Nos. 08-13510-BB and 03-13616 (consolidated)

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.,
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

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BRIEF FOR APPELLANTS BOBBIE HARRIS AND JULIE BEST GRIMES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, Appellants certify that the following persons and entities have an interest in the outcome of these appeals:

1. Acker, Honorable William M. Jr., United States District Judge;
2. Aughtman, Jay, counsel for Grimes and Long;
3. Angwin, Edward E., counsel for Harris;
4. Angwin Law Firm, counsel for Harris;
5. Beasley, Allen, Crow, Methvin, Portis & Miles, counsel for Grimes;
6. Boston Ventures, LP, Defendant-Appellee;
7. Bradley, Arant, Rose & White, counsel for Rave;
8. Butler, Thomas J., counsel for Mexican Specialty Foods;
9. Bryan Cave, LLP, counsel for Rave;
10. Crane-Hirsch, Daniel K., counsel for United States;
12. Gewin, James W., counsel for Rave;
13. Grimes, Julie Best, Plaintiff-Appellant;
14. Gupta, Deepak, appellate counsel for Harris and Grimes;

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16. Harris, Bobbie, Plaintiff-Appellant;

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18. Jones, Alexander W., Jr., trial counsel for Grimes and Long;

19. Jones, Joshua J., counsel for Mexican Specialty Foods;

20. Letter, Douglas N., appellate counsel for United States;

21. Long, Nimrod W.E., III, Plaintiff;

22. Martin, Alice, United States Attorney; counsel for United States;

23. Maynard, Cooper & Gale, P.C., counsel for Mexican Specialty;

24. McIntosh, Scott, appellate counsel for United States;

25. National Association of Consumer Advocates, *amicus curiae*;

26. National Consumer Law Center (NCLC), *amicus curiae*;

27. Pritchard, McCall & Jones, L.L.C., counsel for Grimes and Long;

28. Pritchard, William S., III, counsel for Grimes and Long;

29. Rave Motion Pictures, Birmingham, L.L.C., Defendant;

30. Rave Motion Pictures, Birmingham II, L.L.C., Defendant;

31. Rave Motion Pictures, Birmingham III, L.L.C., Defendant;

32. Rave Review Cinemas, L.L.C., Defendant;

33. Rubin, Richard, representing *amici curiae* NCLC, et al.;

34. Selden, A. Inge, III, counsel for Boston Ventures;

35. Tuley, Scarlett M., trial counsel for Grimes;

36. Vance, Joyce White, appellate counsel for United States;

37. United States of America, Plaintiff-Intervenor;

38. U.S. Public Interest Research Group, *amicus curiae*;

39. Wu, Chi Chi, counsel for *amici curiae* NCLC, et al.;

40. Zerger, Heather S. Esau, counsel for Rave.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because these appeals involve the constitutionality of an important federal statute. The decision below struck down a provision of the Fair Credit Reporting Act that permits consumers to recover statutory damages of not less than $100 and not more than $1,000 for willful violations of the Act. The district court held that the provision is unconstitutionally vague and would result in minimum statutory damages that are unconstitutionally excessive. The district court's ruling, and the void-for-vagueness and excessiveness rationales on which it is based, are unprecedented. So far as Appellants are aware, no previous court has deemed the statutory damages provision of any statute unconstitutional on those grounds.

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STATEMENT OF JURISDICTION

These two cases arise under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq*. The district court had subject matter jurisdiction under 15 U.S.C. § 1681p and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The district court issued its opinion and orders dismissing both cases on May 28, 2008. The plaintiffs in *Harris* (08-13510) and *Grimes* (08-13616) filed their notices of appeal on June 17 and 24, 2008, respectively, and the United States, as intervenor, filed its notices of appeal (Nos. 08-14018 and 08-14019) on July 23, 2008. All four notices of appeal were timely filed under Fed. R. Civ. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

Anyone who willfully violates the Fair Credit Reporting Act may be held civilly liable for either actual damages or statutory damages of "not less than $100 and not more than $1,000[.]" 15 U.S.C. § 1681n(a)(1)(A). These appeals present two questions:

1. Is the Fair Credit Reporting Act's statutory damages provision unconstitutionally vague on its face?

2. Are the $100 minimum statutory damages allowed by the Fair Credit Reporting Act unconstitutionally excessive on their face?

STATEMENT OF THE CASE

The Fair Credit Reporting Act (FCRA) is designed "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2205 (2007). A consumer affected by a violation of one of FCRA's requirements may bring a private action to deter and remedy those violations. If a violation is negligent, the consumer is entitled to actual damages. If a violation is *willful*—that is, if it is committed knowingly or in "reckless disregard of a requirement of FCRA," then "the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages." *Id.* at 2206. At issue in this appeal is the constitutionality of FCRA's statutory damages provision, 15 U.S.C. § 1681n(a)(1)(a), which the district court struck down on both vagueness and excessiveness grounds.

A. Proceedings and Disposition Below

These consolidated appeals arise out of two lawsuits brought by consumers alleging violations of a FCRA provision designed to protect consumer privacy and prevent identity theft. That

provision prohibits merchants from printing credit or debit card receipts bearing a consumer's full account number or expiration date. 15 U.S.C. § 1681c(g)(1). The consumers in these cases allege that the defendant merchants unlawfully printed their account numbers and expiration dates, and thus exposed the consumers to an increased risk of identity theft. [Harris RE1 at 3-4; Grimes RE24 at 5-6].[1] The plaintiffs allege that the defendants' violations of FCRA were willful and seek statutory damages, punitive damages, and injunctive relief. [Harris RE1 at 9-11; Grimes RE24 at 9-11]. The defendants deny that any violations were willful. [Harris RE4 at 3; Grimes RE24 at 4-6]. Both cases were brought as putative class actions, but at this point no classes have been certified, no trials have been held, neither liability nor willfulness has been determined, and no damages have been awarded.

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[1]Because these consolidated appeals are based on two separate district-court records, citations to the separate Record Excerpts are prefaced by the name of the relevant case, *Grimes v. Rave Motion Pictures* (03-13616-BB) ("Grimes") and *Harris v. Mexican Specialty Foods* (08-13510-BB), ("Harris"), followed by the document number and page number. The district court's memorandum opinion, which was filed in both cases (Grimes RE62; Harris RE28), is cited throughout as "Dist. Ct. Op.," followed by the page number.

Acting on its own initiative, the district court convened a joint status conference in these cases, as well as two other FCRA cases, and informed the parties that it believed FCRA's statutory damages provision to be unconstitutional. [Harris DN18 at 17-18]. In response to plaintiffs' argument that any constitutional analysis should await an award of damages, the court explained its view that a "guinea pig judge" was needed to test the statute's constitutionality:

> THE COURT: . . . Now, so what I'm suggesting is a possibility is to keep you all from spending your and my time worrying about class certification and getting ready for a trial on the merits of these cases, to let me go ahead and say what I think and agree with one of you, and y'all pick the one, that wants to file a motion for summary judgment, and backing up your assertion that it's unconstitutional with a little help from me, and I've given you some, and let me grant it and ice the rest of them while that case goes to the Eleventh Circuit.

[Harris DN18 at 17-18].

Following additional discussion, the district court invited all defendants to move for summary judgment and challenge the statute's constitutionality. [Harris DN18 at 29 ("I can't make you do it, but I invite all defendants to file motions for summary

judgment.")]. The court suggested that it contemplated only facial challenges to the statute—"we're talking about whether the statute is constitutional as it's drafted"—but also remarked that it was "possible, not probable, that there might have to be some factual development" concerning the potential impact on the defendants of a hypothetical damages award. [Harris DN18 at 18-19].

Despite the procedural posture of the cases, the district court granted the defendants' motions for summary judgment and declared FCRA's statutory damages provision unconstitutional, reasoning that the provision is impermissibly vague [Dist. Ct. Op. at 7-12] and authorizes minimum damages of $100 that are impermissibly excessive. [Dist. Ct. Op. at 12-15]. Even though both lawsuits requested relief other than statutory damages, the district court ordered the suits dismissed in their entirety. [Grimes RE63; Harris RE29].

B. Statutory Background

1. Fair Credit Reporting Act of 1970. The Fair Credit Reporting Act (FCRA) is a federal statute designed to protect "the confidentiality, accuracy, relevancy, and proper utilization" of consumer credit information by regulating its dissemination, giving consumers the right to dispute its accuracy, and requiring that consumers be given notice of any adverse action based on their credit reports. 15 U.S.C. § 1681(b). To that end, FCRA regulates the activities of consumer reporting agencies, those who furnish information to the reporting agencies, and the users of consumer reports. The Act is part of a package of federal consumer protection statutes, including the Truth in Lending Act and the Fair Debt Collection Practices Act, included within the larger Consumer Credit Protection Act (CCPA), which was first enacted in 1968. Unlike FCRA, most CCPA statutes impose strict liability and permit recovery of statutory damages without a scienter requirement.

Over the years, Congress has amended FCRA many times. *See generally* Chi Chi Wu and Elizabeth De Armond, FAIR CREDIT

REPORTING § 1.4 (6th ed. 2006) (surveying legislative history). Three FCRA amendments, made in 1996, 2003, and 2008, are particularly relevant here.

2. Consumer Credit Reporting Reform Act of 1996. In 1996, following years of deliberation, Congress passed the Consumer Credit Reporting Reform Act, which revised nearly every section of FCRA. Pub. L. No. 104-208, Div. A, Title II, Subtitle D, §§ 2401-2422, 110 Stat. 3009-426 to 3009-454 (1996).

One of the central motivations for reforming FCRA was Congress's judgment that the Act had not fulfilled its original goals as a result of under-enforcement. H. REP. NO. 45, 102d Cong., 1st Sess. 44 (1996). The original FCRA provided for recovery of only actual and punitive damages for willful violations. 15 U.S.C. § 1681n(1)-(2) (1970). Actual damages, however, could be very difficult or impossible to calculate in FCRA cases and thus failed to provide sufficient incentive for private enforcement. The new legislation sought to "strengthen the civil liability applicable in cases of both willful and negligent noncompliance with the FCRA." S. REP. NO. 103-209, at 6 (1993) ("CCRRA Senate Report").

As the Federal Trade Commission's Director of Credit Practices told Congress in his testimony, stronger civil liability measures, including statutory damages, were needed "because the statute was designed to be largely self-enforcing" and "the capacity of consumers to bring private actions to enforce their rights under the statute is at least equally as important" as public enforcement. CCRRA Senate Report at 6; *see also* Wu and De Armond, FAIR CREDIT REPORTING § 11.11 (noting FCRA "is largely dependent" on "private attorney general enforcement" and that "the addition of statutory damages promotes the private enforcement of the law, in this case a law which suffered greatly from lack of compliance and enforcement").

The 1996 legislation amended FCRA to provide modest statutory damages of between $100 and $1,000 for plaintiffs who can prove willful noncompliance. Pub. L. No. 104-208, Div. A, Title II, Subtitle D, § 2412(a)-(c), 110 Stat. 3009-426 (codified at 15 U.S.C. § 1681n(a)). In setting this range, Congress reduced the minimum amount from an initially proposed figure of $300 and consciously sought to "balance the rights of consumers who have

been wronged" with "concerns expressed" by the business community about the prospect of "unwarranted litigation." CCRRA Senate Report at 23-24. Congress struck this balance in part by allowing defendants to recover their reasonable attorneys' fees in connection with unwarranted litigation filings. 15 U.S.C. §§ 1681n(c), 1681o(b). As amended, FCRA's provision concerning damages for willful noncompliance reads in relevant part:

> Any person who willfully fails to comply with any requirement imposed under this subchapter [FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> > (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; . . .
> >
> > (2) such amount of punitive damages as the court may allow; . . .

15 U.S.C. § 1681n(a). Under the amended FCRA, consumers who are able to prove a willful violation may recover actual damages "or" statutory damages between $100 and $1,000, but not both.

3. Fair and Accurate Transactions Act of 2003 (FACTA). In 2003, Congress passed the Fair and Accurate Transactions Act, Pub. L. No. 108-159, 117 Stat. 1952 (FACTA),

which again made significant changes to FCRA, this time by preempting state laws affecting the credit reporting industry and introducing new federal measures to protect consumers from identity theft, a problem that had "reached almost epidemic proportions in recent years." H.R. REP. NO. 108-263, at 25 (2003). Identity theft occurs when someone commits fraud by using another person's identifying information, such as a social security number or credit account number. The fraud could include applying for or using credit in another's name, obtaining bank loans, employment, utility or cell phone service, or similar illegal conduct in the "true name" identity of the consumer whose information was misappropriated. *See Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 6 (2003). Anyone who owns a credit card, checking account, or savings account is a potential victim.

A 2003 study released by the FTC revealed that the cost of identity theft to consumers and the nation was staggering: Over 27 million Americans, or one in eight of all adults, had been

victims in the past five years and the estimated cost to consumers and the economy was over fifty billion dollars annually. *See* Federal Trade Commission, *Identity Theft Survey Report* (2003); *see also* Brief of *Amici* National Consumer Law Center, et al., at 15-20 (discussing prevalence and costs of identity theft).

To "protect consumers from identity thieves" and "limit the number of opportunities for identity thieves to 'pick off' key card account information," S. REP. NO. 108-166, at 3 (2003), FACTA amended FCRA to prohibit businesses from printing "more than the last 5 digits of the [credit] card number or the expiration date upon any [electronically printed] receipt provided to the card-holder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). Although the language of the amendment prohibits the printing of either account numbers "or" expiration dates, the focus at the time was the account-number truncation requirement. As the President said in signing the Act, "this law will help prevent identity theft before it occurs, by requiring merchants to delete all but the last five digits of a credit card number of store receipts." 39 Weekly Comp. Pres. Doc. 1746, 2004 U.S.C.C.A.N.

1755, 1757 (Dec. 4, 2003) (Statement by President George W. Bush). To ensure that businesses came into compliance, the requirement was made the subject of extensive publicity by the FTC and major credit card companies and did not go into effect until January 1, 2005 for credit-card receipt printers first put into use on or after that date, and December 4, 2006, for printers in use prior to January 1, 2005. 15 U.S.C. § 1681c(g)(3).

4. Credit and Debit Card Receipt Clarification Act of 2007. Just a few days after the district court's decision in this case, on June 3, 2008, President Bush signed into law the Credit Card and Debit Card Receipt Clarification of 2007 (Clarification Act), Pub. L. No. 110-241, § 2, 122 Stat. 1565 (2008). The Clarification Act was a response to the unanticipated proliferation of class action lawsuits alleging expiration-date-only violations under FACTA. In its findings, Congress declared that "[m]any merchants understood that [FACTA] would be satisfied by truncating the account number down to the last 5 digits based in part on the language of the provision as well as the publicity in

the aftermath of the passage of the law." Clarification Act, § 2(a)(2).

Moreover, Congress found that "[e]xperts in the field agree that proper truncation of the card number, by itself . . . ., regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud." Clarification Act, § 2. As the Clarification Act's sponsor explained on the floor of the House, the account number is the "single most crucial piece of information that a criminal would need to perpetrate account fraud." 154 Cong. Rec. H0000-28 (daily ed. May 13, 2008) (Rep. Mahoney).

Accordingly, Congress amended 15 U.S.C. § 1681n to provide that merchants who printed credit card receipts bearing expiration dates between December 4, 2004, and June 3, 2008, but who "otherwise complied" with FCRA (*i.e.* who truncated or removed account numbers from their receipts), "shall not be in willful noncompliance . . . by reason of printing such expiration date on the receipt." Clarification Act, § 3 (codified at 15 U.S.C. 1681n(d)). The Clarification Act is applicable to these appeals, to the extent

that the plaintiffs alleged willful violations of FCRA arising out of the printing of expiration dates. Because the Act applies retroactively to all cases pending at the time of its enactment, Clarification Act § 3(b), statutory damages are no longer available in these cases for violations of the prohibition on printing expiration dates. Instead, statutory damages may only be recovered by consumers whose full account numbers were printed.[2]

C. Standard of Review

This Court "review[s] the constitutionality of a federal statute *de novo*." *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 796 n.11 (11th Cir. 2003).

SUMMARY OF ARGUMENT

I. Although FCRA provides both a floor ($100) and a ceiling ($1,000) for statutory damages, the district court held that the

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[2] Two FCRA class-action lawsuits that were dismissed by the district court, like many others nationwide, alleged only expiration-date violations. *Rush v. Hooters of East Birmingham*, Civ. No. 07-AR 2154-S (N.D. Ala.); *Floyd v. Express Oil Change*, Civ. No. 07-AR-2043-S (N.D Ala). Those dismissals were not appealed. Because statutory damages are no longer recoverable in such cases, they probably cannot feasibly be pursued as class actions. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006).

"most obvious" due process problem with the Act is that it does not give judges and juries enough guidance on how to fix an award within that range. Numerous state and federal statutes similarly provide a range of statutory damages, while leaving to the discretion of trial courts the task of fixing the amount within that range. If FCRA is unconstitutional, then so are those other statutes. The district court disregarded those statutes, as well as longstanding precedent according great deference to trial-court judgments about statutory damages awards. The reason for that deference is that it is not possible to reduce the damages calculus to a simple mathematical formula.

In addition to ignoring a century's worth of precedent, the district court reached its decision about the statute's constitutionality based on its own speculative assumptions about how these two cases might proceed in the future—a hypothetical mode of analysis that the Supreme Court has repeatedly condemned. Because of precisely these risks of speculation, facial challenges outside the First Amendment context are disfavored. But to the extent that a facial vagueness challenge is appropriate, the

defendants cannot rely on such case-specific speculation. Instead, they must show that the law is impermissibly vague in *all* of its applications.

Vagueness doctrine is concerned with notice: Would a person of ordinary intelligence have fair warning of what the law requires and what the consequences will be? That inquiry is most demanding when the law defines criminal conduct and is least demanding with respect to civil statutes that regulate business. Even with respect to criminal sentencing laws, the Supreme Court has held that a range of penalties with a statutory minimum and maximum is sufficient to satisfy due process. If burglary is punishable with 10 to 40 years in jail, every burglar knows he is risking 40 years.

As to sentencing in criminal cases as well as punitive damages in civil cases, the Supreme Court has held that open-ended discretion on the part of the judge or jury to fix the consequences of liability does not offend the vagueness doctrine. If even the common-law method of assessing uncapped *punitive* damages does not run afoul of the due process limitations on vagueness, as the

Supreme Court has held, then it is hard to see how a statute like FCRA, which provides a modest range of damages defined by the legislature, could violate those same limitations.

II. The district court's second basis for striking down FCRA's statutory damages provision was its conclusion that an award of $100 minimum damages under the Act would violate constitutional limits on excessive penalties.

In reaching that conclusion, the district court made three major errors: (1) it failed to acknowledge or apply the differing standards applicable to facial and as-applied challenges; (2) it rested its analysis on an unexamined assumption that FCRA's statutory damages are "punitive" and are therefore subject to excessiveness review; and (3) it blurred the deferential standard for reviewing penalties set by the legislature with the standard for constitutional limits on jury-awarded punitive damages.

To the extent that the district court was entertaining an as-applied challenge to FCRA, its decision was fatally premature. Because damages have not been awarded, the damages provision cannot be challenged on an as-applied basis. And although courts

have entertained facial challenges to statutory damages provisions on excessiveness grounds, the bar for such a challenge is set very high: The defendants must show that there is no set of circumstances under which an award of $100 in a FCRA case would be valid.

The district court's assumption that FCRA's statutory damages are penal in nature was wrong. To the contrary, FCRA permits statutory damages as an alternative to actual damages primarily because actual damages may be difficult or impossible to quantify in many cases. This is shown both by the traditional understanding of statutory damages and by the text and history of FCRA itself.

Even assuming FCRA's statutory damages are penal in nature, they should be assessed under the deferential standard announced in *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919). Under that standard, legislatures are given wide latitude to set penalties based on policy needs. The penalty is judged not based on a comparison to actual damages,

but instead based on the potential harm to society, the opportunities for committing the offense, and the need to secure uniformity.

Finally, the constitutional limitations for assessing uncapped punitive damage awards by juries are not appropriate when assessing damages set by a legislature. The Supreme Court's punitive-damages jurisprudence is based on a concern for fair notice to the defendant that simply does not apply when the legislature has already fixed the maximum amount of damages in advance.

ARGUMENT

THE FAIR CREDIT REPORTING ACT'S STATUTORY DAMAGES PROVISION IS CONSTITUTIONAL.

"A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Brown*, 441 F.3d 1330, 1367 (11th Cir. 2006) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see Jacobs v. The Florida Bar*, 50 F.3d 901, 906 n.20 (11th Cir. 1995) (challenger in a facial attack "bears the burden of proving that the law could never be constitutionally applied"). As

to both its vagueness and excessiveness rationales, the district court's ruling fails to clear that very high constitutional bar.

I. FCRA's Statutory Damages Provision Is Not Void for Vagueness.

Anyone who willfully violates the Fair Credit Reporting Act may be held liable for statutory damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1692n(a)(1)(A). The district court concluded that the "most obvious denial of 'due process that facially appears in this statutory scheme comes from its vague description of the damages that must be awarded[.]" Dist. Ct. Op. at 7. This is so, according to the district court, because FCRA specifies the range of minimum and maximum damages, but leaves it to the discretion of judges or juries to set the amount to be awarded based on the facts of a given case, without additional statutory criteria.

1. If the district court was right, then many state and federal laws allowing statutory damages are facially unconstitutional. Many statutes leave to judges and juries the task of setting damages within a statutory range based on traditional factors such as culpability and harm, just as the criminal law does with

respect to sentencing. Perhaps the most prominent example is the Copyright Act, which permits a much broader range of statutory damages than FCRA and has been interpreted as giving the judge or jury great latitude to set the award. *See Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850-52 (11th Cir. 1990). Statutory damages of "not less than $750 or more than $30,000" per infringement may be awarded, "as the court considers just." 17 U.S.C. § 504(c)(1); *see also* 47 U.S.C. § 605(d)(3)(C)(i)(II) (similar provision of Communications Act). Moreover, if the infringement is willful, "the court in its discretion may increase the award of statutory of damages to a sum of not more than $150,000"—one hundred and fifty times more than FCRA's maximum of $1,000. 17 U.S.C. § 504(c)(2); *see also* 47 U.S.C. § 605(d)(3)(C)(ii) (court, "in its discretion," may increase damages "by an amount of not more than $100,000"). And because the Supreme Court has held that the Seventh Amendment confers a right to a jury trial on the issue of statutory damages under the Copyright Act, the amount may be set by a jury rather than a judge. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.

340 (1998); *see also Columbia Pictures v. Kyrpton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1194-95 (9th Cir. 2001) (upholding jury award of $31.68 million in statutory damages on remand from *Feltner*). As far as the district court's vagueness theory goes, FCRA is no different.

The district court also overlooked more than a century of jurisprudence holding that a judge or jury's determination of statutory damages within parameters fixed by the legislature is entitled to a very high degree of deference. As the Supreme Court put it, "the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion." *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935); *see also Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th 1984) ("The court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.") (citing *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919)).

The reason for this rule is that "[f]ew bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of damage recoverable for actionable wrongs. The necessary flexibility to do justice in the variety of situations . . . can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute." *F. W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231 (1952). Indeed, this Court has upheld statutory damages awards even where the district court "did not describe how it arrived at the statutory damages that it awarded," because of the "wide latitude accorded by the district court in awarding statutory damages, bounded only by the statutory limits." *Cable/Home Communication*, 902 F.2d at 852.[3]

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[3] This is not to say that courts and juries are completely at sea in fixing an award within the statutory floor and ceiling. To the contrary, judges hearing cases under FCRA and other federal statutes may consider, and instruct juries to consider, a variety of traditional factors, including the consumers' injury; the clarity of requirements that were violated; the defendants' sophistication, persistent denial of illegal acts, failure to bring practices into compliance despite ample time to do so, and prior violations or liability for the same illegal act; as well as the importance of deterrence. *See* Wu, FAIR CREDIT REPORTING § 11.11; *see also Adiel v. Chase Federal Sav. and Loan Ass'n,* 810 F.2d 1051, 1054-55

If the district court is right, then the courts, including this Court, have been wrong all of these years and statutory damages provisions across the United States Code are in jeopardy. The district court's ruling was literally unprecedented: Although it did not hesitate to strike down a federal statute on its face, the district court did not (because it could not) rely on a single supporting precedent in its entire discussion of vagueness.

2. Worse still, the district court assessed FCRA's constitutionality based on a series of speculative assumptions about how these cases might proceed, without the benefit of factual development or determinations on the critical questions of class certification, liability, willfulness, or damages. Just this year, the Supreme Court warned against precisely such an approach: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about

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(11th Cir. 1987) (Truth in Lending Act); *DIRECTV, Inc. v. Rawlins*, 523 F.3d 318, 330 (4th Cir. 2008) (Wiretap Act). That traditional approach is significant for vagueness analysis, because the relevant guidance "need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage." *State v. Porelle*, 822 A.2d 562, 565 (N.H. 2003).

'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190-91 (2008) (explaining that facial challenges are "disfavored" because they "often rest on speculation," run afoul of principles of "judicial restraint" and constitutional avoidance, and threaten to unnecessarily frustrate the will of the political branches).

Because of these risks of speculation, void-for-vagueness challenges should generally be judged only "in light of the facts of the case at hand," "on an as-applied basis"—an impossibility here given the procedural posture of this case, as the district court seems to have recognized. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *see Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) ("[C]laims of facial invalidity are generally limited to statutes that threaten First Amendment interests."). To be sure, the Supreme Court has said that a statute that does not reach constitutionally protected conduct "may nevertheless be challenged on its face as unduly vague, in violation of due process." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see City of Chicago v. Morales*, 527 U.S. 41,

55 (1999) (plurality) (suggesting that facial challenges are appropriate outside the First Amendment context "[w]hen vagueness permeates the text."). But even assuming a facial challenge is proper here, it can only succeed if the defendants can "demonstrate that the law is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 497; *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982) ("the possibility of a valid application necessarily obviates facial vagueness").

3. The touchstone of the vagueness doctrine is notice. *See Maynard*, 486 U.S. at 361 ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."). The core question is whether a law "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he can act accordingly." *Hoffman Estates*, 455 U.S. at 497. But the "degree of vagueness that the Constitution tolerates" depends on the "nature of the enactment." *Id.* at 498. The Court has held that "economic regulation is subject to a less strict vagueness test," has "ex-

pressed greater tolerance of enactments with civil rather than criminal penalties," and has said that "a scienter requirement may mitigate a law's vagueness[.]" *Id.* at 498-99. Thus, where, as here, a civil statute "simply regulates business behavior and contains a scienter requirement," due process requirements are at their nadir. *Id.* at 499; *see Morales*, 527 U.S. at 55.

In the criminal context, "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). But even with respect to criminal sentencing, a statute that sets a clear minimum and maximum penalty provides sufficient notice: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail." *Blakely v. Washington*, 542 U.S. 296, 309 (2004). The same is true for civil liability: When Congress has set a maximum amount of statutory damages for each violation of a statute, defendants "can hardly complain that they had no fair notice" of the consequences for willful violations of that statute. *Accounting Outsourcing, LLC v.*

Verizon Wireless Personal Communications, L.P., 329 F. Supp. 2d 789, 809 (M.D. La. 2004); *Smith v. Casino Ice Cream, LLC*, 2008 WL 4541013, at *2 (S.D. Fla. 2008) (expressly rejecting the decision below in this case because Congress has "given a statutory window within which the jury may fix the damages based on the evidence adduced at trial"). "Congress, in settling a range for statutory damages, has removed the problem of unbridled discretion." Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 198 (1999).

In *Batchelder*, the Supreme Court rejected a vagueness challenge to two separate provisions of federal criminal law that prohibited convicted felons from receiving firearms but authorized different maximum penalties. The Court held that it was sufficient that the two statutes "unambiguously specif[ied] the activity proscribed and the penalties available upon conviction." 442 U.S. at 123. Like FCRA, the statutes in *Batchelder* set maximum penalties. One of the statutes provided that the defendant "shall be fined not more than $5,000, or imprisoned not more than five years, or both," i*d.* at 116 n.3, while the other provided that the

defendant be "fined not more than $10,000 or imprisoned for not more than two years, or both." *Id.* at 117 n.4. The Court held that so long as statutes "clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Id.* at 123. If statutory maxima are sufficient to satisfy due process with respect to overlapping criminal laws—which can lead to a person's loss of liberty for extended periods of time—then surely the same is true of a statute like FCRA, which "simply regulates business behavior and contains a scienter requirement." *Hoffman Estates*, 455 U.S. at 499.

At bottom, the district court's analysis cannot be reconciled with the traditional practice of conferring broad discretion to the judicial branch to determine the consequences of liability, both civil and criminal, within limits set by the legislature. The Court acknowledged that tradition in *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), a case on which the defendants relied below. *Giacco* struck down on void-for-vagueness grounds a statute allowing juries to impose costs on acquitted criminal defendants. Under the

statute in *Giacco*, if the jury found the defendant "guilty of 'some misconduct' less than that charged against him, it was authorized by law to saddle him with the State's costs in an unsuccessful prosecution." *Id.* at 521. The statute was impermissibly vague because it "would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible conduct.'" *Id.*

The Court made clear, however, that its holding extended only to the vague *standard of conduct* that would lead to the imposition of liability for costs, not to the standards under which the jury would set the consequences of liability "within legally prescribed limits." *Id.* at 405 ("In so holding 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."). Thus, defendants cannot rely on *Giacco* to attack FCRA's statutory damages provision, which simply permits judges or juries, only after they have found that the defendant has recklessly disregarded or knowingly violated FCRA, to assess damages

"within legally prescribed limits." *Id.; see Broussard v. Parish of Orleans*, 318 F.3d 644, 661 (5th Cir. 2003) (rejecting vagueness challenge under *Giaccio* to statute under which "no judicial or executive officers are empowered to charge fees greater than those that are statutorily allowed").

If *Batchelder* and *Giacco* leave any doubt about the error of the district court's ruling, it should be dispelled by the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, which rejected a constitutional challenge to common-law *punitive* damages schemes that impose no statutory maxima and permit damages to be imposed even for conduct that has not been specifically outlawed by the legislature. 499 U.S. 1, 15-18 (1991) (upholding Alabama's common-law method of assessing punitive damages, under which "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar conduct" and the award may be "reviewed by trial and appellate courts to ensure that it is reasonable.").

Haslip categorically rejected a void-for-vagueness challenge on the basis of *Giacco*, relying on *Giacco*'s distinction between the standard of conduct giving rise to liability and discretion to set the penalty. *Id.* at 24 n.12. The Court explained that *Giacco* "did not concern jury discretion in fixing the amount. Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." *Id.* If the common-law method of assessing punitive damages with no statutory maxima is not impermissibly vague, then neither is FCRA's statutory-damages provision, which gives the defendant considerably more notice of the consequences of liability than the potential for an open-ended, uncapped punitive damages award. *Haslip,* together with *Giacco* and *Batchelder*, forecloses the defendants' vagueness challenge.

II. FCRA's Minimum Statutory Damages of $100 Are Not Unconstitutionally Excessive On Their Face.

The district court's second ground for invalidating FCRA's statutory damages provision was the court's prediction that the requirement of damages of "not less than $100" for each willful FCRA violation in these cases would result in damages that are

unconstitutionally excessive under the Due Process Clause. Dist. Ct. Op. at 12-15.

In reaching that conclusion, the district court assumed, without examination, that statutory damages under FCRA are "punitive" and thus subject to excessiveness review. Dist. Ct. Op. at 11-12, 14. As we explain below, that assumption was wrong and so the district court should never have engaged in excessiveness review in the first place. Moreover, in undertaking its excessiveness analysis, the district to failed to explain whether it was applying the deferential standard of *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), which concerns monetary sanctions set within a range determined by the legislature (at least where those sanctions are "essentially penal," *id.* at 66), or that of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which concerns common-law punitive damages awards set by juries with no limits at all. Instead, the district court simply cited both *Williams* and *State Farm*, without noting the considerable differences between the two standards. Dist. Ct. Op. at 14.

Under *Williams*, legislatures are given "wide latitude" to prescribe civil penalties, which run afoul of due process only where they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 66-67. *State Farm*, by contrast, assesses punitive damages awards using three "guideposts": reprehensibility, the disparity between the harm or potential harm and the award, and the difference between the jury award and the civil penalties set by legislatures for comparable conduct. *State Farm*, 538 U.S. at 418; *see also BMW v. Gore*, 517 U.S. 539 (1996). The courts that have actually weighed legislatively-defined monetary sanctions against constitutional limits on excessiveness have consistently rejected the *State Farm/Gore* standard in favor of *Williams*. *See, e.g., Zomba v. Panorama Records, Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 2429 (2008); *In re Marriage of Miller*, 879 N.E.2d 292, 232-34 (Ill. 2007); *Accounting Outsourcing*, 329 F. Supp. 2d at 809.

A. An As-Applied Challenge Would Be Premature and A Facial Challenge, Even If Permissible, Would Face A Heavy Burden.

In addition to blurring the due process standards, the district court failed to acknowledge or apply the differing standards for facial and as-applied challenges. Instead, it once again decided the constitutional question based on hypothetical scenarios and speculative factual assumptions about these cases. It assumed that class certification would be granted, that the defendants would be found to have violated the statute, that their violations would prove willful, that those violations would be willful with respect to every class member, and that the end result would be a large statutory-damages award that the court would consider excessive. As we explained above, constitutional adjudication should never be based on such rampant speculation. *See United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.").

To the extent that the district court was entertaining an as-applied challenge to the statute, its ruling was premature.

"Because damages have not been awarded in this case, defendants cannot succeed in challenging the damages provisions as applied. That challenge is not ripe." *Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 325 (Cal. Ct. App. 2003) (rejecting as-applied excessiveness challenge to federal Telephone Consumer Protection Act's $500 statutory damages provision); *see Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 304 (1981) (due process challenge to statute's civil penalty provisions was "premature" where no challenger "had civil penalties assessed against them"); *Ziaee v. Vest*, 916 F.3d 1204, 1211 (7th 1990) ("It would be premature to answer the question [concerning statutory damages], which so far appears to be abstract.").

Simply put, the defendants are in no position now to challenge FCRA's statutory damages provision based on the particulars of these cases. "[I]t may be that in a sufficiently serious case the due process clause might be invoked [to] reduce the aggregate damage award. At this point in this case, however, these concerns remain hypothetical." *Parker v. Time Warner Entm't*, 331 F.3d 13, 22 (2nd Cir. 2003) (discussing federal Cable Act's minimum

statutory damages of $1,000); *accord Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (stating, in FCRA case, that "constitutional limits are best applied after a class has been certified" and an "unconstitutionally excessive" award "may be reduced"); *see Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1232 (D. Nev. 2007) (excessiveness challenge prior to award of damages under FCRA was "premature").

This leaves only the possibility of a facial challenge to FCRA's damages provision. So far as we can tell, neither the Supreme Court nor any federal appellate court has ever entertained a facial due process challenge to a statute based on the excessiveness of *potential* statutory damages that *might* be awarded under the statute. The level of conjecture that would entail illustrates why facial challenges are "disfavored" and may pose serious ripeness problems under Article III. *See Warshak v. United States*, 532 F.3d 521, 525-31 (6th Cir. 2008) (surveying recent jurisprudence on facial challenges and ripeness); *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1364 (11th Cir. 2002) ("[T]here is an obvious affinity between the ripeness doctrine and the

standard for facial challenges: both doctrines frequently require the challenger to bring a concrete, as-applied challenge."). The district court suggested efficiency alone justified its approach. Dist. Ct. Op. at 13. But while "passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular." *Sabri v. United States*, 541 U.S. 600, 608-09 (2004).

To be sure, several federal district courts and state courts *have* entertained facial excessiveness challenges to various statutory damages provisions, but they have uniformly rejected those challenges under *Williams*.[4] Other than the decision below,

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[4] *See, e.g., Arrez v. Kelly Servs, Inc.*, 522 F. Supp. 2d 997, 1108 (N.D. Ill. 2007) (Illinois Day and Temporary Labor Services Act); *Accounting Outsourcing,* 329 F. Supp. 2d at 809-10 (federal Telephone Consumer Protection Act (TCPA)); *Native American Arts, Inc. v. Bundy-Howard*, Inc., 168 F. Supp. 2d 905, 914-15 (N.D. Ill. 2001) (federal Indian American Arts and Crafts Act); *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090-91 (W.D. Tex. 2000) (TCPA); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164-67 (S.D. Ind. 1997) (TCPA); *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365, 385-86 (Tex. Ct. App. 2004), *rev'd on other grounds*, 184 S.W.3d 707 (Tex. 2006) (TCPA); *Kaufman*, 2 Cal. Rptr. 3d at 325 (TCPA); *Gennari v. Weichert Co. Realtors*, 672 A.2d 1190, 1207 (N.J. Super. 1996) (New Jersey Consumer Fraud Act). All but one of these cases did not address ripeness at all. In *Kaufman*, the court held that an as-

courts that have considered FCRA's statutory damages provision have done the same.[5]

In any event, even assuming a facial challenge is permissible, the defendants' burden is heavy: They must show that *any* award of statutory damages, in any circumstance, would be unconstitutionally excessive. The possible scenarios are not limited to certified class actions, or cases involving credit card truncation, but include *any* willful violation of FCRA for which section 1681n(a)(1)(A) allows statutory damages. That is, the defendants must show that even an award of $100 in an individual case—a case, for example, in which a consumer may have suffered great actual injury from identity theft, or inaccuracies in his or her credit report, and in which the defendant's conduct was egregious—would be unconstitutionally excessive. This includes even cases in which the facts would justify punitive damages. *See, e.g.*, *Saunders v. Branch Banking And Trust Co. of Va.*, 526 F.3d

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applied challenge was unripe *and* summarily rejected a facial challenge under the *Williams* standard.

[5] *See, e.g., Follman v. Village Squire, Inc.,* 542 F. Supp. 2d 816, 821-22 (N.D.Ill. 2007); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972-73 (C.D. Cal. 2007).

142, 153 (4th Cir. 2008) (credit reporting violations were "sufficiently reprehensible to justify an award of punitive damages").

The relevant standard is the one supplied by the Supreme Court in *Salerno*, where the question was whether the federal Bail Reform Act survived a facial challenge based on due process and excessiveness (in that case, under the Excessive Bail Clause of the Eighth Amendment). *See Salerno*, 481 U.S. at 745 ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."). Under *Salerno*, it is not enough for the defendants to do as the district court did here and conjure up "some conceivable set of circumstances" under which a large award of damages under FCRA might be excessive. Rather, the defendants' burden is just the opposite: They must show that there is "no set of circumstances exists under which the Act would be valid." *Id*. at 745.

B. Because Statutory Damages Under FCRA Are Not Punitive, Excessiveness Review is Inapplicable.

As noted above, the district court's ruling was premised on an unexamined assumption that FCRA's $100 minimum statutory

damages are necessarily "punitive" in nature and thus subject to the constitutional limitations applicable to statutory sanctions that are "essentially penal" (under *Williams*) or to jury-awarded punitive damages (under *State Farm* and *Gore*). *See* Dist. Ct. Op. at 11, 14. But both as a general matter and with respect to FCRA in particular, the district court's assumption is unfounded. For that reason, excessiveness review—under either standard—is inapplicable.

"Generally," this Court has explained, "statutory damages are awarded when no actual damages are proven, or actual damages and profits are difficult or impossible to calculate." *Cable/Home*, 902 F.2d at 850; *see F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952). According to the leading treatise on the statute, this is true of FCRA in particular: "Statutory damages for willful violations are available when actual damages are difficult to prove or nonexistent." Wu, FAIR CREDIT REPORTING § 11.11 (citing cases, and noting that courts often consider evidence of actual damage in setting FCRA statutory damages); *see Murray*, 434 F.3d at 953 ("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.").

For example, identity theft can wreak havoc on a person's life, but measurable injury, if any, may consist not out out-of-pocket expenses, but rather the time and effort required to determine and repair the damage to the plaintiff's credit reports and financial accounts—a process that can be extraordinarily aggravating and stressful, but which may not result in any measurable damages for emotional distress. *See* Council of Better Business Bureaus, *2006 Identity Theft Survey Report* (2006) ("vast majority of identity fraud victims (68%) incur no out-of-pocket expenses"); Gary M. Victor, *Identity Theft, Its Environment, and Proposals for Change*, 18 Loyola Consumer L. Rev. 273, 279 & n.34 (2006) (estimating U.S. consumers lost nearly 600 million hours resolving identity theft problems in a recent two-year period); *see also Sloane v. Equifax Information Services, LLC*, 510 F.3d 495, 504 (4th Cir. 2007) (noting that "[t]he recent emergence of identity theft and the rapid growth of the credit-reporting

industry present a unique dilemma without clear precedent" and observing that measuring and compensating injury "is not a simple task"). Moreover, the injury may be more difficult to measure, and more worthy of modest statutory damages, when it is "small—a modest concern about privacy, a slight chance that information would leak out and lead to identity theft." *Murray*, 434 F.3d at 953.

Statutory damages, in other words, are provided as an *alternative* to actual damages, as a kind of rough approximation of compensation, and are therefore not "punitive in nature." *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 576 (Mass. 2007). "As with countless other statutes," FCRA's statutory damages provision "serves to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations." *Id.* (discussing Telephone Consumer Protection Act). The damages "do not necessarily punish offending [merchants] so much as ensure that consumers do not refrain from bringing suit to protect their statutory rights because their damages are difficult to quantify." *Id.*

The best evidence of how FCRA's statutory damages provision functions comes from the text and history of the statute itself. FCRA originally allowed actual and punitive damages for willful violations. In 1996, when Congress amended the statute, it made statutory damages available *in addition* to punitive damages but as *an alternative* to actual damages. *See* 15 U.S.C. 1681n(a). A consumer that elects actual damages must give up the right to recover statutory damages. Moreover, the section of the 1996 Consumer Credit Reform Act that amended FCRA to allow statutory damages is entitled "Minimum Civil Liability for Willful Noncompliance," "indicating that statutory damages are meant to compensate consumers who are unable to prove a higher amount of actual damages." Wu, FAIR CREDIT REPORTING § 11.11. By making it easier to recover damages in cases where it would be difficult to show actual damages, section 1681n(a)(1)(A) helps promote enforcement: Because FCRA "is largely dependent upon private enforcement litigation, or so-called private attorney general enforcement," the "addition of statutory damages promotes the private enforcement of the law, in this case a law which

suffered greatly from lack of compliance and enforcement." *Id.* (citing S. REP. NO. 185, 104th Cong., 1st Sess. 49 (1995)).

Thus, both the general understanding of how statutory damages operate in consumer protection statutes and the text and history of FCRA show that Congress permitted statutory damages as a means of incentivizing private enforcement and providing an alternative means of compensation, not as a method of punishment. That Congress foreclosed the recovery of actual damages for consumers who elect statutory damages, but permitted modest statutory damages *in addition* to punitive damages, demonstrates that FCRA statutory damages are not punitive. *See Saunders*, 526 F.3d at 154 (equating maximum award of $1,000 in FCRA statutory damages with *compensatory damages* for purposes of reviewing an $80,000 punitive damages award under the second *Gore* guidepost). If statutory damages were intended to be punitive, it would make no sense to foreclose their recovery in cases where plaintiffs seek actual damages for measurable losses. Thus, the district court was wrong to assume that FCRA's modest statutory damages are punitive in nature, and was wrong to

evaluate them under the standards for assessing statutory penalties.

C. Even Under the Standard for Evaluating Statutory Penalties, FCRA's Minimum $100 Damages Are Not Excessive.

Only rarely have courts assessed the validity of monetary sanctions awarded within legislatively-defined ranges against due process limitations on excessiveness. When they have, they have employed the very deferential standard set out by the Supreme Court in *Williams*. *See, e.g., Zomba*, 491 F.3d at 587 (describing *Williams* as "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review"); A*ccounting Outsourcing*, 329 F. Supp. 2d at 809-10 (observing that "due process challenges to statutory damages are not unprecedented" but have uniformly failed under *Williams*). As explained above, because statutory damages under FCRA are not punitive, there is no need to engage in such analysis here. But in any event, FCRA's statutory damages provision easily satisfies *Williams*.

1. At issue in *Williams* was an Arkansas statute that allowed railroad passengers who were charged more than a fixed

fare to sue the railroad and recover $50 to $300 per violation. Two sisters returning home from a school graduation were charged 66 cents more than the lawful rate; they sued and were awarded $75 apiece by a jury—a ratio of approximately 113:1. The railroad challenged the verdict, arguing that the statutory penalties were unconstitutionally excessive in violation of the Due Process Clause. Although it was a civil statute, the Court characterized the law as "essentially penal" and "intended to punish" and concluded that "the Legislature may adjust its amount to the public wrong rather the private injury[.]" 251 U.S. at 66.

Turning to the excessiveness question, *Williams* held that although due process limits the states' power to set penalties, "the states still possess a wide latitude of discretion in the matter." *Id.* Because of that "wide latitude of discretion," the test is deferential: A statute violates due process "only where the penalty is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66-67.

The Court candidly acknowledged that the "[w]hen the penalty is contrasted with the overcharge possible in any instance it

of course seems large," but stressed that "its validity is not to be tested that way." *Id.* at 67. The statutory penalty, in other words, is not judged by comparing it to the private loss in an individual case. Rather, the penalty must be "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.*

2. FCRA passes muster under *Williams*. The numbers alone tell the story. Even without adjusting for inflation, FCRA's minimum of $100 is only twice the $50 minimum in 1919 dollars under the Arkansas law. Measured in today's dollars, the penalties in *Williams* are actually much stiffer: the minimum was $600 per violation and the actual awards obtained by each of the two sisters were $900. *See* Bureau of Labor Statistics, Consumer Price Index Inflation Calculator.[6]

The personal and societal costs of identity theft and inaccuracy in the credit-reporting system are much more damaging to the national economy than small overcharges of railroad fares.

[6] http://www.bls.gov/data/inflation_calculator.htm.

FCRA's $100 minimum damages requirement is a perfectly justified legislative response to "the interests of the public" in ensuring a fair and accurate credit reporting system and in preventing identity theft, the "numberless opportunities" for violations of FCRA by credit reporting agencies and merchants entrusted with millions of credit reports or thousands of credit cards, and the "need for securing uniform adherence" to regulation of the exchange of consumer financial information. 251 U.S. at 67; *see Brief of Amici* National Consumer Law Center, et al.

A comparison with other statutes is instructive. The $100 minimum for FCRA damages is only *one-fifth* of the $500 mandatory statutory damage amount for transmitting unsolicited fax advertisements under the TCPA, 47 U.S.C. § 227(b)(3)—an amount that the court "may, in its discretion," increase to $1,500 for willful violations. Yet TCPA's statutory damages provision has been consistently upheld under *Williams*. *See Accounting Outsourcing*, 329 F. Supp. 2d at 908-10; *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d at 1090-91; *Kenro, Inc. v. Fax Daily, Inc.*, 962

F. Supp. at 1164-67; *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d at 385-86; *Kaufman*, 2 Cal. Rptr. 3d at 325.

Some statutes impose minimum penalties *per day* of violations, and these also have been consistently upheld in the face of due process excessiveness challenges. For example, the Indian Arts and Crafts Act prohibits selling goods in a manner falsely suggesting that they are "Indian produced" and sets statutory damages at a minimum of $1,000 per day. 25 U.S.C. § 305e(a)(2). That *daily* statutory minimum damage amount—ten times higher than FCRA's $100 minimum—has been found to pass muster under *Williams*. *See Native American Arts, Inc. v. Bundy-Howard*, Inc., 168 F. Supp. 2d 905 (N.D. Ill. 2001). Similarly, the Illinois Supreme Court recently upheld an award of $1.2 million in statutory damages against man who failed nearly 12,000 times to timely forward $82/week child-support payments that he was withholding from his son's pay, under a statute that imposed a statutory penalty of $100 for each day that each payment was knowingly late. *In re Marriage of Miller*, 879 N.E.2d at 300-05.

Copyright cases, once again, offer a useful comparison. In *Zomba*, the Sixth Circuit recently upheld a statutory damages award of $806,000—consisting of $31,000 for each of the twenty-six violations at issue. 491 F.3d at 580 ("If the Supreme Court countenanced a 113:1 ratio in *Williams*, we cannot conclude that a 44:1 ratio is unacceptable here."). And *Lowry's Reports, Inc. v. Legg Mason*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004), rejected a due process excessiveness challenge to a $19 million statutory damages award based on 240 acts of copyright infringement.

Given the wide latitude of discretion accorded to legislatures to fix monetary sanctions under *Williams* and due regard for Congress's judgments about the need to protect the public from identity theft and ensure the accuracy of the credit reporting system, FCRA's $100 minimum for statutory damages does not run afoul of the Due Process Clause.

D. Statutory Damages Are Not Subject to Constitutional Limits on Punitive Damages.

The district court in this case appears to be the only court ever to have assessed statutory damages using the Supreme Court's *Gore*/*State Farm* framework for reviewing punitive

damages. The courts that have considered the district court's approach have all rejected it. *See Zomba*, 491 F.3d at 588; *Lowry's Reports*, 302 F. Supp. 2d at 459-60; *Accounting Outsourcing*, 329 F. Supp. 2d at 808-09. This Court should follow suit.

1. The core concern of the Supreme Court's punitive damages jurisprudence is notice: Given the lack of constraints on the jury's discretion, did the defendant receive "fair notice" of the "severity of the penalty that a State may impose"? *Gore*, 517 U.S. at 574; *cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008) ("The real problem, it seems, is the stark unpredictability of punitive awards."). To that end, the Court set out three general "guideposts" by which punitive damages awards are evaluated—the "reprehensibility" of the defendant's conduct, the "disparity between the harm or potential harm suffered" and the size of the award, and "the difference between this remedy and the civil penalties authorized or imposed [by legislatures] in comparable cases." *Id.* at 575.

The *Gore*/*State Farm* framework is animated by a concern that, in setting ordinary punitive damages, juries can routinely

assess unlimited and unpredictable amounts, exposing out-of-state corporations to abusive awards based on local prejudice and unrelated conduct, and doing little to advance legislatively-defined public policy. *See State Farm*, 538 U.S. at 417; *Gore*, 517 U.S. at 588, 595-96 (Breyer, J., concurring). In contrast to statutory damages, ordinary punitive damages typically are not crafted by a legislature to balance vital interests in an area of specific concern. Instead, they apply generally to virtually any type of intentional wrong, from wrongful death to failing, as in *Gore*, to disclose touch-up paint on a new car. *Id.* at 565. And unlike statutory damages, punitive damages are not calibrated to satisfy current policy needs as determined by legislatures, but are set on an *ad hoc* basis with no broader policy perspective. *See Haslip*, 499 U.S. at 45-46 (O'Connor, J., dissenting).

Statutory damages are an entirely different animal. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993) ("review of a jury's award for arbitrariness and the review of legislation surely are significantly different"). "Concerns about whether the defendant has received fair notice are absent, because

the defendant was on notice of the range of damages available for violations of the statute." Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. at 198. And unlike punitive damages, statutory damages are a focused remedy for clearly defined misconduct. They are modest in size and are meant not to punish, but to serve as an alternative to actual damages, where those damages may be difficult or impossible to calculate. A specific level of culpability—willfulness—is required. And, finally, because the statutory range of damages is uniform nationally, businesses have fair notice of potential risks across the country and can be confident that the risks of local bias are minimized. None of those things is true of punitive damages.

2. Applied to statutory damages, the *Gore*/*State Farm* guideposts become *non sequiturs*. The first guidepost—the most important—asks courts to consider the reprehensibility of the defendants' conduct. But under that inquiry, it is "presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages,

is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 419 U.S. at 419. That same presumption applies to the second guidepost, which asks court to consider the relationship between the "harm, or potential harm, to the plaintiff and the punitive damages award" and is generally measured by the ratio between the compensatory and punitive awards. *Id.* at 424-45. But, under FCRA, a consumer can recover statutory damages only by giving up the right to seek actual damages, so this central premise of the framework will always be wrong if statutory damages are considered the equivalent of punitive damages. To the contrary, the correct approach is to view the statutory damages award as a stand-in for actual damages. *See Saunders*, 526 F.3d at 153-54 (treating award of $1,000 in statutory damages under FCRA as equivalent of compensatory damages for purpose of determining whether $80,000 punitive damages award was excessive).

Finally, the third guidepost requires courts to compare the amount of punitive damages awarded to "the civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at

575. The justification for this test is the same as in *Williams*: to "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583. Here, of course, there is no need for such a comparison because the two things are exactly the same. We know exactly what Congress has authorized for willful violation of FCRA: minimum statutory damages of $100.

CONCLUSION

The judgment of the district court should be reversed and these cases should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 9,786 words and complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B).

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CERTIFICATE OF SERVICE

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