

No. 12-715

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**In the Supreme Court of the United States**

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JAMMIE THOMAS-RASSET, PETITIONER

*v.*

CAPITOL RECORDS, INC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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SRI SRINIVASAN  
*Acting Solicitor General  
Counsel of Record*

STUART F. DELERY  
*Principal Deputy Assistant  
Attorney General*

SCOTT R. MCINTOSH  
JEFFREY CLAIR  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

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### QUESTION PRESENTED

Whether due process review of an award 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).

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-22) is reported at 692 F.3d 899. The opinion of the district court (Pet. App. 23-60) is reported at 799 F. Supp. 2d 999. Prior opinions of the district court are reported at 579 F. Supp. 2d 1210 and 680 F. Supp. 2d 1045.

**JURISDICTION**

The judgment of the court of appeals was entered on September 11, 2012. The petition for a writ of certiorari was filed on December 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Copyright Act of 1976 gives the owner of a copyrighted sound recording the exclusive right to reproduce the sound recording, to prepare derivative works, and to distribute the sound recording to the

public. 17 U.S.C. 102(a)(7), 106(1)-(3); 17 U.S.C. 114 (2006 & Supp. V 2011); see also 17 U.S.C. 115(d). The transfer of a copy of a digital sound recording over the Internet and the resulting creation of a copy on a local computer hard drive amount to the “distribut[ion]” and “reproduc[tion]” of the work. Thus, one who downloads a copy of a sound recording over the Internet or subsequently uploads a copy of the sound recording to other Internet users, without the copyright owner’s permission, has infringed the copyright in the work. 17 U.S.C. 501(a).

A copyright owner has a statutory cause of action against an infringer. 17 U.S.C. 501(b). This case concerns 17 U.S.C. 504, the Copyright Act provision that governs the computation of damages in successful infringement actions. Section 504(a) provides that an infringer is liable for either (1) the copyright owner’s actual damages and any additional profits of the infringer, or (2) “statutory damages,” as defined under Section 504(c). 17 U.S.C. 504(a). The copyright owner “may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages.” 17 U.S.C. 504(c)(1). Under Section 504(c)(2), “[t]he court shall remit statutory damages” if the infringer was, or worked for, a specified nonprofit entity or a public broadcasting entity and reasonably believed that his use was a fair use. 17 U.S.C. 504(c)(2) (Supp. V 2011).

A plaintiff who elects statutory damages need not prove actual damages or lost profits. Instead, the court may award an amount of statutory damages that it “considers just” and that is within the range specified by

statute. 17 U.S.C. 504(c)(1).<sup>1</sup> For most statutory-damages awards, the Copyright Act establishes a permissible range between a minimum of \$750 and a maximum of \$30,000 per infringed work. *Ibid.* The statutory range of permissible damages awards, however, may be increased or reduced in light of the infringer's conduct. Thus, if the infringement is willful, the statutory maximum is increased to \$150,000 per infringed work. 17 U.S.C. 504(c)(2). Conversely, if the defendant establishes that he was not aware and had no reason to believe that his actions constituted an infringement, the statutory minimum is reduced to \$200 per infringed work. *Ibid.*

2. The private respondents (respondents) in this case are recording companies. They allege that petitioner violated their copyrights in 24 sound recordings by using an Internet-based, peer-to-peer network to download unauthorized copies of the recordings and to distribute them to others.<sup>2</sup> They brought this action for copyright infringement, requesting injunctive relief to restrain further acts of infringement and statutory damages under Section 504(c). Three jury trials followed. See Pet. App. 25-27.

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<sup>1</sup> Although the statute refers to an award of damages by "the court," the Seventh Amendment guarantees the right to a jury trial on all issues pertinent to the award of statutory damages, including the amount. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-355 (1998). Accordingly, if a jury trial is elected, the jury determines the appropriate amount of statutory damages.

<sup>2</sup> Peer-to-peer networking software enables participating computer users to communicate and to exchange files with each other without mediation by a central computer server. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 921-922 (2005); *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 104-106 (E.D. Pa. 2005).

a. In the first trial, the jury found that petitioner had willfully infringed respondents' copyrights, and it awarded statutory damages in the amount of \$9250 per infringed work, for a total award of \$222,000. Petitioner filed a motion for a new trial or remittitur. She argued that the damages award was excessive and should be reduced under either the common-law remittitur procedure or the Due Process Clause. Pet. App. 26. The United States intervened in the action to defend the constitutionality of the statute. See 28 U.S.C. 517, 2403(a). On its own motion, the district court concluded that it had erred in instructing the jury. Without addressing the damages award, the court vacated the jury verdict and granted a new trial. Pet. App. 26.

b. The second jury again found that petitioner had willfully infringed respondents' copyrights. It awarded statutory damages in the amount of \$80,000 per infringed work, for a total award of \$1.92 million. Petitioner filed a motion for a new trial or remittitur, arguing again that the damages award was excessive and should be reduced under either the common-law remittitur procedure or the Due Process Clause. The district court granted common-law remittitur and did not reach the constitutional issue. The court offered respondents statutory damages of \$2250 per infringed work (three times the statutory minimum) for a total award of \$54,000. Respondents declined the reduced award, opting instead for a new trial on damages. Pet. App. 26-27.

c. The third jury awarded statutory damages in the amount of \$62,500 per infringed work, for a total award of \$1.5 million. Pet. App. 27. Petitioner filed a motion to alter or amend the judgment, but she did not request remittitur. Instead, she urged the district court to find the jury award excessive under the Due Process Clause.



*Id.* at 28. Because petitioner had not requested remittitur, and because of respondents’ “demonstrated refusal to accept remittitur,” the court determined that it needed to “address the constitutionality of the damages award.” *Ibid.*

The district court agreed with respondents and the United States that the appropriate standard for assessing the constitutionality of a within-range award of statutory damages under the Copyright Act had been set forth in *St. Louis, Iron Mounain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919). See Pet. App. 29-36. Petitioner had argued that this Court’s decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)—both of which involved awards of punitive damages—provided the governing standard. The district court disagreed. See Pet. App. 31-36. The court explained that the “guideposts” set forth in *Gore* were “inapplicable” to statutory damages and “unhelpful to [the] analysis for three main reasons.” *Id.* at 32.<sup>3</sup> First, the court explained, “statutory damages and punitive damages are two distinct remedies with different purposes and attributes.” *Ibid.* Second, the court continued, the “underlying consideration in the *Gore* punitive damages jurisprudence is lack of notice; that concern does not neatly apply to a review of statutory damages awarded within a range explicitly set forth by Congress.” *Ibid.* Finally, the court ex-

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<sup>3</sup> The three guideposts are: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Campbell*, 538 U.S. at 418; see *Gore*, 517 U.S. at 574-575.

plained that “the *Gore* guideposts themselves do not logically fit an analysis of statutory damages.” *Id.* at 32-33.

Applying the *Williams* standard, the district court concluded that the jury’s award of \$1.5 million was “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” Pet. App. 48. As it had done in the earlier remittitur order, the court relied on the prevalence of treble damages to determine “the maximum amount that will comply with due process.” *Id.* at 48-52. The court concluded that, “in this particular case, involving a first-time willful, consumer infringer who committed illegal song file-sharing for her own personal use, \$2,250 per song, for a total award of \$54,000, is the maximum award consistent with due process.” *Id.* at 52. The court again vacated the jury verdict, and this time it entered judgment in that amount. *Id.* at 60.

3. Both private parties appealed. Their litigating positions on appeal narrowed the issues such that only the first jury verdict (awarding statutory damages in the amount of \$222,000) was properly before the court of appeals. See Pet. App. 11-12.

The court of appeals first considered the standard to be applied in determining whether the \$222,000 award was constitutional. Agreeing with the district court, the court of appeals identified *Williams* as the governing standard, and it declined petitioner’s request to apply the “punitive damages guideposts” to an award of statutory damages under the Copyright Act. Pet. App. 15-17. The court explained that, unlike punitive damages, statutory damages raise no “concern[s] about fair notice” because the “damages are identified and constrained by the authorizing statute.” *Id.* at 16. The court further

explained that the *Gore* guideposts cannot coherently be applied to a statutory-damages award because “[i]t makes no sense to consider the disparity between ‘actual harm’ and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate.” *Ibid.* The court of appeals also observed that a reviewing court could not “consider the difference between an award of statutory damages and the ‘civil penalties authorized,’ because statutory damages *are* the civil penalties authorized.” *Ibid.*

Applying the *Williams* standard to the first jury verdict, the court of appeals concluded that an award of \$9250 per infringing work (\$220,000 total) does not violate petitioner’s rights under the Due Process Clause. See Pet. App. 17-22. The court also explained that, under *Williams*, the legislature may adjust the statutory penalty to the public wrong, rather than to the private injury, and that the Constitution does not require “a comparison of an award of statutory damages to actual damages caused by the violation.” *Id.* at 21. The court declined to opine on the constitutionality of different “hypothetical” awards, explaining that “[i]f and when a jury returns a multi-million dollar award for noncommercial online copyright infringement, then there will be time enough to consider it.” *Id.* at 21-22.

#### ARGUMENT

Petitioner seeks this Court’s review of the question whether there is “any constitutional limit to the statutory damages that can be imposed for downloading music online.” Pet. i. That question is not presented in this case. The court of appeals and the district court both reviewed the constitutionality of the jury’s statutory-damages awards. Both courts correctly held that the

due process analysis for such awards is governed by *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), rather than by the punitive-damages guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). There is no conflict among the courts of appeals on that issue. Petitioner's further contention (Pet. 15-18) that the court of appeals misapplied the *Williams* standard is not fairly encompassed in the question presented and is, in any event, a case-specific challenge that does not warrant this Court's review.

1. The question whether there is "any constitutional limit to the statutory damages that can be imposed for downloading music online," Pet. i, is not in fact presented in this case. The court of appeals and the district court both reviewed the constitutionality of the jury's statutory-damages awards. Applying the standard set forth by this Court in *Williams*, both courts asked whether the relevant award was "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Pet. App. 15 (quoting 251 U.S. at 67); *id.* at 35-36. The district court answered that question in the affirmative with respect to the third jury verdict (\$1.5 million). See *id.* at 48. Because the parties' litigating positions had changed on appeal, the court of appeals reviewed only the first jury verdict (\$220,000), and concluded that it did not violate petitioner's due process rights. See *id.* at 15-21. And, far from holding that the Constitution imposes no limits on statutory-damages awards within the range set by the Copyright Act, the court of appeals specifically explained that the Due Process Clause analysis might well have been different if a much greater number of works had been involved and the award had been correspondingly larg-

er. See *id.* at 21-22. Because both courts below reviewed the relevant jury award to ensure that it comported with due process requirements, this case is not an appropriate vehicle to decide petitioner's question presented.

2. In the body of the petition, petitioner argues that the court of appeals should have applied the punitive-damages guideposts set forth in *Gore*, rather than the *Williams* standard. The court of appeals (and the district court) correctly rejected that argument. Contrary to petitioner's contention (Pet. 21-23), there is no conflict among the circuits on that issue. Further review of that question is therefore also not warranted.

a. Both of the courts below correctly held that due process review of a jury's award of statutory damages under the Copyright Act is governed by *Williams* rather than by the punitive-damages guideposts set forth in *Gore*. See Pet. App. 15-17, 30-31. Under the standard set forth in *Williams*, a statutory-damages award violates due process if it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 67. That standard accords substantial deference to the legislature's judgment as to an appropriate assessment. *Id.* at 66. It also recognizes that statutory assessments are not intended solely to safeguard the pecuniary interests of private parties, but also serve to redress and deter harm to important public interests. *Ibid.*

Those considerations are directly applicable here. As in *Williams*, an award of statutory damages under the Copyright Act does not simply redress a private injury, but also serves to vindicate an important public interest. In particular, the exclusive rights conferred by a copyright are "intended to motivate the creative activity of

authors \* \* \* by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). That public interest cannot be realized if the inherent difficulty of proving actual damages leaves the copyright holder without an effective remedy for infringement or precludes an effective means of deterring further copyright violations. The statute reflects a legislative determination of the range of assessments necessary to vindicate those public interests, see 17 U.S.C. 504(c), and Congress’s judgment as to the appropriate amounts is entitled to deference. Due process review of a within-range damages award should therefore proceed according to the standard set forth in *Williams*.

b. Petitioner contends (Pet. 18-21) that the court of appeals (and the district court) should have instead applied the punitive-damages guideposts set forth in *Gore*. As this Court has explained, in assessing whether a punitive-damages award comports with due process, courts should look to three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); see *Gore*, 517 U.S. at 574-575. The court of appeals (and the district court) correctly declined to apply those guideposts to an award of statutory damages under the Copyright Act.

As both courts explained, because *Gore*'s due process standard serves purposes unique to the review of a jury's award of punitive damages, it cannot coherently be applied to an award of statutory damages under the Copyright Act. See Pet. App. 16-17, 31-36. First, whereas punitive damages are "awarded in addition to compensatory damages, the Copyright Act statutory damages award is awarded in place of compensatory damages, precisely because actual damages are so difficult to calculate." *Id.* at 32. Second, the fair-notice concern that underlies this Court's punitive-damages jurisprudence "does not neatly apply to a review of statutory damages awarded within a range explicitly set forth by Congress." *Ibid.* In *Gore*, this Court spoke of "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive fair notice \* \* \* of the severity of the penalty a State may impose." 517 U.S. at 574. Whereas "[p]unitive damages are potentially unlimited and subject to the unbridled discretion of the jury," Pet. App. 33, statutory damages are "identified and constrained by the authorizing statute," *id.* at 16. Because the Copyright Act specifies the range of permissible damages awards, see 17 U.S.C. 504(c), would-be infringers have advance notice of their potential financial exposure, substantially mitigating the fair-notice concerns identified by this Court in *Gore*.

Third, the *Gore* guideposts themselves "do not logically fit an analysis of statutory damages." Pet. App. 32-33. In reviewing a jury award of statutory damages under the Copyright Act (or a similar statute), a court could not compare the award to the authorized "civil penalties" because "statutory damages *are* the civil penalties authorized." *Id.* at 17; see *id.* at 34. And, as

this Court recognized in *Gore*, “substantial deference [is due] to legislative judgments concerning appropriate sanctions for the conduct at issue.” 517 U.S. at 583 (citation omitted). The guideposts are also inapt because it “makes no sense to consider the disparity between ‘actual harm’ and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate.” Pet. App. 17; see *id.* at 34-35.

Petitioner suggests that, if the award in this case is reviewable under the more deferential *Williams* standard, “a legislature could evade *Gore* and *Campbell* simply by authorizing punitive damages in a statute.” Pet. 18-19. That argument reflects a misunderstanding of the court of appeals’ analysis. The “statutory damages” at issue here differ from punitive damages (whether authorized by common law or by statute) in at least two fundamental respects. First, they are imposed in lieu of, rather than in addition to, compensatory damages. Second, the amount of damages is constrained within a specific range defined by the legislature. That legislative constraint limits jury discretion and provides notice to potential infringers. Because the *Gore* guideposts were designed for situations in which such legislative constraints are absent, there is nothing anomalous or suspect about declining to apply those guideposts in the circumstances presented here.

c. Contrary to petitioner’s contention (Pet. 21-23), the courts of appeals are not divided on the question whether due process review of a non-punitive statutory-damages award should proceed pursuant to *Williams* or *Gore*.

With respect to the Copyright Act in particular, there is plainly no conflict. The only other court of appeals to



squarely decide this question reached the same conclusion as the courts below, and this Court denied certiorari. See *Zomba Enter., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587-588 (6th Cir. 2007) (declining to apply *Gore* in reviewing an award of statutory damages under the Copyright Act and treating *Williams* as controlling), cert. denied, 553 U.S. 1032 (2008). The First Circuit has also “strongly suggested, without deciding, that” *Williams* rather than *Gore* provides “the standard for evaluating the constitutionality of statutory damages” under the Copyright Act. *Sony BMG Music Entm’t v. Tenenbaum*, No. 07-11446, 2012 WL 3639053, at \*4 (D. Mass. Aug. 23, 2012) (citing *Sony BMG Entm’t v. Tenenbaum*, 660 F.3d 487, 513 (1st Cir. 2011), cert. denied, 132 S. Ct. 2431 (2012)).<sup>4</sup> None of the purportedly conflicting cases cited by petitioner involves the Copyright Act.

Most of the cases on which petitioner relies also involve punitive damages. In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 230-238 (2005), the Third Circuit applied *Gore* to an award of punitive damages, which were imposed in addition to compensatory damages and pursuant to a state statute that placed no limit on jury discretion. *Capstick v. Allstate Insurance Co.*, 998 F.2d 810 (10th Cir. 1993), predated *Gore*. That case likewise involved an award of punitive damages imposed in addition to compensatory damages and pursuant to a state statute that, based on the facts found, placed no outer limit on jury discretion. See *id.* at 821-823. *Romano v. U-Haul International*, 233 F.3d 655, 673 (1st Cir. 2000), cert. denied, 534 U.S.

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<sup>4</sup> The First Circuit case involves facts similar to those presented here, and a second appeal is currently pending. See *Tenenbaum*, No. 12-2146 (filed Sept. 25, 2012).

815 (2001), involved an award of punitive damages under Title VII, which does include a statutory cap. After noting that “a punitive damages award that comports with a statutory cap provides strong evidence that a defendant’s due process rights have not been violated,” the court explained that the jury award would survive scrutiny “[e]ven” under the *Gore* analysis. *Ibid.* The court did not consider whether *Williams* provided a more appropriate standard for reviewing an award of punitive damages subject to a statutory cap. As noted above, however, the First Circuit suggested more recently that the *Williams* standard might well control a statutory-damages award under the Copyright Act. See *Tenenbaum*, 660 F.3d at 513.

The two remaining decisions on which petitioner relies did not even mention *Williams*, and their discussions of *Gore* and *Campbell* were dicta. In *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (2006), the Seventh Circuit discussed whether class certification was appropriate when statutory damages under the Fair Credit Reporting Act could result in a high aggregate damages award. In the course of that discussion, the court cited *Campbell* and noted that “[a]n award that would be unconstitutionally excessive may be reduced.” *Id.* at 954. Similarly, in *Parker v. Time Warner Entertainment Co. L.P.*, 331 F.3d 13, 22 (2003), the Second Circuit responded to the concurrence’s “legitimate concern” that class certification under a different statute (the Cable Communications Policy Act of 1984) could result in a high aggregate damages award. In the course of that discussion, the court cited *Campbell* and *Gore* with a “cf.” signal and explained that “it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to

nullify that effect and reduce the aggregate damage award.” *Ibid.* Neither court discussed the appropriate standard for reviewing a future damages award, and there is no reason to think that either would apply *Gore* rather than *Williams* if such an award were alleged to be excessive.

3. Petitioner’s additional suggestion (Pet. 17-18) that the court of appeals misapplied the *Williams* standard is not fairly encompassed within the question presented. See, e.g., *Wood v. Allen*, 130 S. Ct. 841, 851 (2010) (“[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.”) (citation and brackets omitted). In any event, this Court’s review is not warranted. The court of appeals concluded that the first jury award of \$220,000 is consistent with due process, and it declined to opine on hypothetical “multi-million dollar award[s] for noncommercial online copyright infringement.” Pet. App. 22. Further review of that case-specific holding is not warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SRI SRINIVASAN  
*Acting Solicitor General*  
STUART F. DELERY  
*Principal Deputy Assistant  
Attorney General*  
SCOTT R. MCINTOSH  
JEFFREY CLAIR  
*Attorneys*

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