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.,
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

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REPLY BRIEF FOR APPELLANTS BOBBIE HARRIS AND JULIE GRIMES

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REPLY BRIEF FOR APPELLANTS HARRIS AND GRIMES

Striking down a federal statute is, in itself, an extraordinary act that should never be taken lightly by any court. The district court's ruling was all the more extraordinary because it invalidated a statute without any supporting precedent—indeed, without even an attempt to show how existing law could properly be extended to support its decision. Acknowledging this unusual feature of its opinion, the district court maintained that it was "citing little case authority because the propositions of law the court relies on are well understood, virtual truisms." Dist. Ct. Op. 6. The briefs of defendants Rave and La Paz, however, suggest another explanation: The district court cited no authority because there is none.

The district court held that that the Fair Credit Reporting Act (FCRA) is unconstitutionally vague because it gives courts too much discretion to set statutory damages within a specified range. But many statutes are identical to FCRA in this respect, and no other court has ever suggested that they are unconstitutionally vague. To the contrary, our opening brief cited three Supreme Court decisions concerning the vagueness doctrine that firmly foreclose the district court's conclusion.

The defendants make no effort to confront the logic of those three decisions.

The district court also held that FCRA would lead to excessive damages in these cases. The defendants, however, have no answer to the overwhelming authority holding that an excessiveness challenge in the absence of a damages award is fatally premature. And they do not dispute that a facial excessiveness challenge, assuming it is even permissible, would require them to show that there is *no set of circumstances* under which minimum damages of $100 may constitutionally be awarded under FCRA. In any event, FCRA's statutory damages provision is not punitive and is therefore not subject to excessiveness review. And even if it is punitive, it readily satisfies the deferential due-process standard for assessing statutes (as opposed to jury awards).

I. FCRA IS NOT UNCONSTITUTIONALLY VAGUE.

According to the district court, the "most obvious" flaw with FCRA is that it grants too much discretion to judges and juries to set damages within a specified range of $100 to $1,000. Dist. Ct. Op. 7. Our opening brief offered three responses. *First*, we showed that the

district court's reasoning would imperil all state and federal statutes that give courts discretion to set statutory damages within a specified (and, in some cases, much broader) range. Pl's Br. 20-24. Like FCRA, such statutes accord "wide latitude" to the trial courts, "bounded only by the statutory limits," *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850-52 (11th Cir. 1990), an approach that has been consistently upheld because the damages calculus cannot be reduced to a "short and simple formula." *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231 (1952); *see Douglas v. Cunningham*, 294 U.S. 207, 210 (1935).

The closest the defendants come to addressing this point is an attempt to distinguish FCRA from the Copyright and Communications Acts on the grounds that the latter statutes contain language—*e.g.*, "as the court considers just," "the court in its discretion"—describing the broad discretion they confer. *See* Rave Br. 22-23. This is a distinction without a difference. When Congress says that courts may assign damages within a range, it has self-evidently given courts discretion to set damages within that range. In any event, it is hard to see how this argument supports the district court's holding that FCRA gives courts

too much discretion. Shifting gears, Rave contends that a court employing traditional factors to set damages under FCRA, in the absence of more concrete guidance, would violate the "doctrine of separation of powers" by assuming the "role of legislator." Rave Br. at 23. That argument, which is apparently distinct from the vagueness challenge, has no support in existing law. *See Mistretta v. United States*, 488 U.S. 361, 395 (1989) (historically "[i]t was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them").

Second, our opening brief explained that the district court overlooked both the standards for facial challenges and principles of judicial restraint by speculating about a range of unresolved issues—class certification, liability, willfulness, the number of violations, and the amount of damages. Pl's Br. 24-25. It is unclear whether a facial vagueness challenge outside the First Amendment context is permissible at all. But even assuming that it is, "the possibility of a valid application necessarily obviates facial vagueness." *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982). If the court were to

award no damages at all, or $100 in minimum damages, the prospect of unbridled discretion within the statutory range would not even arguably materialize. Neither defendant offers any response to these points.

Third, and most important, we demonstrated that the district court's conclusion is foreclosed by three Supreme Court decisions—*United States v. Batchelder*, 442 U.S. 114 (1979), *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Pl's Br. 27-31. Tellingly, neither defendant says one word about *Giacco* or *Haslip*, which both held that the settled practice of giving juries broad discretion to fix the consequences of liability does not run afoul of the vagueness doctrine—particularly where, as here, that discretion is channeled "within legally prescribed limits." *Giacco*, 382 U.S. at 405; *see Haslip*, 499 U.S. at 15-18, 24 n.12 (explaining that "jury discretion in fixing the amount" is properly accorded far more leeway than a decision "as to whether a violation has occurred"). If, as *Haslip* held, due process does not preclude the common-law method of allowing juries to assess punitive damages with

no statutory ceiling all, then FCRA's statutory damages provision, *a fortiori*, passes muster.

Rave does make a half-hearted attempt to distinguish *Batchelder* on its facts (because it involved two statutes with different penalty ranges for the same conduct whereas these cases involves one statute), but it never grapples with the decision's chief holding, which is just as applicable here: So long as federal statutes "clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Batchelder*, 442 U.S. at 123. Put another way, "Congress, in setting 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).

II. FCRA DOES NOT IMPOSE UNCONSTITUTIONALLY EXCESSIVE STATUTORY DAMAGES.

The district court's alternative basis for striking down FCRA's damages provision was its view that the statute "may result in an award of excessive damages." Dist. Ct. Op. 12. Our opening brief explained that the district court disregarded the standards for facial and as-applied challenges as well as Article III's limits on premature

constitutional adjudication (Pl's Br. 35-40) and improperly assumed that statutory damages under FCRA are essentially punitive (*id.* 40-45). We also explained that, even assuming that they are punitive, FCRA's statutory damages would satisfy the due-process standard for statutory penalties (*id.* 46-51) and are not subject to the standards applicable to punitive damages (*id.* 51-56). Unfortunately, although the defendants' briefs pay lip service to these arguments, they largely fail to engage them and instead fall back on parroting the district court's opinion.

A. The Defendants Have Not Shown That An As-Applied Challenge Is Ripe or That a Facial Challenge, Even If Permissible, Could Succeed.

The defendants do not acknowledge, much less address, the overwhelming authority holding that an excessiveness challenge in the absence of a damages award is fatally premature. Pl's Br. 36-37; *see, e.g., Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006); *Parker v. Time Warner Entm't*, 331 F.3d 13, 22 (2d Cir. 2003); *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 304 (1981). Nor do they dispute that a *facial* excessiveness challenge, assuming such an animal even exists, would present an

insurmountable burden: They would need to show that there is "no set of circumstances" under which an award of $100 in *any* case under FCRA would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Pl's Br. 39-40.

The defendants' only real response on this score is the one that the district court gave—that these cases will result in ruinous damages that will bankrupt the defendants and that this possibility trumps the limitations of Article III. *See* La Paz Br. 14-16; Rave Br. 13-19. But ripeness is not a doctrine of convenience to be tossed aside for the sake of efficiency, particularly in the context of facial challenges. *See Sabri v. United States*, 541 U.S. 600, 608-09 (2004).

Moreover, there are simply too many unknowables here: whether class certification will be deemed appropriate at all, whether and to what extent the defendants have violated FCRA, whether their violations were willful, and what amount of damages—if any—the district court might ultimately assess. In this regard, the defendants speak out of both sides of their mouths. One the one hand, they repeat the district court's predictions that these cases will lead to annihilating damages. But on the other hand, they have "expressly preserved all

other arguments for summary judgment, including but not limited to, the indisputable fact that none of them ever acted willfully." Rave Br. 9. And they "dispute that class certification is proper" on the grounds that any violations of FCRA were isolated and "random." *Id.*

If it is true, as defendants say, that they violated FCRA, if it all, only "on rare occasions" and as to "only some, and by no means all, receipts," *id.* at 7 & n.3, then it follows that the defendants' actual exposure to liability, if any, will be substantially smaller than it is in the district court's doomsday scenarios. Indeed, the defendants' risk of exposure to damages has decreased dramatically since the issuance of the district court's decision because Congress has enacted the Credit and Debt Receipt Clarification Act, which precludes the plaintiffs from seeking statutory damages for most of the alleged violations of FCRA at issue in these cases. *See* Pl's Br. 12-14.

B. The Defendants Have Not Demonstrated That Statutory Damages Under FCRA Are Punitive.

As for the merits, the defendants fail (and, in Rave's case, do not even attempt) to establish the key premise of the district court's excessiveness holding—that minimum statutory damages of $100 under FCRA are punitive. *See* Pl's Br. 40-46; U.S. Br. 31-35. To the

contrary, FCRA "unambiguously indicates that statutory damages can be awarded *in lieu of, but not in addition to*, actual damages. Therefore, the statutory damage provision acts as compensation, and is not punitive." *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 342 (N.D. Ill. 2002) (emphasis added).[1]

That statutory damages are available under FCRA only to plaintiffs who elect not to pursue actual damages underscores that their function is to stand in for actual damages, when actual damages are "difficult or impossible to calculate." *Cable/Home Communication Corp.*, 902 F.2d at 850; *see also De Leon-Granados v. Eller and Sons*

[1] Because it rests on the same premise, the theory that FCRA imposes "double" punishment by permitting both statutory and punitive damages (La Paz. Br. 16-20; Rave Br. 25-28) likewise fails. *See In re Trans Union*, 211 F.R.D. at 342 (holding, for this reason, that FCRA "does not impermissibly impose a double penalty"). In any event, the theory has no basis in existing constitutional law, and defendants identify none. La Paz Br. 17; Rave Br. at 27 (citing cases on irrelevant common-law doctrines). Perhaps defendants have in mind the classic "multiple punishments" problem—the risk that a single defendant will face damages for the same conduct in cases nationwide, s*ee* Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 432 (2003)—but no such problem is presented when multiple punishments are imposed in the same case. *See Albernaz v. United States*, 450 U.S. 333, 344 (1981) (holding that the imposition of multiple punishments in a single case "does not violate the Constitution").

Trees, Inc., 497 F.3d 1214, 1221 (11th Cir. 2007). The defendants never address this critical feature of FCRA's architecture.

In attempting to defend the district court's premise, La Paz (at 7-9) relies on a different faulty assumption: that the plaintiffs, because they are not seeking actual pecuniary damages, have suffered no harm at all. That same assumption is peppered throughout both defendants' briefs, but it is simply not correct. First, nothing about the plaintiffs' complaints in these cases purports to leaves out those who have suffered actual pecuniary damages as a result of identity theft. Second, as the Seventh Circuit has explained, FCRA is designed to let plaintiffs recover statutory damages for just the type of privacy-related harm involved here—a "concern about privacy" or a "chance that information would leak out and lead to identity theft"—which can be modest and hard to quantify. *Murray*, 434 F.3d at 952-53 ("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."); *see also Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (exposure to heightened risk of identity theft, although "small and hard to quantify," constitutes

"actual harm"); *see generally* Br. of *Amici* Nat'l Consumer Law Ctr., et al. 12-19 (discussing harms of exposure to risk of identity theft, purposes animating FACTA, and problems of proof of damages for victims of identity theft).

In this respect, FCRA is no different from a broad array of federal statutes that impose statutory damages for consumer privacy violations. Among other things, federal law imposes minimum statutory damages for the disclosure of consumers' bank records (12 U.S.C. § 3417(a)(1)), taxpayer returns (26 U.S.C. § 7413(c)(1)(A)), video rental information (18 U.S.C. § 2710(c)(2)(A)), cable or satellite television subscribers' personal identifying information (47 U.S.C. §§ 551(f)(2)(A), 338(*i*)(7)), the content of emails or voicemails (18 U.S.C. § 2707(c)), and drivers' license information (18 U.S.C. § 2724(b)(1)). None of the reasons that defendants give for regarding FCRA's statutory damages provision as "punitive" distinguishes FCRA from these and other federal statutes that authorize statutory damages for privacy-related harms that are hard to quantify.

As this Court has observed, "[d]amages for a violation of an individual's privacy are a quintessential example of damages that are

uncertain and possibly unmeasurable." *Kehoe v. Fidelity Fed'l Bank & Trust*, 421 F.3d 1209, 1213, 1216 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006) (discussing statutory damages under Drivers' Privacy Protection Act and surveying other federal privacy statutes; holding that plaintiffs may recover statutory damages under DPPA without proof of actual damages).

C. Even If Statutory Damages Under FCRA Were Punitive, the Statute Would Satisfy Due Process.

Even assuming for the sake of argument that statutory damages under FCRA are punitive, the defendants tout the wrong standard for evaluating whether they are unconstitutionally excessive—an issue addressed at length in both plaintiffs' and the government's opening briefs. Pl's Br. 33-34, 46-56; U.S. Br. 36-49. Tellingly, neither defendants' brief discusses at all the question of which standard is appropriate: the deferential standard set by *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), which addresses monetary sanctions set within a range determined by the legislature (where those sanctions are "essentially penal"), or that of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW v. Gore*, 517 U.S. 559 (1996), which concerns common-law

punitive damages awards set by juries with no limits at all. Every single court that has considered an excessiveness challenge to a statute has evaluated that challenge under *Williams* rather than *State Farm* and the defendants offer no reason for a contrary approach here.[2]

Both defendants make at least some attempt to show that the district court's decision can be defended under *Williams* (La Paz Br. 10 n.2; Rave Br. 34-35), but they do so only by ignoring what the opinion actually says. On its face, *Williams* accords legislatures a "wide latitude of discretion" to fix penalties and expressly rejects the simple proportionality approach urged by the defendants. 251 U.S. at 66-67. Referring to the 113:1 ratio between the penalty and the overcharge in that case, the Court acknowledged that "[w]hen the penalty is contrasted with the overcharge possible in any instance it of course seems large," but held that "its validity *is not to be tested in that*

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[2]*See, e.g., Zomba v. Panorama Records*, 491 F.3d 574, 587 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008); *Accounting Outsourcing v. Verizon Wireless*, 329 F. Supp. 2d 789, 809-10 (M.D. La. 2004); *Native Am. Arts v. Bundy-Howard*, 168 F. Supp. 2d 905 (N.D. Ill. 2001); *Texas v. Am. Blastfax*, 121 F. Supp. 2d 1085, 1090-91 (W.D. Tex. 2000); *Kenro v. Fax Daily*, 962 F. Supp. 1162, 1164-67 (S.D. Ind. 1997); *In re Marriage of Miller*, 879 N.E. 2d 292, 300-05 (Ill. 2007); *Chair King v. GTE Mobilnet*, 135 S.W.3d 365 (Tex. Ct. App. 2004); *Kaufman v. ACS Sys.*, 2 Cal. Rptr. 3d 296, 325 (Cal. Ct. App. 2003).

way,"—*i.e.*, by comparing it to the private pecuniary harm in an individual case. *Id.* (emphasis added). Rather, the statute 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 the law. *Id.* Plaintiffs and the government have demonstrated why FCRA passes muster in light of those three criteria (Pl's Br. 48-51; U.S. Br. 36-43) and the defendants, once again, offer no response.

Finally, the defendants' excessiveness challenge fails on its own terms. Both defendants (La Paz Br. 9-13; Rave Br. 28-34) contend that any award of $100 in minimum statutory damages would fail scrutiny under the Supreme Court's three "guideposts" for punitive jury awards: (1) the reprehensibility of the conduct, (2) the disparity between the harm or potential harm and the award, and (3) the difference between the remedy and the civil penalties authorized by legislatures in comparable cases. Every court to consider the issue has held that it is inappropriate to apply these guideposts to statutes. *See, e.g., Zomba*, 491 F.3d at 588; *Lowry's Reports, Inc. v. Legg Mason*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004).

Our opening brief showed (at 52-56) why it makes no sense to try to apply these guideposts to damages set by a statute. The first two guideposts presume that a plaintiff has already been made whole by compensatory damages, *State Farm*, 419 U.S. at 419, but that assumption will always be wrong in the case of statutory damages under FCRA because they are an *alternative* to actual damages. *See Saunders v. Branch Banking and Trust Co. of Va.*, 526 F.3d 142, 153-54 (4th Cir. 2008) (equating $1,000 statutory damages award under FCRA with compensatory damages for purposes of reviewing $80,000 punitive damages award). And the problem with attempting to apply the third guidepost to a statute is perhaps self-evident: The two quantities that would be compared (the award of damages and the damages set by the legislature) are exactly the same. *Cf. Gore*, 517 U.S. at 583 (emphasizing that courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue"). Although the defendants do not grapple with any of these issues head-on, their briefs are a good illustration of the problem. Rave, for example, struggles (at 32) to say anything meaningful about the second guidepost (disparity between the compensated harm and

the punitive award) and admits that the third guidepost (comparison to statutory penalties) "cannot be analyzed."

The defendants' approach is not only unworkable in practice, but also fundamentally unsound in theory. The defendants do not deny that the core concern animating the Supreme Court's punitive damages jurisprudence—a concern about whether a defendant hit with a jury award has had "fair notice" of the "severity of the penalty a State may impose," *Gore*, 517 U.S. at 574—is entirely absent with respect to a statute with a fixed maximum penalty. *See* Pl's Br. 52-54; *Accounting Outsourcing*, 329 F. Supp. 2d at 809 (refusing to apply *Gore* and *State Farm* to a statute because the "[d]efendants can hardly complain they had no fair notice regarding the severity of the potential punishment"); Murphy, *Judicial Assessment of Legal Remedies*, 94 Nw. U. L. Rev. at 198 ("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."). In this respect, the defendants' excessiveness challenge fails for the same reason as its vagueness challenge: Because FCRA "clearly define[s] the conduct

prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Batchelder*, 442 U.S. at 123.

That Congress has invariably given the defendants fair notice of the consequences of unlawful conduct is true of civil statutes generally, but it is perhaps particularly true of the FACTA amendments to FCRA. Just this year, Congress took action to ensure that statutory damages under FCRA would be assessed only for FACTA violations of which the defendants had clear, widespread notice. *See* Pl's Br. 12-14 (discussing Credit and Debt Receipt Clarification Act). Concluding that retailers were aware or should have been aware of the more important account-number-truncation requirement but were not as conscious of the less significant expiration-date requirement, Congress retroactively provided that an expiration-date violation will not subject a defendant to statutory damages, but *deliberately left in place* the availability of statutory damages for the printing of account numbers, which the legislation's sponsor described as the "single most crucial piece of information that a criminal would need perpetrate account fraud." 154 Cong. Rec. H00000-29, H3730 (daily ed. May 13, 2008). At bottom, the defendants' complaints are properly directed to Congress,

not to the courts. *See Murray*, 434 F.3d at 954 ("Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted.").

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 3,459 words and complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B).

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