No. 23-1206

In The
Supreme Court of the United States

ELITE IT PARTNERS, INC., AND JAMES MARTINOS,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The brief in opposition is striking for its fundamental agreement with Petitioners' key arguments. Most importantly, the Federal Trade Commission agrees that "something more than a change in decisional law is *generally* needed to justify setting aside a final judgment." Br. in Opp. 11 (emphasis added). And, the FTC continues, this general rule "does not mean that a change in decisional law is never relevant to a Rule 60(b)(6) analysis." *Id.*

But, likely because Petitioners said nothing different, the FTC claims that the Tenth Circuit below held merely that "a change in decisional law standing alone is *generally* insufficient to warrant relief under Rule 60(b)(6)." Br. in Opp. 12 (emphasis added). But that's not at all what the Tenth Circuit said. Rather, the Tenth Circuit applied a per se rule and held that a post-judgment "change in case law doesn't justify vacatur under Rule 60(b)(6)." App. 12a (citation omitted).

The FTC also denies that the circuits diverge in their treatment of Rule-60(b)(6) motions based on post-judgment changes in decisional law. Notably, however, the FTC completely ignores the Ninth Circuit's decision in *Phelps v. Alameida*, 569 F.3d 1120, 1132 (9th Cir. 2009), which concluded that this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), "directly refuted" the "*per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law." As discussed in the Petition (at 9–11) and below, several circuits including the Tenth Circuit nonetheless apply a per se rule when considering Rule-60(b)(6) motions based on post-judgment changes in decisional law.

The FTC fares no better when it claims that a waiver clause in consent agreements absolutely precludes relief under Rule-60(b)(6) even though the rule "implicitly contemplate[s] consideration of circumstances *beyond the terms* of the judgment." *Zimmerman v. Quinn*, 744 F.2d 81, 82 n.1 (10th Cir. 1984) (emphasis added).

Ultimately, the Government is forced to rely on the general policy of finality. But as this Court observed in *Gonzalez*, the "policy consideration" of finality, "standing alone, is unpersuasive in the interpretation of a provision [Rule 60(b)(6)] whose whole purpose is to make an exception to finality." 545 U.S. at 529.

* * *

The Tenth Circuit held that a post-judgment change in decisional law alone *never* provides a basis to reopen judgments under Rule 60(b)(6). Other circuits disagree, and this Court appears to side with the latter. The Court should grant the petition and determine whether Rule-60(b)(6) relief based on a post-judgment change in decisional law is categorically unavailable

ARGUMENT

I. THE GOVERNMENT TRIES TO MUDDLE THE TENTH CIRCUIT'S HOLDING AND IGNORE THE CIRCUIT SPLIT

The Tenth Circuit below concluded definitively that a post-judgment "change in case law doesn't justify vacatur under Rule 60(b)(6)." App. 12a (citing *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958)). But as the FTC itself observes, this Court holds that "a change in decisional law by this Court, standing alone, is *generally* not an extraordinary cir-

cumstance that warrants relief under Rule 60(b)(6)" and that "'[i]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).'" Br. in Opp. 10 (emphasis added) (discussing *Gonzalez*, 545 U.S. 524, and quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)).

Several circuits likewise "reject[] the absolute position . . . that intervening changes in the law *never* can support relief under Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015). *See, e.g.*, *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 891 (7th Cir. 2020) (citing *Agostini*, 521 U.S. at 239); *Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014) ("not foreclos[ing] the possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief"); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1210 (8th Cir. 2015) (holding "change in the law could 'represent so significant an alteration in circumstances as to justify both prospective and retrospective relief from the obligations of a court order'") (citation omitted); *FTC v. Hewitt*, 68 F.4th 461, 468 (9th Cir. 2023) (stating intervening change in law "may be adequate" to grant relief under Rule 60(b)(6)); *see generally* Pet. 11–13.

To elide the distinction between the decision below and decisions from other circuits and from this Court, the FTC claims that the Tenth Circuit below held that "a change in decisional law standing alone is *generally* insufficient to warrant relief under Rule 60(b)(6)." Br. in Opp. 12 (emphasis added).

But that's not what the Tenth Circuit said. It said that—aside from cases arising out of the same transaction or occurrence—a post-judgment change in deci-

sional law is *always* insufficient to warrant relief under Rule 60(b)(6). Here, therefore, because Petitioners "weren't involved in the events giving rise to" *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021)—that is, because Petitioners' case did not arise out of the same set of facts as the *AMG* case—the Tenth Circuit held that Petitioners could not obtain relief through Rule 60(b)(6). App. 14a.

As the FTC implicitly concedes, this Court's decisions do not require a factually related case before awarding Rule-60(b)(6) relief. *See* Br. in Opp. 10–12 (discussing inter alia *Gonzalez*, *Agostini*, and *Buck v. Davis*, 580 U.S. 100 (2017)). Rather, Rule-60(b)(6) relief may be based on a change in decisional law alone. To claim otherwise, the FTC observes that courts applying this approach have looked at various factors when considering Rule-60(b)(6) relief. *See* Br. in Opp. 12–17.

But no one disputes that courts "may consider a wide range of factors" when ruling on a Rule-60(b)(6) motion. *Buck*, 580 U.S. at 123. *See* Pet. 7–8. The question here is whether a post-judgment change in decisional law alone may *never* justify relief under Rule 60(b)(6). *See, e.g.*, *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (holding change in decisional law "is not an 'extraordinary circumstance' sufficient *to invoke* Rule 60(b)(6)") (emphasis added).

According to the Tenth Circuit and other circuit courts, a change in decisional law has just that effect. *See* Pet. 9–11; *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016) (A "change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)."); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (A "'change in decisional law after

entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment' under Rule 60(b)(6).") (citation omitted); *Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018) ("[C]hanges in decisional law alone do not establish grounds for Rule 60(b)(6) relief."); *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) ("'[E]xtraordinary circumstances' are not present . . . when there has been an intervening change in case law.") (citation omitted).

Most egregiously, as noted above, the FTC completely ignores the Ninth Circuit's *Phelps v. Alameida* opinion, which concluded that this Court's decision in *Gonzalez* "directly refuted" the "*per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law." 569 F.3d at 1132.[1] Indeed, according to the Ninth Circuit, the "Supreme Court's central holding in *Gonzalez* was that a Rule 60(b)(6) motion is the *proper* means of bringing" a challenge based on a change in decisional law. *Id.* (citing *Gonzalez*, 545 U.S. at 533) (citing, in footnote, *Agostini*, 521 U.S. at 239;

[1] The FTC also ignored *Kemp v. United States*, 596 U.S. 528, 540 (2022) (Sotomayor, J., concurring); *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882 (7th Cir. 2020); *Crutsinger v. Davis*, 140 S. Ct. 2, 3 (2019) (Sotomayor, J.) (noting contrasting approaches between (a) the Third (*Cox*) and Seventh (*Ramirez*) Circuits, and (b) the Fifth Circuit (*Adams*)); *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152 (3d Cir. 2017); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th Cir. 2013). And the FTC gave only passing consideration (Br. in Opp. 9, 13, 14 n.5, 15, 16) to several other circuit court cases that demonstrate the circuit split. *See FTC v. Hewitt*, 68 F.4th 461 (9th Cir. 2023); *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015); *Biggins v. Hazen Paper Co.*, 111 F.3d 205 (1st Cir.), *cert. denied*, 522 U.S. 952 (1997).

Polites v. United States, 364 U.S. 426, 432 (1960)). *See* Pet. 13–15, 18.

The split on this issue could not be more stark.

As a result, the FTC falls back on the general policy of finality—*i.e.*, that litigation must at some point come to an end and that, therefore, retroactivity of decisional law has limits. Br. in Opp. 10–11. No one suggests otherwise. And, as this Court observed, the "policy consideration" of finality, "standing alone, is unpersuasive in the interpretation of a provision [Rule 60(b)(6)] whose whole purpose is to make an exception to finality." *Gonzalez*, 545 U.S. at 529; *see* Pet. 9.[2]

Finally, the FTC hopes that the extraordinary nature of 60(b)(6) relief counts as a reason not to grant certiorari. It thus asks this Court to deny review of the question presented—whether Rule-60(b)(6) relief based on a post-judgment change in decisional law is categorically unavailable—on the ground that no court of appeals would "require" Rule-60(b)(6) relief in this case. Br. in Opp. 15. The FTC also claims that no

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[2] Cases cited by the Government concerning the general rules of retroactivity (Br. in Opp. 10–11) are thus inapposite. *See George v. McDonough*, 596 U.S. 740, 744, 748 (2022) (considering application for veterans benefits "decades" after decision on grounds of "clear and unmistakable error"); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (noting that new legal principles do not *ordinarily* apply to closed cases); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) (holding "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision"); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (applying doctrine of res judicata). In *James B. Beam Distilling Co. v. Georgia*, no opinion garnered a majority, and the FTC here (Br. in Opp. 11) relies on Justice Souter's opinion, joined only by Justice Stevens, to support the unremarkable point that retroactivity is limited by the need for finality. 501 U.S. 529, 541 (1991).

court of appeals has granted Rule-60(b)(6) relief based on a change in decisional law alone without considering relevant factors. *Id.* These arguments merely rehash the FTC's earlier attempts to soften the distinction between the courts' approaches to requests for Rule-60(b)(6) relief based on post-judgment changes in decisional law.

* * *

Contrary to the Tenth Circuit's categorical rule, a post-judgment change in decisional law alone may support relief under Rule 60(b)(6). By applying a per se rule against considering post-judgment changes in decisional law, the Tenth Circuit below failed to recognize that Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (citation omitted). As Petitioners demonstrated, this Court's unanimous decision in *AMG* confirmed that the FTC has for decades taken advantage of its misapplication of §13(b) of the FTC Act. *See* Pet. 14–15. Here, without the extraordinary leverage provided by the FTC's erroneous application of §13(b), the FTC could never have obtained an ex parte TRO, which included an immediate asset freeze and business shut-down, or the consent judgment at issue in this case.[3] Pet. 14–15.

[3] The FTC's "Statement," which relies on the district court's order denying Petitioners' motion to vacate, treats the complaint's allegations as established facts. Br. in Opp. 2. The district court, however, expressly noted that Petitioners "admitted no wrongdoing in the settlement agreement." App. 38a n.3.

The Court should grant certiorari to clarify the proper standard for considering requests for relief under Rule 60(b)(6).

II. UNDER RULE 60(b)(6), A CONSENT JUDGMENT WITH A WAIVER TERM MAY BE REOPENED JUST LIKE ANY OTHER JUDGMENT

The FTC seeks to impose yet another per se rule against 60(b)(6) relief. It repeatedly declares—without authority—that a waiver provision in a consent judgment absolutely precludes Rule-60(b)(6) relief. Br. in Opp. 7–9. This argument fails.

First, the FTC's argument would contradict this Court's instruction that, as just noted, Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg*, 486 U.S. at 864 (citation omitted). Nor has the FTC identified a single case finding an exception to this authority when parties include a waiver term in a consent judgment.

Second, the FTC's argument contradicts the plain terms of Rule 60(b)(6), which states that a "court may relieve a party or its legal representative from a final judgment" for "*any* . . . reason that justifies relief" (outside of the reasons specified in Rule 60(b)(1)–(5)). Fed. R. Civ. P. 60(b)(6) (emphasis added). The FTC thus ignores the Rule's express grant of broad discretion to courts while also interpreting Congress's silence about waiver terms as an implicit bar on even considering the reopening of consent judgments that include a waiver term.

Indeed, it would defy logic to say that a rule granting broad discretion to reconsider any judgment for "any" reason that justifies relief precludes, without exception, the reconsideration of judgments that include

a waiver term. As the Tenth Circuit itself has observed, Rule 60(b)(6) "implicitly contemplate[s] consideration of circumstances *beyond the terms* of the judgment." *Zimmerman*, 744 F.2d at 82 n.1 (emphasis added); *cf. also United States v. Bank*, 965 F.3d 287, 292–93 (4th Cir. 2020) (declining to rely on term in consent agreement, which said, "Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein," because only after defendant signed the consent agreement did the Supreme Court consider disgorgement to be a penalty) (emphasis removed).

Again, the question here is whether Rule-60(b)(6) relief based on a post-judgment change in decisional law is categorically unavailable. Whether the waiver term in this case might ultimately counsel against relief is an issue for remand, if the case gets that far. But the FTC errs in claiming that courts are barred from even considering a Rule-60(b)(6) motion when a consent agreement includes a waiver term.

III. THE FTC'S REMAINING ARGUMENTS ARE WITHOUT MERIT

The FTC skips ahead to the merits and argues that 60(b)(6) relief is unwarranted here because (1) Petitioners entered the consent agreement when the circuits were split on whether §13(b) allowed monetary relief and when a petition for a writ of certiorari in *AMG* was pending; and (2) the FTC originally asked for relief under both §13(b) and §19 of the FTC Act. Neither argument holds water.

First, Petitioners cannot be faulted for failing to predict whether this Court would grant the cert petition in *AMG* and, if so, whether the Court would agree

with Petitioners' position. This Court grants certiorari in fewer than three percent of petitions filed,[4] and not all decisions result in reversals (as *AMG* did). Importantly, when Petitioners settled this dispute, the Tenth Circuit had applied for decades the FTC's view of §13. *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005).

Second, the FTC's original request for relief under §19 was not granted. The district court granted relief solely under §13(b). *See* App. 25a–27a; *see also id.* 2a. Nor could the district court have awarded the FTC $13,537,288.75 in this case under §19, which permits only non-punitive awards that redress injury to consumers, and explicitly forbids "the imposition of any exemplary or punitive damages." 15 U.S.C. § 57b(b); *see also FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Here, the consent judgment ordered that "money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement." App. 28a. Such an award was available only under the previous—but erroneous—interpretation of §13(b).

This Court should not countenance the FTC's continued attempt to excuse decades of lawless imposition of (punitive) "injunctive" monetary penalties.

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[4] *See* https://www.uscourts.gov/sites/default/files/data_tables/jb_b2_0930.2023.pdf, last visited July 22, 2024.

CONCLUSION

Resolution of the question presented is critical to litigants facing extraordinary circumstances arising out of a post-judgment change in decisional law and is significant to the ultimate meaning of Rule 60(b)(6)—whether it remains a fundamentally equitable tool for courts to accomplish justice. The Court should grant the petition for a writ of certiorari and resolve that important question.

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Respectfully submitted,

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