend considerable time and energy clearing up their credit histories and other financial records." House FACTA Report at 25. Collectively, victims spend billions of dollars recovering from the effects of identity theft. Presidential Task Force Report at 11; see also Federal Trade Commission, *2006 Federal Identity Theft Survey Report*, pp. 5-7, 32-42 (Nov. 2007) (available online at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>). In addition to harming consumers and financial institutions, identity theft also threatens "the fair and efficient functioning of consumer credit markets," by "undermin[ing] the accuracy and the credibility of the information flows that support those markets." Senate FACTA Report at 8.

**b.** Identity theft starts with the acquisition of identifying information about a consumer, such as the consumer's Social Security number, credit card numbers, or

other financial account information. The process of obtaining such information “is often no more sophisticated than stealing paper documents” or retrieving them from the trash. Presidential Task Force Report at 14. One goal of FACTA is to reduce the incidence of identity theft by minimizing the opportunities for thieves to obtain such information.

Traditionally, one of the most readily obtained sources of personal financial information has been the printed receipt given to consumers by merchants in credit card or debit card transactions. In order “to limit the number of opportunities for identity thieves to ‘pick off’ key card account information,” Senate FACTA Report at 13, FACTA amended the FCRA to prohibit merchants from printing card numbers or expiration dates on customers’ receipts. Specifically, any business that accepts credit or debit cards is prohibited from electronically printing “more than the last 5 digits of the card number or the expiration date” on “any receipt provided to the cardholder at the point of the sale or transaction.” 15 U.S.C. § 1681c(g)(1).<sup>2</sup> As the President observed in signing FACTA into law, “[s]lips of paper that most people throw away should not hold the key to their savings and financial secrets.” 39

---

<sup>2</sup> The restriction does not apply when the merchant records the account number and expiration date “by handwriting or by an imprint or copy of the card,” as opposed to printing the receipt electronically. 15 U.S.C. 1681c(g)(2). In those situations, the customer receipt is typically a carbon copy of the merchant’s own transaction record, which necessarily includes the complete information.

Weekly Comp. Pres. Doc. 1746, 1748, 2004 U.S.C.C.A.N. 1755, 1757 (Dec. 4, 2003).

To ensure that merchants had ample opportunity to bring cash registers and other printing devices into conformity with the law, Congress postponed the effective date of the requirement until December 2006, three years after the law's enactment, for printing devices in use before January 1, 2005. 15 U.S.C. § 1681c(g)(3).

### **B. The Present Litigation**

The present suits were filed as separate class actions in the Northern District of Alabama. In each case, the named plaintiff alleges that the defendant willfully violated FACTA's prohibition against printing customers' untruncated account numbers and/or expiration dates on credit and debit card receipts. No. 08-13510 Doc. 1, pp. 3, 4, 9-10 (Complaint ¶¶ 11-12, 17-18, 40, 42-43); No. 08-13616 Doc. 16, pp. 5-6, 9-10 (Second Amended Complaint ¶¶ 12, 14-16, 22-25).<sup>3</sup> The defendants in both cases acknowledge having violated that provision, but deny that the violations were willful. No. 08-13510 Doc. 4, pp. 3, 6 (Answer ¶¶ 11-12, 17-18, 40, 42-43); No. 08-13616 Doc. 24, pp. 4-6 (Answer ¶¶ 12, 14-16, 22-25). The complaints seek statutory damages, punitive damages, and injunctive relief. No. 08-13510 Doc. 1, pp.

---

<sup>3</sup> Because the district court did not itself consolidate the two cases that are involved in the present consolidated appeals, each case has a separate docket. We therefore preface citations to the district court records with the corresponding appellate docket number.

10-11; No. 08-13616 Doc. 16, pp. 10-11. If the proposed classes are certified under Rule 23(b)(3), class members who wish to recover actual damages rather than statutory damages will be permitted, although not required, to opt out of the proposed plaintiff classes.

Acting *sua sponte*, the district court informed the parties that it regarded the statutory damage provision of Section 616(a)(1)(A) as unconstitutional and invited the defendants to move for summary judgment on constitutional grounds. No. 08-13510 Doc. 18, pp. 118, 23, 29 (transcript of status conference). The defendants duly filed motions for summary judgment, and the United States intervened as a plaintiff pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the statute.

On May 28, 2008, the district court issued an opinion declaring the statutory damages provision of Section 616(a)(1)(A) to be unconstitutional both on its face and as applied. No. 08-13510 Doc. 28.<sup>4</sup> On the basis of that opinion, the court entered judgments of dismissal in both cases. The court dismissed the suits notwithstanding the fact that the complaints pray for other forms of relief, such as punitive damages and injunctions, that are unaffected by the court's invalidation of Section 616(a)(1)(A).

---

<sup>4</sup> The district court entered its opinion separately on the dockets of both cases. For convenience, we cite the opinion hereafter by reference to its docket number in the *Harris* case (No. 08-13510).

The district court held that the statutory damages provision of Section 616(a)(1)(A) violates the Due Process Clause in two basic respects. First, the court held that the provision is facially unconstitutional because it does not contain any criteria to govern the calculation of statutory damages within the statutory range from \$100 to \$1000. The court stated that Section 616(a)(1)(A) “leav[es] it to the whim of the jury” to decide how much to award within that range, “unless the court violates the doctrine of separation of powers and assumes the role of legislator \* \* \* .” No. 08-13510 Doc. 28, p. 8. The court stated that the absence of statutory criteria was “an almost perfect illustration of the concept [of] ‘void for vagueness.’” *Id.* at 9.

Second, the court held that Section 616(a)(1)(A) is unconstitutional as applied in these cases because it will result in unconstitutionally excessive awards of statutory damages. In so holding, the court rejected the argument of the United States that questions of excessiveness should not, and indeed cannot, be taken up until and unless willful violations are found, statutory damages are awarded, and their magnitude is known. To determine the excessiveness of awards that have yet to be made, the court made the following series of assumptions:

- Class certification will be granted and the certified classes will be extremely large (*id.* at 13);
- The juries will find that the defendants' violations were willful, subjecting the defendants to statutory damages (*id.* at 15-16);
- The defendants' violations, although pervasive, did not result in actual harm to any class member (*id.* at 14); and
- Even if the juries award only the statutory minimum of \$100 to each class member, the aggregate awards will be so large that they will bankrupt the defendants (*id.* at 13, 15).

Armed with these assumptions, the court held that the anticipated awards of statutory damages would be unconstitutionally excessive under the Due Process Clause. *Id.* at 14. The court looked to the Supreme Court's jurisprudence regarding excessive awards of punitive damages, reasoning that statutory damages under Section 616(a)(1)(A) are non-compensatory and hence equivalent to punitive damages for constitutional purposes. *Id.* The court interpreted the Supreme Court's precedents as implying that punitive damages are inherently excessive in the absence of actual harm. *Id.* The court reasoned that punitive damages are excessive *a fortiori* if they threaten to bankrupt a company for harmless conduct. *Id.* The court held that the awards would be unconstitutional for similar reasons under *St. Louis Iron*

*Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), which the court construed as holding that the Due Process Clause prohibits awards of statutory damages that are highly disproportionate to actual damages. *Id.* at 14-15.

Several days after the district court issued its decision, the President signed into law the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (June 3, 2008) (Clarification Act). The purpose of the Clarification Act is to withdraw the availability of statutory damages and punitive damages where the defendant's violation consists solely of printing an expiration date, as opposed to a card number, and the violation occurred prior to the effective date of the Act. Specifically, Section 3(a) of the Clarification Act provides that "any person who printed an expiration date on any receipt \* \* \* between December 4, 2004, and the date of enactment of this subsection but otherwise complied with the requirements of section 605(g) for such receipt shall not be in willful noncompliance with section 605(g)," and hence will not be subject to the remedies for willful violations in Section 616, "by reason of printing such expiration date on the receipt." 122 Stat. 1566 (to be codified at 15 U.S.C. § 1681n(d)).

Section 3(b) of the Clarification Act makes this change applicable to pending as well as future suits. *Id.* Thus, insofar as particular receipts issued by the defendants in these cases contained only expiration dates, statutory damages are no

longer available with respect to such receipts. Receipts that contained untruncated card numbers, in contrast, remain subject to statutory damages – provided, as always, that willfulness is proven.

### **C. Standard of Review**

Decisions of district courts on questions of constitutional law are subject to *de novo* review. *United States v. Brown*, 364 F.3d 1266, 1268 (11th Cir.), *cert. denied*, 543 U.S. 879 (2004).

## **SUMMARY OF ARGUMENT**

1. It is a bedrock principle of constitutional adjudication that federal courts do not pass on the constitutionality of an Act of Congress unless and until it is necessary to do so. The district court flouted that basic principle here. The court undertook to decide the constitutionality of the statutory damages provision of Section 616(a)(1)(A) of the FCRA before any jury has found the defendants to be liable under that provision and before any statutory damages have been awarded. Moreover, the court undertook to determine whether awards of statutory damages would be unconstitutionally excessive when the amount of any award is unknown and could prove to be zero. The district court made a series of speculative assumptions about the likely magnitude of future awards, but the court's assumptions are unfounded, and they ignore the fact that *no* awards of statutory damages will be made until and unless

a jury finds that the defendants' actions were willful – a factual issue that the defendants themselves are contesting. Under these circumstances, the district court had no basis for passing on the constitutionality of Section 616(a)(1)(A), and this Court should remand the cases for further proceedings while deferring adjudication of the constitutionality of the statute until the point (if ever) where that question must be addressed and can be resolved in the context of concrete awards of statutory damages.

2. Assuming *arguendo* that the constitutional issues are appropriate for resolution at this point, the district court's ruling that Section 616(a)(1)(A) is unconstitutionally vague is flatly incorrect. The statute provides defendants with specific notice of the minimum (\$100) and maximum (\$1000) award of statutory damages that a plaintiff may claim. The Supreme Court's precedents make clear that such notice is constitutionally sufficient, even if Congress has not specified the criteria to be employed in fixing the amount of the award within that range. Even in the criminal context, the Supreme Court has held that a statute providing notice of the minimum and maximum penalties which a defendant faces, such as "not more than \$10,000 or not more than ten years," is sufficient without more to satisfy the requirements of the vagueness doctrine. It follows *a fortiori* that Section 616(a)(1)(A) is not unconstitutionally vague, for not only does it likewise specify the

permissible range of liability, but it is a civil statute, and the Due Process Clause requires less specificity in the civil context than it does when criminal liability is at stake.

3. The district court also erred in holding that any award of statutory damages in these cases would be unconstitutionally excessive. Given the speculation required to calculate the magnitude of awards that have yet to be made, the district court should have postponed any excessiveness review until it had actual awards before it. But the district court's excessiveness holding is flawed for reasons that go far beyond its mere prematurity.

First, contrary to the district court's assumption, the statutory damages provision of Section 616(a)(1)(A) is not punitive. Under the terms of the statute, statutory damages are available *in lieu of* actual damages and *in addition to* punitive damages. That statutory framework strongly indicates that statutory damages under Section 616(a)(1)(A) were designed primarily with compensatory rather than punitive goals in mind. It is the punitive character of punitive damages and civil penalties that subjects them to excessiveness review under the Due Process Clause in the first place, and where statutory damages play a fundamentally different role, constitutionally based excessiveness review never comes into play.

Second, assuming *arguendo* that excessiveness review is in proper under the Due Process Clause, the governing standards are those prescribed for civil penalties in *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71 (1919). The standard of judicial review under *Williams* is highly deferential, and Section 616(a)(1)(A) readily meets that standard. *Williams* makes clear that the excessiveness of a civil penalty depends not on the impact of the defendant's action on the plaintiff before the court, as the district court thought, but instead on the potential impact to society at large from the defendant's course of conduct. As for the district court's concern that an award of statutory damages will be financially ruinous to the defendants, there are ample ways to avoid that result without striking down Section 616(a)(1)(A) itself.

Third, the district court erred in holding that awards of statutory damages in these cases would run afoul of the standards developed by the Supreme Court for reviewing punitive damages. When a court is presented with a civil penalty whose bounds have been set by the legislature rather than an unbounded award of punitive damages by a jury, the concerns about fair notice that animate the Supreme Court's punitive damages jurisprudence are inapplicable. In any event, even if the standards for reviewing punitive damages were applied, awards of statutory damages in these cases would still pass muster.

## ARGUMENT

### SECTION 616(a)(1)(A) OF THE FAIR CREDIT REPORTING ACT IS CONSTITUTIONAL

#### **I. The District Court Should Not Have Reached the Constitutionality of the Statutory Damages Provision Prior to Any Determination of Liability or Award of Damages**

“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality \* \* \* unless such adjudication is unavoidable.” *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring). The decision of the district court in these cases flouts that rule of judicial restraint in dramatic fashion. The district court reached out to decide the constitutionality of a federal statute that has not yet been applied and may *never* be applied in these cases. In so doing, it undertook to decide the constitutional excessiveness of hypothetical statutory damage awards whose magnitude cannot now be known and could turn out to be zero. A more complete departure from principles of judicial restraint in constitutional adjudication would be hard to imagine.

As noted above, statutory damages are available under Section 616(a)(1)(A) only if a jury finds that a defendant’s violation of the FCRA was willful. There have

been no such findings in these cases. Indeed, the cases have not yet gone to trial. Although the district judge regarded a determination of willfulness as a foregone conclusion, the defendants deny that their conduct was willful (see p. 10 *supra*), and the disagreement between the plaintiffs and the defendants regarding willfulness is one for juries to resolve. *Cf. Day v. Liberty Nat. Life Ins. Co.*, 122 F.3d 1012 (11th Cir. 1997), *cert. denied*, 523 U.S. 1119 (1998) (ADEA suit) (“Generally, willfulness is a question of fact for the jury”). If the juries find that the defendants’ violations were not willful, or if the cases simply settle before they reach the juries, no award of statutory damages will be made. And in that event, there will be no need for the district court or this Court to pass on the constitutionality of the statute at all.

This Court invoked judicial restraint in similar circumstances in *Wyzykowski v. Department of Corrections*, 226 F.3d 1213 (11th Cir. 2000). In *Wyzykowski*, a habeas petitioner argued that the one-year limitations period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 violated the Suspension Clause in habeas cases involving claims of actual innocence. This Court declined to decide that constitutional question because the district court had yet to determine whether the petitioner was actually innocent. Citing Justice Brandeis’s opinion in *Ashwander*, the Court held that “the factual issue of whether the petitioner can make a showing of actual innocence should be first addressed, before addressing the

constitutional issue of whether the Suspension Clause requires such an exception for actual innocence.” *Id.* at 1218-19. So too here: the factual question of whether the defendants have committed willful violations of the statute should be resolved before any court addresses the constitutionality of the statutory remedies for such violations.

Moreover, even if willfulness *is* found and statutory damages *are* awarded, the magnitude of any awards cannot be known until the awards are actually made. An award of statutory damages cannot properly be reviewed for excessiveness under the Due Process Clause until and unless there is a specific award to review. Indeed, we know of no other case in which a court has purported to find an award constitutionally excessive – much less invalidate an Act of Congress on the ground that it authorizes such an award – before any award has been made.

The district court assumed that it could determine the minimum award of statutory damages under Section 616(a)(1)(A), and therefore could decide whether the smallest possible award would be unconstitutionally excessive. But if the juries do not find that the defendants’ actions were willful, there will be no award of statutory damages at all. And even if there is an award, its minimum size will depend on facts that are not yet known, such as what proportion of the printed receipts contain only expiration dates and therefore are not subject to statutory damages under the Clarification Act (see p. 14 *supra*), and how many class members exercise their

right to opt out of the proposed classes. Thus, it is impossible to know at this point what the minimum award, if any, will be. Moreover, further proceedings may also elicit other facts, such as evidence about whether any class members have suffered actual financial losses, that would be germane to the excessiveness inquiry even under the district court's own reasoning. Thus, claims that awards of statutory damages will be unconstitutionally excessive cannot be resolved prior to trial, as the district court tried to do, by simply making a series of speculative assumptions about how the litigation will turn out.

The district court appears to have felt that the availability of statutory damages should be resolved at this point in the litigation to spare the litigants, and in particular the defendants, from the burden of a trial that would not lead (in the district court's view) to a constitutionally permissible remedy. No. 08-13510 Doc. 28, p. 13. But premature adjudication of the constitutionality of Acts of Congress cannot be justified on the ground of convenience to the parties. Moreover, as noted above, the complaints are seeking other remedies in addition to statutory damages – specifically, punitive damages and injunctive relief. The district court's constitutional holding has no bearing on those other forms of relief and does not foreclose the plaintiffs from pursuing them. Thus, the court was wrong to think that its invalidation of Section

616(a)(1)(A) would suffice, without more, to bring this litigation to a close and avoid the need for further proceedings.

## **II. The Statutory Damages Provision Is Not Unconstitutionally Vague**

As the foregoing discussion shows, the district court erred in deciding the constitutionality of Section 616(a)(1)(A) at this stage of the litigation. The court compounded that error by concluding that the statute violates the requirements of the Due Process Clause. As we now show, that conclusion is manifestly wrong.

Section 616(a)(1)(A) permits the victim of a willful violation of the FCRA to recover “not less than \$100 and not more than \$1,000” in statutory damages. The statute does not specify criteria to be used in selecting an award within that statutory range. There is nothing novel about that feature of the statute. Other federal laws likewise provide for the recovery of statutory damages without prescribing the criteria for choosing an award, and the statutory range is often vastly greater than the \$900 difference between the maximum and minimum awards authorized by Section 616(a)(1)(A). For example, under the Copyright Act, a defendant who engages in willful copyright infringement is subject to statutory damages ranging from \$750 to \$150,000 per infringed work. 17 U.S.C. § 504(c)(2). Similarly, under the Communications Act of 1934, persons who illegally disclose or use the contents of private telephone calls and other wire communications are subject to statutory damages

ranging from \$1,000 to \$10,000, and when the violation is committed “willfully and for purposes of direct or indirect commercial advantage or private financial gain,” the court “in its discretion” may increase the award “by an amount of not more than \$100,000.” 47 U.S.C. § 605(d)(3)(C)(i)(II), (ii).<sup>5</sup>

The district court held that Congress’s failure to prescribe criteria for the calculation of statutory damage awards under Section 616(a)(1)(A) renders the statute unconstitutional under the void-for-vagueness doctrine. No. 08-13510 Doc. 28, 7-12. But the court failed to identify any decision that supports that holding. Indeed, the court did not cite any vagueness decisions at all. See *id.*

The district court’s decision to invalidate an Act of Congress on constitutional grounds without identifying any precedential support is at once remarkable and telling. Not only do existing precedents not support the district court’s vagueness holding, but they categorically foreclose it. In particular, the district court’s holding is flatly inconsistent with the Supreme Court’s due process jurisprudence regarding indeterminate sentencing statutes in criminal cases.

---

<sup>5</sup> Other federal statutes set a fixed quantum of statutory damages but give the district court discretion over whether to award statutory damages at all, without providing criteria for the exercise of that discretion. See, e.g., *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 816-18 (11th Cir. 2004) (district court has discretion whether to award statutory damages for violations of federal wiretap statute).

Prior to the enactment of the Sentencing Reform Act of 1984, Congress generally prescribed maximum sentences for federal crimes (for example, “fined not more than \$10,000, or imprisoned not more than ten years, or both”), but did not provide any sentencing criteria or otherwise give statutory guidance regarding the imposition of sentences in particular cases. Instead, “Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range” specified by statute. *Mistretta v. United States*, 488 U.S. 361, 364, 109 S. Ct. 647, 651 (1989). Under that system, “[j]udges and defendants alike were ‘[l]eft at large, wandering in deserts of uncharted discretion,’” and “‘similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences.’” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2628 (2008); see *Mistretta*, 488 U.S. at 366, 109 S. Ct. at 652 (noting “the great variation among sentences imposed by different judges upon similarly situated offenders”). Many states used similar indeterminate sentencing schemes, often vesting the resulting sentencing discretion in juries rather than judges. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n.8, 86 S. Ct. 518, 522 n.8 (1966).

If the district court were correct that it is unconstitutional for Congress to specify a range of statutory damages in civil suits without prescribing criteria for fixing damages within the specified range, then Congress’s longstanding approach

to indeterminate federal sentencing would be unconstitutionally *a fortiori*. But the Supreme Court has held squarely that indeterminate sentencing statutes do *not* offend the void-for-vagueness doctrine.

In *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198 (1979), the Court rejected a vagueness challenge to two federal criminal statutes that prescribed different ranges of penalties for the same criminal conduct. One statute provided that the defendant “shall be fined not more than \$5,000, or imprisoned not more than five years, or both,” while the other provided for a fine of “not more than \$10,000” or imprisonment for “not more than two years” or both. The defendant argued that the statutes were void for vagueness because they failed to provide adequate notice of the penalties to which the defendant was exposed. The Supreme Court rejected the vagueness claim, holding that “[s]o long as overlapping criminal provisions clearly define the conduct prohibited and punishment authorized, *the notice requirements of the Due Process Clause are satisfied.*” 442 U.S. at 123, 99 S. Ct. at 2204 (emphasis added). That standard was met because “[t]he provisions in issue here \* \* \* unambiguously specify the activities proscribed and the penalties available upon conviction.” *Id.* (emphasis added). Thus, the Court found it sufficient for “the notice requirements of the Due Process Clause” that the statutes gave “unambiguous” notice of the range of criminal penalties to which a defendant could be subjected – in that

case, a fine ranging from \$0 to \$10,000, and a prison term ranging from no time at all up to five years.

*Batchelder* disposes of the district court's vagueness ruling. Like the statutes at issue in *Batchelder*, Section 616(a)(1)(A) sets minimum and maximum levels for statutory damages without specifying criteria for choosing within that range. If a statute that allows a defendant to be "fined not more than \$5,000, or imprisoned not more than five years, or both," provides criminal defendants with constitutionally sufficient notice of the potential magnitude of their liability, as the Court held in *Batchelder*, then a statute providing that willful violations of the FCRA are subject to statutory damages "not less than \$100 and not more than \$1,000" necessarily provides sufficient notice here. Indeed, notice concerns have even less resonance in the present context than they did in *Batchelder*, because the FCRA is an exercise in economic regulation and the liability in question is civil rather than criminal. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193 (1982) ("economic regulation is subject to a less strict vagueness test \* \* \* [and] [t]he Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992) ("To find a civil statute void for vagueness, the

statute must be so vague and indefinite as really to be no rule or standard at all”) (internal quotation marks omitted).

In the proceedings below, the defendants sought to rely on the Supreme Court’s decision in *Giaccio, supra*. In that case, the Supreme Court struck down on vagueness grounds a state statute empowering criminal juries to impose the costs of the trial on an acquitted defendant. The statute itself provided no criteria for determining what conduct by the defendant would warrant the imposition of costs, and judicial precedents spoke only in terms of vague generalities like “misconduct.” The Court held that the law was unconstitutional because it “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” 382 U.S. at 402-403, 86 S. Ct. at 521. In so doing, however, the Court took care to add that “we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.” *Id.* at 405 n.8, 86 S. Ct. at 522 n.8. Thus, *Giaccio* is entirely consistent with the Court’s subsequent approval of indeterminate sentencing statutes in *Batchelder*, and it casts no doubt on the constitutionality of Section 616(a)(1)(A).

The district court worried that, without the benefit of statutory criteria, juries would be left at sea with no principled means of deciding where to fix the amount of

damages within the statutory range. But there is no reason why courts cannot provide juries with guidance regarding the considerations that may be taken into account in setting an award. For example, as noted above, the Copyright Act provides an extremely wide range of statutory damages for willful copyright infringement (\$750 to \$150,000 per work) without specifying any statutory criteria. The courts have filled that lacuna by identifying a variety of factors relating to the goals of the statute. See, e.g., *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1116-17 (2d Cir. 1986) (enumerating factors). When a litigant invokes his Seventh Amendment right to have statutory damages under the Copyright Act determined by a jury, see *Feltner v. Columbia Picture Television, Inc.*, 523 U.S. 340, 347-55, 118 S. Ct. 1279, 1284-88 (1998), those same factors are available to provide guidance to the jury as well as the judge.

The district court regarded it as an invasion of the legislative function for a court to develop criteria for choosing the appropriate amount of damages within the statutory range between \$100 and \$1000. But that is precisely what courts have done for decades under other federal statutes such as the Copyright Act, drawing appropriate guidance from the structure and purpose of the statutes. And federal courts performed the same function in criminal cases prior to 1984. Faced with criminal statutes that provided a broad range of permissible criminal sentences (e.g.,

“not more than \$10,000” and “not more than ten years”), courts had to develop criteria for imposing sentences within that range. The exercise of that function by federal judges may have had undesirable results as a matter of sentencing policy, but no court has ever suggested that it offended the constitutional separation of powers.

Indeed, the Supreme Court’s decision in *Mistretta* rests on precisely the opposite premise. In *Mistretta*, the Court rejected a separation-of-powers challenge to the Sentencing Commission because, *inter alia*, “the Judicial Branch, as an aggregate, [historically] decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances.” 488 U.S. at 395, 109 S. Ct. at 667; see also *Loving v. United States*, 517 U.S. 748, 756-68, 116 S. Ct. 1737, 1742-48 (1996) (exercise by President of delegated authority to define aggravating factors that permit imposition of death penalty in military capital cases does not violate separation of powers). Thus, there is not constitutional impediment to having federal judges provide guidance to juries about the factors relevant to the assessment of statutory damages under Section 616(a)(1)(A).

### **III. Awards of Statutory Damages in These Cases, If Any, Will Not Be Unconstitutionally Excessive**

For reasons explained above, the district court’s excessiveness ruling is fatally premature. But the problems with the district court’s excessiveness ruling are not

confined to mere prematurity. Even if all of the district court’s assumptions about the future course of the litigation were to come true, the court’s conclusion that awards of statutory damages would be unconstitutionally excessive is wrong as a matter of law. As we now show, awards of statutory damages under Section 616(a)(1)(A) are not subject to excessiveness review under the Due Process Clause in the first instance, and even if they were, there is no reason why such awards would run afoul of the relevant due process standards in these cases.

**A. Statutory Damages under Section 616(a)(1)(A) Are Not Punitive**

The district court’s excessiveness ruling rests on the premise that statutory damages under Section 616(a)(1)(A) are punitive rather than compensatory, and therefore are subject to the due process limitations that govern statutory civil penalties or punitive damages. No. 08-13510 Doc. 28, pp. 13-15. As we show below, even if the statutory damages provision *were* punitive, the provision would readily pass constitutional muster. But the district court’s initial assumption about the punitive character of the statutory damages provision is itself wrong. And without that assumption, the due process jurisprudence on which the district court relied never comes into play.<sup>6</sup>

---

<sup>6</sup> The district court’s opinion states that the United States “concede[s] that the award of more than \$100 in a particular transaction would represent punishment \* \* \* .” No. 08-13510 Doc. 28, p. 11. The United States made no such concession,

The clearest indication that Congress intended for statutory damages under Section 616(a)(1)(A) to serve a compensatory role, rather than a punitive one, comes from the language and structure of the section. As noted above, Section 616 originally provided for the recovery of actual damages and punitive damages. See p. 6 *supra*. When Congress amended the Fair Credit Reporting Act in 1996 to allow consumers to recover statutory damages, it made them available *in addition to* punitive damages, but *in lieu of* actual damages. See 15 U.S.C. § 1681n(a)(1)(A), (a)(2). Thus, a plaintiff who chooses to recover actual damages must forgo statutory damages, and vice versa.

The fact that recovery of actual damages precludes an award of statutory damages strongly suggests that Congress conceived of statutory damages as an alternative means of compensating plaintiffs for their injuries. By the same token, the fact that statutory damages are available in addition to punitive damages is an equally strong indication that Congress did not regard statutory damages as form of punishment.<sup>7</sup> While Congress is free as a constitutional matter to impose multiple

---

and the court's contrary understanding was mistaken.

<sup>7</sup> Section 616(a) of the FCRA differs in this respect from the Copyright Act, which does not separately authorize punitive damages, and where statutory damages therefore may be called on to serve punitive as well as other functions. See, *e.g.*, *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).

punishments in a single proceeding (*cf. Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 679 (1983)), it had no practical need to deploy statutory damages as an additional penalty under Section 616, because the existing punitive damages provision already gave juries and courts the power to impose any level of financial punishment that may be deemed necessary. And if statutory damages *were* intended to serve as a form of punishment, Congress presumably would have made them available in all cases under Section 616, rather than withholding them in cases where plaintiffs seek compensation for their actual losses.

There are obvious practical reasons why Congress might have wished to offer statutory damages as a remedial alternative to the recovery of actual damages. In many cases, though certainly not all, the injuries suffered by a victim of identity theft will not consist of out-of-pocket costs, such as payment for goods obtained by the identity thief, but instead will entail the time and effort required to identify and repair the damage to the plaintiff's credit records and financial accounts. Those injuries are very real, but they may be difficult and expensive to prove and quantify in court. *Cf. Douglas v. Cunningham*, 294 U.S. 207, 209, 55 S. Ct. 365, 366 (1935) (statutory damages provision of Copyright Act provides compensation "where the rules of law render difficult or impossible proof of damages"). Moreover, even if a victim of identity theft has suffered readily demonstrated out-of-pocket losses, he may have

difficulty proving that the defendant before the court, rather than some other merchant, was the source of the receipt that found its way into the hands of the identity thief. In such cases, the modest statutory damages provided by Section 616(a)(1)(A) provide a measure of compensation for injuries that might otherwise effectively go uncompensated.

In saying this, we should not be understood to suggest that Section 616(a)(1)(A) serves compensatory purposes in every case, or that it is unavailable as a statutory matter when there are no actual losses to be compensated. The terms of Section 616(a)(1)(A) do not make financial or other losses a precondition for the recovery of statutory damages. As a result, statutory damages are available not only to plaintiffs whose losses are hard to quantify or prove, but also to those who have not suffered any identifiable loss at all. See, e.g., *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“statutes such as the Fair Credit Reporting Act provide for modest [statutory] damages without proof of injury”); *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 622 (7th Cir. 2007) (“actual damages are not necessarily a precondition for suit” under Section 616); *Ramirez v. Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1168 (D. Kan. 2008); *Follman v. Village Squire, Inc.*, 542 F. Supp. 2d 816, 822 (N.D. Ill. 2007); *Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753, 755-56 (E.D. Pa. 2007); *Arcilla v. Adidas Promotional Retail Operations*,

*Inc.*, 488 F. Supp. 2d 965, 974 (C.D. Cal. 2007); *cf. Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982) (statutory damages for violation of Truth In Lending Act “must be imposed \* \* \* regardless of the district court’s belief that no actual damages resulted or that the violation is *de minimis*”).

In cases where no identifiable losses have been shown to have occurred, statutory damages primarily serve a deterrent function rather than a compensatory one, providing merchants with a financial incentive to comply with the law even when lawbreaking does not result in an identifiable loss. But even in those cases, nothing about the text, structure, or legislative history of Section 616(a)(1)(A) suggests that Congress intended for statutory damages to *punish* wrongdoers. That is what punitive damages are for – and punitive damages are independently available under Section 616(a)(2), and were already available when Congress added statutory damages to the law in 1996. Thus, the district court’s assumption that statutory damages are necessarily punitive rather than compensatory is fundamentally misconceived.<sup>8</sup>

---

<sup>8</sup> The fact that statutory damages have a deterrent effect cannot be enough by itself to trigger excessiveness review under the Due Process Clause. As this Court has pointed out, “[c]ompensatory damages serve a very strong deterrent function.” *Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1575 (11th Cir. 1989) (emphasis added). Yet no one would suggest that compensatory awards must therefore be reviewed for excessiveness under the Due Process Clause. It is the retributive character (and the potentially unlimited magnitude) of punitive damages,

**B. Awards of Statutory Damages in These Cases Would Not Be Unconstitutionally Excessive in Any Event**

The district court held that any awards of statutory damages would be unconstitutionally excessive under *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71 (1919). Because statutory damages under Section 616(a)(1)(A), unlike the civil penalties at issue in *Williams*, are not punitive in nature, the due process standards articulated in *Williams* simply do not apply. But even if they did apply, Section 616(a)(1)(A) readily passes muster under *Williams*.

1. In *Williams*, an Arkansas statute provided that a railroad passenger who was charged more than the authorized fare could sue the railroad to recover a statutory penalty of \$50 to \$300 per violation. In the case before the Court, two passengers who were each overcharged by 66 cents brought suit and recovered \$75. The railroad sought to overturn the award under the Due Process Clause as impermissibly excessive.

The Supreme Court characterized the statute as “essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate.” 251 U.S. at 66, 40 S. Ct. at 73. The Court held that while the Due Process Clause limits “the power of the states to prescribe penalties for violations of their laws, \* \* \* the

---

not their deterrent effect, that triggers due process review.

states still possess a wide latitude of discretion in the matter,” and “their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* at 66-67, 40 S. Ct. at 73.

The Court held that the Arkansas penalty was permissible under this standard “[w]hen it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates.” *Id.* at 67, 40 S. Ct. at 73. The Court acknowledged that “[w]hen the penalty is contrasted with the overcharge possible in any instance it of course seems large, but \* \* \* its validity is not to be tested that way” – *i.e.*, not by comparing it to the actual private injury in any individual case. *Id.* Instead, “the Legislature may adjust its amount to the public wrong rather than the private injury.” *Id.* at 66, 40 S. Ct. at 73.

2. The district court regarded the hypothetical minimum award of statutory damages in these cases as unconstitutionally excessive under *Williams* for two reasons. The first was its assumption that the class members in this case have not suffered any actual injury, whereas the plaintiffs in *Williams* had suffered actual losses, albeit *de minimis* ones. No. 08-13510 Doc. 28, p. 14. But *Williams* explicitly provides that the excessiveness inquiry looks to “the public wrong rather than the

private injury,” and that “the validity [of the award] is not to be tested” by measuring it against “the overcharge possible in any instance.” 251 U.S. at 67, 40 S. Ct. at 73. Instead, the considerations that mattered in *Williams* were “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates.” *Id.* at 66, 40 S. Ct. at 73.

Here, those considerations point strongly toward the conclusion that awards of statutory damages would *not* be unconstitutionally excessive. First, “the interests of the public” are at least as consequential here as they were in *Williams*. As explained above, identity theft causes billions of dollars of losses to consumers and financial institutions, and it threatens the integrity of the consumer credit system. See p. 8 *supra*. There is a strong public interest in prohibiting commercial practices that provide identity thieves with opportunities to “pick off” key card account information.” Senate FACTA Report at 13. Second, the “opportunities for committing the offense” are just as “numberless” here as they were in *Williams*; the willful failure of a merchant to meet its obligations under FACTA can result in the printing of thousands or even millions of card numbers. Finally, the need to “secur[e] uniform adherence” to the identity theft protections of FACTA is surely as great as the need to secure uniform adherence to railroad passenger tariffs in

*Williams*. Under these circumstances, the minimum statutory award of \$100 cannot possibly be dismissed as “wholly disproportionate to the offense.”<sup>9</sup>

Moreover, particularly at this stage of the litigation, there is no basis for the district court’s factual assumption that the class members have not suffered actual losses. The proposed classes do not exclude individuals who have suffered financial losses; they merely allow such individuals to opt out.<sup>10</sup> Assuming that the classes are certified as proposed, the mere existence of an opt-out option does not mean that the remaining class members will not have suffered actual damage. As long as the potential burden of litigation exceeds a customer’s amount of actual damages, class members who have suffered actual losses are better off staying in the class and taking their share of the potential statutory damage award than litigating individually in

---

<sup>9</sup> In *Williams* itself, the Supreme Court sustained an award of \$75. Since *Williams* was decided in 1919, the Consumer Price Index has increased by a factor of more than 12. See <[http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm)>. Thus, in current dollars, the minimum penalty in *Williams* was more than \$600 per violation, and the actual award was more than \$900 – nearly a full order of magnitude greater than an award of \$100 under Section 616(a)(1)(A).

<sup>10</sup> The district court stated that “[t]he descriptions of the \* \* \* putative classes expressly exclude all persons who want to pursue claims for actual damages.” No. 08-13510 Doc. 28, p. 3. That is incorrect. The proposed classes encompass all persons whose card numbers and/or expiration dates were printed by the defendants after the effective dates of FACTA, without regard to whether they have or wish to pursue claims for actual damages. See No. 08-13510 Doc. 1, p. 4 (Complaint ¶ 20); No. 08-13616 Doc. 16, p. 6 (Second Amended Complaint ¶ 17).

pursuit of actual damages. Hence, it is entirely possible that members of the plaintiff class *will* have suffered actual injuries, even after the opt-out mechanism runs its course. This provides yet another illustration of why the district court, even under its own view of the law, acted prematurely in trying to measure the excessiveness of potential awards before the cases have gone to trial.

3. The other basis for the district court's excessiveness holding was its determination that even the smallest quantum of statutory damages provided by Section 616(a)(1)(A) would bankrupt the defendants. The district court reasoned that, if it certified the nationwide classes proposed by the plaintiffs, the cumulative impact of an award of \$100 to every class member would be more than the defendants could afford to pay. No. 08-13510 Doc. 28, pp. 3-4, 13, 15.

At the time that the court made that financial assessment, Section 616(a)(1)(A) made statutory damages available not only for the printing of untruncated card numbers, but also for the printing of expiration dates. As a result, the district court assumed that every class member would be entitled to statutory damages. But within a week of the court's ruling, Congress made statutory damages *unavailable* in instances where only the expiration date has been printed. See p. 14 *supra*. As a result, members of the proposed classes whose receipts contained only the expiration dates of their cards can no longer claim statutory damages. For that reason, even

granting all of the district court's other assumptions, the size of any awards can no longer be calculated by multiplying \$100 times the number of customers in the proposed classes. Until it is known what percentage of the transactions involved the printing of card numbers, as opposed (or in addition) to expiration dates, the number of class members who are still potentially eligible to recover statutory damages cannot be known either, and the district court's financial calculus cannot be sustained.<sup>11</sup>

In any event, even if it *could* be demonstrated that the defendants would be unable to pay any classwide awards of statutory damages, the Court's conclusion that Section 616(a)(1)(A) is therefore unconstitutional is a *non sequitur*. The financial concern identified by the district court is not caused by Section 616(a)(1)(A) itself, but by the interaction between Section 616(a)(1)(A) and class certification under Rule 23 – more particularly, by the district court's announced intention (No. 08-13510 Doc. 28, p. 13) to certify classes under Rule 23 despite the perceived impact on the

---

<sup>11</sup> As noted above, the Clarification Act applies by its terms to pending as well as future cases. The fact that the Clarification Act became law after the district court's judgment does not affect its applicability to these appeals. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102, 109 (1801) (“if subsequent to the judgment [of the trial court] and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed”); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

defendants' constitutional rights. If that financial impact had constitutional implications, the solution would not be to hold an Act of Congress unconstitutional, but instead to manage the class certification process so as to avoid the problem in the first place.

There are a variety of means by which the district court could allow the litigation to go forward without producing financially prohibitive liability under Section 616(a)(1)(A). One option would be to limit prospectively the class award, as suggested by Judge Newman in his concurring opinion in *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 26-28 (2d Cir. 2003). Another option would be to reduce the award returned by the jury to the extent – and only to the extent – that it exceeds any constitutional limits. Finally, some courts have declined to certify statutory-damage class actions altogether in order to avoid the imposition of excessive awards. See, e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004) (one factor in superiority analysis under Rule 23(b)(3) is “whether the potential damages available in a class action are grossly disproportionate to the conduct at issue”); *Helms v. ConsumerInfo.com, Inc.*, 236 F.R.D. 561, 566-68 (N.D. Ala. 2005); but see *Murray*, 434 F.3d at 953-54. That approach has typically been employed in cases of strict liability or technical violations of complex regulatory schemes (*Klay*, 382 F.3d at 1271), not in cases of willful misconduct. But if constitutional concerns

were thought (wrongly, in our view) to foreclose altogether the imposition of statutory damages on a classwide basis, the superiority standard of Rule 23(b)(3) (“superior to other available methods for the fair and efficient adjudication of the controversy”) could accommodate those concerns.

In identifying these options, we should not be understood to concede that any of them, particularly refusing to certify a class altogether, is constitutionally required here.<sup>12</sup> The district court’s due process reasoning amounts to a rule that statutory damages must make lawbreaking affordable in order to be constitutional. That is, at the very least, not a self-evident proposition. But even if it is correct, the existence of these options shows that Section 616(a)(1)(A) can be implemented in these cases without producing an unconstitutionally excessive award. Thus, not only was the district court premature in declaring Section 616(a)(1)(A) unconstitutional, but it was wrong as a matter of law, for the statute itself is not unconstitutional at all.

---

<sup>12</sup> In our view, declining to certify a class based solely on speculation about the probability and magnitude of an eventual award would be extremely ill-advised, since it could leave class members without a meaningful remedy for willful violations of the law. Courts have typically chosen to defer dealing with concerns about potentially excessive awards until an award has actually been made and the magnitude and impact of the award can be assessed. See, e.g., *Ramirez*, 537 F. Supp. 2d at 1169; *Matthews v. United Retail, Inc.*, 248 F.R.D. 210, 216 (N.D. Ill. 2008); *Arcilla.*, 488 F. Supp. 2d at 973; *Krey v. Castle Motor Sales, Inc.*, 241 F.R.D. 608, 617-18 (N.D. Ill. 2007).

**C. Statutory Damages under Section 616(a)(1)(A) Are Not Subject To, and in Any Event Do Not Violate, Constitutional Limitations on Punitive Damages**

1. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), the Supreme Court formulated criteria for determining whether awards of punitive damages are impermissibly excessive under the Due Process Clause. *Gore* identified three basic “guideposts” for that inquiry: (1) “the degree of reprehensibility” of the defendant’s actions; (2) “the disparity between the harm or potential harm suffered” by the plaintiff and the magnitude of the award; and (3) “the difference between this remedy and the civil penalties authorized or imposed in comparable cases.” 517 U.S. at 575, 116 S. Ct. at 1598-99; *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520 (2003). The district court here held that any awards of statutory damages in these cases would be excessive under *Gore* and its progeny for the same reasons that the district court regarded them as excessive under *Williams*: because the court did not believe that any plaintiff class members have suffered actual harm and because the court thought that even the smallest award in a class action would bankrupt the defendants. No. 08-13510 Doc. 28, pp. 13-15.

These concerns have no more force under the Supreme Court’s punitive damages jurisprudence than they do under *Williams*. As explained above, the district

court was wrong to assume that none of the class members has suffered actual losses. But even if that assumption were correct, *Gore* and its progeny look to “the harm *or potential harm*” suffered by the plaintiffs. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1598 (emphasis added); *State Farm*, 538 U.S. at 418, 123 S. Ct. at 1520 (“the disparity between [the award and] the actual *or potential* harm suffered by the plaintiff”) (emphasis added); *TXO Production Co. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (“it is appropriate to consider the manitude of the *potential harm*”) (emphasis in original). Even if the defendants’ actions did not result in actual harm, the existence of thousands of alleged violations manifestly had the *potential* to cause losses to consumers on a wide scale. And the court’s belief that Section 616(a)(1)(A) will lead to the financial ruin of the defendants is misconceived for all of the reasons already discussed.

2. Having said this, we should add that the district court’s reliance on *Gore* and its progeny was misplaced for an additional and more fundamental reason. Assuming that statutory damages under Section 616(a)(1)(A) are subject to excessiveness review at all, they are governed by the standards for statutory penalties prescribed in *Williams*, not by the standards developed by the Supreme Court to oversee the awarding of punitive damages. As other courts have recognized, the awarding of statutory damages does not present the risks of unforeseeable and

unbounded liability that trigger the judicial scrutiny mandated by *Gore*. Indeed, *Gore*'s own framework makes clear that statutory damages are outside its ambit.

In framing the three “guideposts” in *Gore*, the Supreme Court presented them not as a test for excessiveness *per se*, but as a way of determining whether the defendant has received “adequate notice of the magnitude of the sanction that [the government] might impose” on him. *Id.* at 574, 116 S. Ct. at 1598 (emphasis added). As this Court noted in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1335 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999), “the essential legal issue is whether \* \* \* the[] facts indicate that [the defendant] had adequate notice that its conduct might subject it to this punitive damage award.” Thus, an “excessive” award of punitive damages is unconstitutional under *Gore* not simply because it is excessive, but because due process requires fair notice of potential liability, and an award of punitive damages that is grossly excessive when measured against the *Gore* criteria cannot reasonably have been anticipated.

Because the ultimate touchstone of *Gore* and its progeny is fair notice, *Gore*'s guideposts are irrelevant to statutory damages like those authorized by Congress in Section 616(a)(1)(A). Unlike punitive damages, which have no fixed limit, Section 616(a)(1)(A) establishes clear and specific upper and lower bounds that give a defendant notice of the magnitude of his potential liability. It was this statutory

feature that led the Supreme Court to hold in *Batchelder* that indeterminate criminal sentencing statutes provide criminal defendants with constitutionally adequate notice. Statutory damages under Section 616(a)(1)(A) provide equally adequate notice, as we have already explained above. Thus, with respect to statutory damages, *Batchelder* answers the question that *Gore* is designed to pose.

The *Gore* framework is also inapposite to statutory damages because it calls on a court to compare an award of punitive damages to “the civil penalties authorized or imposed in comparable cases.” 517 U.S. at 575, 116 S. Ct. at 1598-99. Assuming that statutory damages under Section 616(a)(1)(A) *are* penalties – a dubious assumption (see pp. 31-35 *supra*), but one that the district court had to make in order to invoke *Gore* in the first place – they are themselves “civil penalties authorized or imposed in comparable cases.” Thus, applying *Gore* here would mean comparing the statutory damages provision in Section 616(a)(1)(A) to itself.

The fact that *Gore* uses civil penalties as a constitutional benchmark is a further demonstration that civil penalties themselves do not pose the constitutional concerns animating *Gore*. As *Gore* explained, “a reviewing court engaged in determining whether an award of punitive damages is excessive should accord *substantial deference to legislative judgments concerning appropriate sanctions* for the conduct at issue.” 517 U.S. at 583, 116 S. Ct. at 1603 (emphasis added and internal quotation

marks omitted). If statutory damages under Section 616(a)(1)(A) are to be treated as a penalty, they necessarily embody “legislative judgments concerning appropriate sanctions,” and they are therefore entitled to “substantial deference” of a sort that punitive damages awarded by juries are not.

For all of these reasons, other courts have declined to subject statutory damages to excessiveness review under *Gore* and its progeny. For example, in *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008), the Sixth Circuit held that awards of statutory damages under the Copyright Act (see p. 23 *supra*) are subject to review not under *Gore*, but instead under the standard for civil penalties articulated in *Williams*. *Id.* at 587-88. The Sixth Circuit added that the *Williams* standard “is extraordinarily deferential – even more so than in cases applying abuse-of-discretion review.” *Id.* at 587.

In *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004), the district court likewise held that *Gore* is inapplicable to statutory damages under the Copyright Act. The court pointed out that under that statute (as here), “[s]tatutory damages exist in part because of the difficulties in proving – and providing compensation for – actual harm,” and “they may only be awarded when a plaintiff forgoes the right to collect actual damages \* \* \* .” *Id.* at 460. The court

reasoned that “[t]he unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress’s carefully crafted and reasonably constrained statute.” *Id.* The same reasoning applies with even greater force here, where the maximum award is \$1,000 per violation rather than \$150,000 per copyrighted work.<sup>13</sup>

To our knowledge, the district court in this case is the first court ever to review and invalidate statutory damages on the basis of *Gore*’s standards for reviewing punitive damages. The court erred in applying *Gore* to statutory damages in the first place; it erred in applying *Gore* to an award that has yet to be made; and it erred in concluding that Section 616(a)(1)(A) is incapable of producing an award that satisfies *Gore*. For all of these reasons, the decision must be reversed.

---

<sup>13</sup> In *Parker*, the Second Circuit stated that “it may be” that an award of statutory damages to a very large class would be subject to review under *Gore* and *State Farm*. 331 F.3d at 22. However, the court’s comment regarding the possibility of excessiveness review under *Gore* and *State Farm* was dictum. *Id.* (“At this point in this case, \* \* \* these concerns remain hypothetical”).

## CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

GREGORY G. KATSAS  
*Assistant Attorney General*

ALICE H. MARTIN  
*United States Attorney*

DOUGLAS N. LETTER  
SCOTT R. McINTOSH  
*Attorneys, Appellate Staff  
Civil Division, Room 7259  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
202-514-4052*

*Counsel for the United States*

September 22, 2008

## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 11,612 words.

---

Scott R. McIntosh  
Counsel for the United States

## CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2008, I filed and served the foregoing BRIEF FOR THE UNITED STATES by causing an original and five copies to be filed with the clerk of the court by first-class mail and by causing two copies to be served on each of the following counsel in the same manner:

William Perry Brandt  
Heather S. Esau Zerger  
Bryan Cave LLP  
3500 One Kansas City Place  
1200 Main Street  
PO Box 419914  
Kansas City, MO 64141-6914

Joshua D. Jones  
Maynard Cooper & Gale PC  
AmSouth Harbert Plaza, Suite 2400  
1901 6th Avenue North  
Birmingham, AL 35203-2618

Deepak Gupta  
Public Citizen Litigation Group  
1600 20th Street, NW  
Washington, DC 20009

---

Scott R. McIntosh

