No. 12-715

In the Supreme Court of the United States

JAMMIE THOMAS–RASSET,
Petitioner,
v.
CAPITOL RECORDS INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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1. The Government characterizes the question presented as whether due-process review of statutory damages under the Copyright Act is governed by *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams*, 251 U.S. 63 (1919), or *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). This is the predicate to the Government's argument that the question presented is insubstantial. In the Government's view, no issue of consequence is raised by a statute that authorizes copyright holders, as owners of ephemeral intellectual property, to use civil process in the federal courts to impose and collect bankrupting statutory fines from individual consumers with no requirement of proof of damages, justified by the need for general deterrence of peer-to-peer not-for-profit file sharing rather than by the features of the particular defendant's conduct.

The question presented is just as Thomas–Rasset has stated it: Is there any constitutional limit to the statutory damages that can be imposed for downloading music online? The prevailing interpretations of the Copyright Act,[1] the nature of file

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[1] Three interpretations of the Copyright Act lead to the present problem: (1) that juries, rather than judges, pick the amount of statutory damages, with the statutory range quoted to them as their only tangible guide under *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345–46, 355 (1998), as implemented by the lower courts; (2) that the Act does not permit appellate review, even for abuse of discretion, of the fact finder's (at the time, the district judge's; after *Feltner*, the jury's) award of statutory damages, so long as it is within the statutory range, *F.W.*

sharing, and the unprecedented litigation campaign of the RIAA against 12,500 individual consumers (with demand letters sent to 5,000 more), have created a situation in which the statutory damages that can be imposed for downloading music online are absurd, arbitrary, and without practical limit, except as they are limited by the due-process notions in *Williams*, the other early cases, *Gore*, and *Gore*'s progeny. Answering the question presented will involve articulating the limits that due process imposes on punitive statutory damages like these and deciding whether the lower courts properly applied those limits in this case.

2. The recording companies attempt to vanish the circuit split identified in the Petition by distinguishing punitive damages authorized by statute with a statutory cap, as were at issue in *Romano v. U-Haul Int'l*, 233 F.3d 655, 672–73 (1st Cir. 2000), and without a statutory cap, as were at issue in *Willow Inn, Inc. v. Public Service Mutual Ins. Co.*, 399 F.3d 224, 229–30 (3d Cir. 2005), and *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 818 (10th Cir. 1993), from statutes like the Copyright Act that authorize punitive statutory damages with both a statutory minimum and a statutory cap. Respondents' Br. at 17–19. By

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Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232–34 (1952); *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935); and (3) that the Act does not permit the fact finder to impose statutory damages below the statutory minimum, even if the fact finder believes that justice requires that result and even in the absence of any actual damages suffered by the copyright owner or profits made by the infringer, *Jewell–La Salle Realty Co. v. Buck*, 283 U.S. 202, 203–08 (1931); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106–07 (1919). *See* Pet. 13–15.

distinguishing these cases in this way, the recording companies implicitly agree that the mere fact that damages, imposed to punish, are authorized by statute does not remove them from scrutiny under *Gore* and its progeny.

What difference, then, can the fact that punitive damages are authorized by statute make; what difference with respect to the concerns described in *Williams*, *Gore*, and the rest of the cases about ensuring that civil damages are not arbitrary, that they are tied to particular features of the individual defendant's conduct, like the harm it caused or its reprehensibility? The difference cannot be the naked fact that Congress authorized the damages, for Congress has no more power under the Due Process Clause to impose arbitrary civil punishments than the courts do under the common law. The difference can only be that, when Congress authorizes statutory damages, it is making a judgment, worthy of deference, that a certain amount or range of amounts is appropriate and hence not arbitrary for the particular sort of conduct made an offense under the statute.

The error comes in believing that Congress has made such a judgment in this case. It has not. Instead, Congress established a broad statutory range applicable to the broad range of conduct that constitutes modern copyright infringement — from publishing the manuscript of a presidential memoir to going beyond the scope of a software license agreement for a computer operating system — and asked the courts to determine, in particular cases, what amount, within that range, is appropriate to the particular sort of copyright infringement before them. The Copyright

Act does not reflect any judgment from Congress about whether any particular award of statutory damages is appropriate; rather, it reflects Congress's decision to delegate that judgment to courts in particular cases. *See, e.g.,* 17 U.S.C. § 504 (authorizing statutory damages in an amount "the court considers just"). A statute that, unlike the Copyright Act, were to identify a narrow, specific kind of offense and prescribe for that offense punitive damages within a narrow, tailored range would present a materially different question.[2]

3. The recording companies' arguments in the lower courts and in this Court are afflicted by a peculiar kind of category error: they argue from this Court's cases interpreting and applying the statutory-damages provision of the Copyright Act — statutory-interpretation cases — to the conclusion that those statutory damages are constitutional. *See, e.g.,* Respondents' Br. at 27–28 (discussing *Westermann*, *Douglas*, and *Woolworth*). None of these cases involved the constitutionality of statutory damages under the Copyright Act. Thomas–Rasset does not deny that the judgment she seeks would undermine a Congressional policy that approves of delegating to the recording

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[2] The 1831 and 1909 Copyright Acts, 4 Stat. 436, §§ 6–7, 35 Stat. 1075, § 25, were closer to this kind of statute, prescribing specific ranges of statutory damages for specific offenses, like copying a book, copying a map, or preaching a sermon. Congress later abandoned this scheme of tailored statutory damages in favor of a single, broad range applicable to all copyright infringement and a delegation to the courts (judges before *Feltner*, juries after) to select an appropriate amount in each particular case. This decision reflects the ever-growing range of conduct that has come to be called copyright infringement.

industry (or any other industry) unfettered discretion to impose unbounded punitive damages on individual consumers through threat of the full force of federal process, if that is indeed Congress's policy; she merely argues that such a policy is not within Congress's power under the Constitution.

Similarly mistaken is the recording companies' and the Government's focus on the three-factor test in *Gore*. Respondents' Br. at 20–23; Government Br. at 10–12. While the *Gore* factors can be applied to copyright statutory damages and are a useful tool in that context, *see Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85, 103–18 (D. Mass. 2010) (Judge Nancy Gertner applying the three *Gore* factors in detail to strike down the award of statutory damages in the only other individual file-sharing case to go to trial), they are not the only teaching of the modern punitive-damages cases. The teachings of *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994), and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 20–21, 21 n.10 (1991), that vigorous judicial review of jury-imposed civil punishments is constitutionally required and of *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003), and *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), that civil punishments must be for the injury caused by the particular defendant against the particular plaintiff in the case have as much or more bearing on this case than do the *Gore* factors.

The question presented is not merely whether the *Gore* factors apply, but whether the whole panoply of modern due-process law applies to civil punishments authorized by statute as it does to civil punishments

under the common law. No case could present a better vehicle for deciding that question: it is the sole remaining issue on appeal; it is dispositive; it has been well and thoroughly litigated below, with the United States participating at every level and a former Solicitor General arguing for the private respondents; and it presents the problem — civil punishments so absurdly high, $222,000 for 24 songs in this case, that 12,500 cases and 5,000 more demand letters resulted in only two trials because every other defendant, without the benefit of counsel acting *pro bono*, had no practical choice but to acquiesce in the recording industry's legal construct and pay up — as starkly as it will ever come before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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