No. _____

In The

Supreme Court of the United States

KRISTY ROSS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a judgment lacking in subject matter jurisdiction under Article III of the U.S. Constitution is "void" under Federal Rule of Civil Procedure 60(b)(4) even if an "arguable basis" existed for the exercise of subject matter jurisdiction.

2. Whether, if governing, the "arguable basis" test is satisfied by application of a legal principle overruled by this Court in a 9-0 decision.

3. Whether a 9-0 decision by this Court overruling erroneous circuit court decisional law *per se* provides no grounds for relief under Federal Rule of Civil Procedure 60(b)(6).

CORPORATE DISCLOSURE STATEMENT

The sole petitioner, Kristy Ross, is an individual, and not a corporation.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

Federal Trade Commission v. Kristy Ross, No. 22-2078 (4th Cir.) (App., *infra*, 1-19 and reported at 74 F.4th 186 (4th Cir. 2023)); judgment issued July 19, 2023.

Federal Trade Commission v. Kristy Ross, No. RDB-08-3233 (D. Md.) (App., *infra*, 21-31 and available at 2022 U.S. Dist. LEXIS 166360 (D. Md. Sept. 14, 2022)); order issued September 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Kristy Ross ("Ross") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion (App., *infra*, 1-19) is reported at 74 F.4th 186 (4th Cir. 2023). The district court's decision (App., *infra*, 21-31) is available at 2022 U.S. Dist. LEXIS 166360 (D. Md. Sept. 14, 2022).

STATEMENT OF JURISDICTION

The Court of Appeals entered its decision on July 19, 2023. App., *infra*, 20. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the

> United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rule of Civil Procedure Rule 60(b) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

PRELIMINARY STATEMENT

Petitioner Kristy Ross ("Ross") seeks certiorari review over the affirmance of the denial of her post-judgment motion under Federal Rules of Civil Procedure 60(b)(4) and 60(b)(6), seeking vacatur of the

damages judgment in the amount of over $163 million entered against her individually, but without authority, on September 24, 2012. At oral argument for her Rule 60 appeal, a Fourth Circuit judge admitted that court's original error, candidly stating that it "ruled incorrectly" against Ross in her original appeal. (ca4.uscourts/OArchive/mp3/22-22-2078-20230503.mp3 at 2:08-09.) Rule 60 exists for this very purpose—preventing the perpetuation of void and exceptionally wrong judgments, particularly where this Court unanimously has stated that no monetary judgment was available against Ross.

At every level of the federal court system in 2012-2014—before the district court, the Court of Appeals and this Court—Ross challenged the Federal Trade Commission's ("FTC") nonstatutory overreach in seeking monetary remedies under Section 13 of the FTC Act. But the lower courts rebuffed her, and this Court denied certiorari. The Court of Appeals at least praised the effort, calling her legal argument "not entirely unpersuasive," but regrettably declined relief. Her case returns to this Court now because, some years later, this Court vindicated her exact jurisdictional argument.

On April 22, 2021, this Court unanimously decided *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), which pronounced beyond all doubt that the district court lacked statutory authorization to enter any form of a monetary judgment against Ross. Although not every error justifies reopening a case to vacate part of a judgment, the error here requires such

relief under two of Rule 60(b)'s narrow categories of exceptions. First, under Rule 60(b)(4), the monetary component of the judgment against Ross is "void" because the district court lacked statutory authority (and thus subject matter jurisdiction under Article III of the U.S. Constitution) to enter that type of judgment. Second, under Rule 60(b)(6), "extraordinary" circumstances—including this Court's abrogation of lower court precedent in *AMG* under Ross's own theory—alternatively warrant vacatur of the monetary component of the judgment.

Rule 60 relief must be granted to protect the integrity of this Court's unanimous decision in *AMG*. Respondent FTC understandably wants to salvage the remnants of an unauthorized power that it improperly used—and lower federal courts erroneously endorsed—for decades. But neither federal agencies nor district courts are allowed to aggrandize to themselves powers that Congress never bestowed, particularly where this Court unanimously declared that neither the FTC nor the courts ever had such powers. The question here fundamentally concerns constitutional and statutory limitations barring agency and judicial overreach, as much as it concerns lower courts' fidelity to this Court's authority. Such agency overreach, for decades, led to judicial "legislation" of monetary remedies that are the sole province of Congress. The district court granted a monetary remedy inarguably tainted by this judicial activism and bestowed on the FTC remedies that it had no statutory authority to seek.

Petitioner Ross argued every step of the way for the holding of *AMG*, and pursued relief both to the Court of Appeals and this Court. Under *AMG*, the monetary judgment against Ross was never available. Under these circumstances, this Court should confirm availability of Rule 60(b) relief.

STATEMENT

I. The Proceedings Below

The FTC brought the underlying case on December 2, 2008, alleging violations of Section 5(a) (15 U.S.C. § 45(a)) of the FTC Act and asserted its right to bring the action to the district court under Section 13(b) (15 U.S.C. § 53(b)) of the FTC Act. (App. 52.) Following a two-day bench trial commencing on September 11, 2012, the district court issued its judgment and memorandum opinion on September 24, 2012. (*See* App. 52-87.) The district court found Ross liable under Section 13(b) for $163 million in monetary damages, and also issued a permanent injunction. (App. 86, 88-89.)

Ross timely appealed the monetary judgment to the Court of Appeals for the Fourth Circuit, arguing that Section 13(b) does not expressly or impliedly authorize monetary damages. *FTC v. Ross*, Appeal No. 12-2340 (4th Cir.), Dkt. No. 21, Mar. 5, 2013 Ross's Opening Appellant Brief at 48-65. In doing so, Ross cited *Meghrig v. KFA Western*, 516 U.S. 479 (1996), as the principal legal basis for her argument that monetary remedies are not authorized under Section 13(b).

Id. at 61. While stating that Ross's arguments were "not entirely unpersuasive," the Court of Appeals did not address the *Meghrig* decision and nonetheless affirmed. *Ross v. FTC*, 743 F.3d 886, 891-92 (4th Cir. 2014) ("Ross makes a series of arguments about how the structure, history, and purpose of the Federal Trade Commission Act weigh against the conclusion that district courts have the authority to award consumer redress; her arguments are not entirely unpersuasive, but they have ultimately been rejected by every other federal appellate court that has considered this issue.") (citations omitted).

Ross also timely filed a petition for a writ of certiorari with this Court, seeking "review of the statutory authority of the district court to award any monetary remedy under Section 13(b)." *Ross v. FTC*, No. 13-1426 (S. Ct.), May 27, 2014 Ross's Petition for a Writ of Certiorari at 16. The petition relied heavily on *Meghrig*, 516 U.S. 479, again as the principal legal basis for the argument that monetary remedies are not authorized under Section 13(b). *Id*. at 16-25. Additionally, the Washington Legal Foundation filed an *amicus curiae* brief in support of Ross. *Ross v. FTC*, No. 13-1426 (S. Ct.), June 30, 2014 Brief of Washington Legal Foundation as *Amicus Curiae*. Despite such support, however, the petition was unable to cite any clear circuit split on the issue whether Section 13(b) authorizes monetary remedies, as one did not exist until years later. The Court denied Ross's petition on October 6, 2014, without opinion, marking the exhaustion of her

direct appellate remedies for the underlying judgment in this matter.

Nearly five years later, on August 21, 2019, the Seventh Circuit created exactly such a split when it broke ranks from other circuits by holding that Section 13(b) fails to authorize monetary remedies. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). *Meghrig* was central to its analysis. *Id*. at 783 ("*Meghrig*'s reasons for refusing to find restitutionary authority . . . applies with equal force to section 13(b)."). In doing so, the Seventh Circuit expressly acknowledged that its decision "creates a circuit split." *Id*. at 767 n.1.

In *AMG*, this Court granted certiorari to address whether Section 13(b) authorized district courts to render monetary judgments, recognizing "recent differences that have emerged among the Circuits as to the scope of §13(b). . . ." 141 S. Ct. at 1345. Over six years after denying Ross's petition for certiorari, this Court relied heavily on *Meghrig* for the proposition that a statutory grant "of equitable authority does not authorize [monetary remedies] because the relevant statutory scheme (as here) contained 'elaborate enforcement provisions,' including (as here) provisions that explicitly provide for [monetary] relief." *Id*. at 1350 (quoting *Meghrig*, 516 U.S. at 487). It concluded that "the inference against §13(b)'s authorization of monetary relief is strong and follows from the interpretative approach we took in *Meghrig*." *Id*. at 1350. The Court ultimately held—unanimously—that Section

13(a) provides no authority for a court to enter a monetary judgment. *Id.* at 1352. Ross was right all along.

The FTC has manipulated courts for decades, seeking the same types of unauthorized remedies as those procured against Ross. As noted by the Court, the FTC had been "using §13(b) to win equitable monetary relief directly in court with *great frequency*" and was "'bring[ing] *dozens of §13(b) cases every year* seeking . . . the return of illegally obtained funds.'" *AMG*, 141 S. Ct. at 1347 (emphasis added). The FTC played its role as a public-interest plaintiff against usually unsympathetic defendants. It became well-versed in a playbook of (1) filing under seal to obtain asset freezes, (2) obtaining preliminary injunctions against litigants deprived of access to funds to pay counsel, and (3) frog marching cases to judgment against newly-impecunious businesspeople, usually after defaults. *AMG* undermined such tactics by exposing the abuse of the absence of legal basis for any asset freeze. This long history of abuse did not acquire legitimacy over the period of time that the practice was permitted by various circuit courts to continue. The FTC is not wearing a "white hat" in these proceedings.

Prompted by the vindication of her position in the *AMG* decision, on September 9, 2021 (less than five months following that decision), Ross moved under Federal Rules of Civil Procedure 60(b)(4) and 60(b)(6) to vacate the monetary judgment against her. (*See* App. 25); *FTC v. Ross*, case no. 1:08-cv-03233-RDB (D. Md.), ECF No. 276, Sept. 9, 2021 Mem. of Law in Support of Ross's Motion to Vacate. The FTC opposed, but

nowhere denied that the monetary judgment against Ross rested on a manifest statutory misconstruction. *FTC v. Ross*, case no. 1:08-cv-03233-RDB (D. Md.), ECF No. 280, Sept. 22, 2021 FTC's Opposition to Ross's Motion to Vacate. Nor did the FTC contest that Ross, at all times (all the way up to seeking certiorari from this Court), argued against statutory authorization for a monetary judgment—a position ultimately confirmed by *AMG*—even though she faced circuit precedents that uniformly held otherwise. *See id*. There was no dispute below that "[n]othing more realistically could have been expected from Ross or was even possible." *FTC v. Ross*, case no. 1:08-cv-03233-RDB (D. Md.), ECF No. 276, Sept. 9, 2021 Mem. of Law in Support of Ross's Motion to Vacate at 18; *see FTC v. Ross*, case no. 1:08-cv-03233-RDB (D. Md.), ECF No. 280, Sept. 22, 2021 FTC's Opposition to Ross's Motion to Vacate.

The district court refused relief under both Rules 60(b)(4) and 60(b)(6). (App. 21-31, 32.) In doing so, it made no findings of fact. (*See* App. 21-31.) The Court of Appeals affirmed. In doing so, it committed at least three legal errors for which review is sought. First, it applied an "arguable basis" test to evaluate whether a lack of subject matter jurisdiction warranted Rule 60(b)(4) relief, instead of simply asking if the resulting judgment was "void." (App. 9-14.) Second, it determined that an "arguable basis" existed because circuit precedent once supported monetary relief prior to this Court's decision in *AMG*. (*See id*. at App. 11-14.) Third, the Court of Appeals refused to consider a change in decisional law as a factor relevant to relief available

under Rule 60(b)(6). (*See id*. at App. 15-17.) Each one of those errors reflects a conflict with other circuits, as well as this Court's precedent. The Court should intervene and correct the foregoing errors to ensure the sanctity of its substantive decision in *AMG*.[1]

II. Relevant Legal Principles

Federal Rule of Civil Procedure 60(b) enables a court to provide relief from a final judgment under six different sets of grounds. The Rule exists as "an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). Here, Rules 60(b)(4) and 60(b)(6) provide two independent grounds for vacatur of the district court's final monetary judgment against Ross. Under Rule 60(b), "[o]n motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceedings for the following reasons: . . . (4) the judgement is void; . . . or (6) any other reason that justifies relief."

A. Rule 60(b)(4)

"A void judgment is a legal nullity." *United States Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised

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[1] Defiance of this Court's rulings unfortunately are not isolated. Recently, in Alabama, for example, the state's legislature brazenly defied this Court's ruling in *Allen v. Milligan*. 143 S. Ct. 1487 (2023). (*See*, *e.g.*, https://www.brennancenter.org/our-work/analysis-opinion/alabama-defies-voting-rights-act.)

even after the judgment becomes final." *Id*. But, "[a] judgment is not void . . . simply because it is or may have been erroneous." *Id*. (internal quotations omitted). Indeed, "Rule 60(b)(4) is not a substitute for a timely appeal." *Id*. "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process. . . ." *Id*. at 271. As pertinent here, a judgment lacking Article III subject matter jurisdiction is void under Rule 60(b)(4). *See*, *e.g*., *Schwartz v. United States*, 976 F.2d 213, 217 (4th Cir. 1992) (A judgment is "'void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.' 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2862 at 198-200 (1973)."). Decisions on Rule 60(b)(4) motions are reviewed *de novo*. *See*, *e.g*., *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

B. Rule 60(b)(6)

Rule 60(b)(6) "has been described as the 'catch-all' clause because it provides the court with 'a grand reservoir of equitable power to do justice in a particular case' and 'vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice' where relief might not be available under any other clause in 60(b)." *Compton v. Alston Steamship Company*, 608 F.2d 96, 104, 106-07 (4th Cir. 1979) (citations omitted). This power is circumscribed by the principle that a Rule 60(b)(6)

motion must demonstrate "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). But, "[i]n determining whether extraordinary circumstances are present, a court may consider a wide range of factors." *Buck v. Davis*, 580 U.S. 100, 123 (2017). Decisions on Rule 60(b)(6) motions are reviewed for abuse of discretion. *Id*. at 122.

REASONS FOR GRANTING THE PETITION

I. The Court Should Decide Whether The Existence Of An "Arguable Basis" For Subject Matter Jurisdiction Forecloses A "Voidness" Determination Under Rule 60(b)(4).

Federal Rule of Civil Procedure 60(b)(4) provides relief from a "void" judgment. As articulated by this Court in *Espinosa*, "Rule 60(b) . . . provides an 'exception to finality' that 'allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.'" 559 U.S. at 269 (quoting *Gonzalez*, 545 U.S. at 529). That is so because "[a] void judgment is a legal nullity." *Id*. at 270. "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Id*. Indeed, "the whole purpose" of Rule 60 "is to make an exception to finality," and the "policy consideration [of finality], standing alone, is unpersuasive in view" of Rule 60. *Gonzalez*, 545 U.S. at 529.

The requisite infirmity may include a "certain type of jurisdictional error." *Id*. at 271. As this Court observed, "[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect *generally* have reserved relief only for the exceptional case in which the court that rendered that judgment lacked even an 'arguable basis' for jurisdiction." *Id*. (emphasis added). Of course, this use of the phrase "arguable basis" was descriptive, not normative. And it offered no definitional aid for future cases. Moreover, this Court in *Espinosa* declined to articulate the nature of a jurisdictional defect sufficient to warrant Rule 60(b)(4) relief: "This case presents no occasion to engage in such an 'arguable basis' inquiry *or to define the precises circumstances in which a jurisdictional error will render a judgment void* because [petitioner] United does not argue that the Bankruptcy's error was jurisdictional." *Id*. (emphasis added). While dictum, this Court recognized that the "arguable basis" standard is not the sole basis for Rule 60(b)(4) relief on jurisdictional grounds.

Although Rule 60(b)(4) was promulgated over 75 years ago (in 1946), *Espinosa* remains the only decision of this Court to touch on its metes and bounds. This vacuum of controlling authority has resulted in substantial divergence among the courts of appeals. Guidance is essential.

A. The Courts Of Appeals Are Split Regarding Applicability Of The "Arguable Basis" Standard For Purposes Of Assessing "Voidness" Under Rule 60(b)(4).

Numerous circuits (*i.e.*, First, Second, Third, Fourth, Sixth, Ninth and Tenth) have grafted onto the Rule 60(b)(4) analysis the "arguable basis" test for evaluating whether vacatur is warranted for want of subject matter jurisdiction. *See Baella-Silva v. Hulsey*, 454 F.3d 5, 9-10 (1st Cir. 2006) (recognizing that the parties' settlement agreement "agreed to . . . jurisdiction" and stating that "if the record supports an 'arguable basis' for concluding that subject-matter jurisdiction existed, a final judgment cannot be collaterally attacked as void")[2]; *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1985) ("a court will be deemed to have plainly usurped jurisdiction only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction"); *Metropolitan Edison Co. v. Pennsylvania Public Utility Comm'n*, 767 F.3d 335, 364 (3d Cir. 2014) (applying "arguable basis" standard to conclude that state court was "not divested of authority to act"); *FTC v. Ross*, 74 F.4th 186, 192 (4th Cir. 2023) ("this Court applies the

[2] Prior to *Baella-Silva*, the First Circuit evaluated voidness on the basis of whether the "exercise of jurisdiction" resulted from "a clear usurpation of power." *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) (rejecting Rule 60(b)(4) motion's attempt to modify a consent decree, and noting that the argument was "not directed at . . . subject matter jurisdiction").

arguable-basis test")[3]; *Eglington v. Loyer*, 340 F.3d 331, 336 (6th Cir. 2003) ("a Rule 60(b)(4) motion will succeed only if . . . no 'arguable basis' for jurisdiction existed"); *Hunter v. Underwood*, 362 F.3d 468, 476 (8th Cir. 2004) ("while perhaps lacking in subject matter jurisdiction, [the challenged decision] cannot be

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[3] *See also Hawkins v. i-TV Digitalis Tavkolesi zrt.*, 935 F.3d 211, 222 (4th Cir. 2019) ("i-TV had a chance to challenge the court's subject matter jurisdiction but did not . . . so [it] must show there was no arguable basis for the district court's subject matter jurisdiction"); *Wendt v. Leonard*, 431 F.3d 410, 414 (4th Cir. 2005) (circuit split provided "arguable basis" for jurisdiction in view of "appeal that was never taken"). However, the Fourth Circuit has not uniformly applied the "arguable basis" standard in evaluating voidness under Rule 60(b)(4). For example, in *Compton*, the Court of Appeals found an unauthorized punitive monetary remedy to be void under Rule 60(b)(4). 608 F.2d at 104, 106. And it did so without any inquiry whether the district court had an "arguable basis" to provide a remedy in the form of punitive damages. There are thus both intra- and inter-circuit splits. In *Wendt*, by contrast, the Court of Appeals applied the more stringent "arguable basis" test in view of "the risk that litigants like Wendt will use Rule 60(b)(4) to circumvent an appeal process they elected not to pursue." *Id.* at 412. It stated: "we must not transform a Rule 60(b)(4) motion into a belated appeal that was never taken. . . ." *Id.* at 414. Indeed, "Rule 60(b)(4) is not a substitute for a timely appeal." *Espinosa*, 559 U.S. at 270. But that concern was not present here, as Ross exhausted appellate remedies all the way up to petitioning this Court for a writ of certiorari. To the extent that the more stringent "arguable basis" standard must apply in accordance with the precedent of the lower courts, its application should be cabined to those situations in which a party (unlike Ross) ***squandered*** its opportunity to challenge jurisdiction in the first instance. *See*, *e.g.*, *Hawkins*, 935 F.3d at 222 ("When it appeared, i-TV had a chance to challenge the court's subject matter jurisdiction but did not. So i-TV must show there was no arguable basis for the district court's subject matter jurisdiction.").

considered a total usurpation of power because there existed an arguable basis for jurisdiction"); *FTC v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023) (applying "arguable basis" standard); *Johnson v. Spencer*, 950 F.3d 680, 695 (10th Cir. 2020) (rejecting Rule 60(b)(4) argument because "the district court had at least an 'arguable basis' to exercise jurisdiction" (quoting *Espinosa*, 559 U.S. at 271)). In this way, *Espinosa*'s descriptive phrase within dictum has gained vitality as if it were a normative holding of this Court.

In contrast stands a number of other circuits (*i.e.*, Fifth, Seventh, Eleventh and Federal) that have not in any reported decision known to Petitioner applied the "arguable basis" test in evaluating whether subject matter jurisdiction was lacking in connection with a Rule 60(b)(4) motion. *See Mitchell Law Firm, L.P. v. Bessie Jeanne Worthy Revocable Trust*, 8 F.4th 417, 420 (5th Cir. 2021) (despite "misleading citizenship allegations," the "case involves a paradigmatic void judgment" warranting Rule 60(b)(4) relief)[4]; *Hill v. Baxter*

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[4] *See also Carter v. Fenner*, 136 F.3d 1000, 1008-09 (5th Cir. 1998) (finding consent judgment on behalf of minor void under Rule 60(b)(4) because procedural rules to protect the minor were not followed). To be sure, the "arguable basis" standard is mentioned in dictum in two reported Fifth Circuit decisions known to Petitioner. First, in *SEC v. Novinger*, the standard is mentioned in a footnote, but jurisdiction was not contested in that case. 40 F.4th 297, 303 n.2 (5th Cir. 2022) (noting that "defendants do not challenge the consent judgment on jurisdictional grounds"). Second, in *Brumfield v. Louisiana State Board of Education*, the court held "void for lack of subject matter jurisdiction" an order that exceeded "the scope of the district court's continuing jurisdiction" to rectify a constitutional infirmity. 806 F.3d 289, 298 (5th

Healthcare Corp., 405 F.3d 572, 574-77 (7th Cir. 2005) (order quashing attorney lien found void where entered following dismissal with prejudice that divested court of subject matter jurisdiction, despite arguments supporting jurisdiction)[5]; *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1339-41 (11th Cir. 2015) (reversing denial of Rule 60(b)(4) motion where district court rested damages award on papers that were not properly executed amendments to underlying contract)[6]; *Garber v. Chicago Mercantile Exch.*, 570 F.3d 1361, 1364-66 (Fed.

Cir. 2015). In reaching that conclusion, the court did not apply the "arguable basis" standard, but, rather, only mentioned the standard when quoting *Espinosa* in the context of addressing the dissent. *See id*. at 301.

[5] *See also United States v. Indoor Cultivations Equip. from High Tech Indoor Garden Supply*, 55 F.3d 1311, 1313-17 (7th Cir. 1995) (resolving statutory construction argument and concluding that district court only had power to order the return of seized property once the government failed to file a complaint within the 60-day period required by statute).

[6] *See also Burke v. Smith*, 252 F.3d 1260, 1266-67 (11th Cir. 2001) ("dismissal based on settlement properly found void where settlement could not bind minor absent a fairness hearing"). In dictum, the Eleventh Circuit mentioned the "arguable basis" test in a footnote. *See Bainbridge v. Governor of Florida*, 75 F.4th 1326, 1335 n.4 (11th Cir. 2023). At issue there was not a challenge of jurisdiction, but, rather, the assertion that the district court supposedly erred by crafting an injunction that did not comport with the partes' stipulation. *See id*. at 1330-31, 1334-36. There was no question that the court had the power to enter an injunction; the parties agreed to one. Similarly, the "arguable basis" standard is mentioned in dictum in *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 743 n.24 (11th Cir. 2014). There, however, the Rule 60(b)(4) issue related to "an alleged denial of due process." *Id*.

Cir. 2009) (Rule 41(a)(1) dismissal divested court of subject matter jurisdiction to dismiss case with prejudice).

The D.C. Circuit has applied the "arguable basis" standard in limited circumstances. In *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, the D.C. Circuit explicitly rejected the "arguable basis" standard: "A judgment remains void even after final judgment if the issuing court lacked subject matter jurisdiction, regardless of whether there existed an 'arguable basis' for jurisdiction." 734 F.3d 1175, 1181 (D.C. Cir. 2013). In a later decision, however, a different panel of judges for the D.C. Circuit appeared to limit the rule of *Bell* to a "specific situation" involving "a default judgment entered against a foreign sovereign who did not appear to defend itself from the suit, but who later moved to vacate the judgment against it under rule 60(b)(4). . . ." *Lee Mem. Hosp. v. Becerra*, 10 F.4th 859, 864 (D.C. Cir. 2021). It should be noted, however, that the Rule 60(b)(4) movants in *Lee* originally argued "that jurisdiction existed over their challenge." *Id*. at 861. They maintained that position during the initial appeal and did not challenge jurisdiction until bringing the Rule 60(b)(4) motion a year after the mandate issued in that appeal. *Id*. at 862-63. Importantly, the precedent for alleging the lack of jurisdiction arose in 2017, and was addressed by the court during the original appeal. *See id*. at 862. Thus, *Lee*'s application of the "arguable basis" standard can be confined to situations where subject matter jurisdiction is conceded prior to exhaustion of appellate remedies, and where

no intervening decisions would later suggest the absence of subject matter jurisdiction.

Collectively, the foregoing cases demonstrate inconsistent application of the "arguable basis" standard. Guidance from this Court is paramount.

B. This Court Should Clarify That An "Arguable Basis" Fails To Justify The Erroneous Exercise Of Subject Matter Jurisdiction.

Although the Court of Appeals recognized that "the Supreme Court in *Espinosa* declined to reach precisely what constitutes a jurisdictional defect worthy of voidness relief under Rule 60(b)(4), and it did not itself expressly adopt the arguable basis test, [the Fourth Circuit] seems to have done so." (App. 9.) The Court of Appeals correctly (though ironically) recognized that this Court never proclaimed that an "arguable basis" forecloses vacatur under Rule 60(b)(4). After all, the Court in *Espinosa* noted merely that federal courts granting Rule 60(b)(4) relief "*generally* have reserved relief for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." 559 U.S. at 271 (emphasis added). As noted, this was descriptive, not normative. The *Espinosa* Court did not even "engage in such an 'arguable basis' inquiry or define the precise circumstances in which a jurisdictional error will render a judgment void. . . ." *Id*. It accordingly does not stand for any sweeping requirement that Ross must

negate an "arguable basis" for subject matter jurisdiction as a predicate for Rule 60(b)(4) relief. Indeed, the Rule does not say "inarguably void," it just says "void." The Court of Appeals erred in holding to the contrary.

"'It is a fundamental precept that federal courts are courts of limited jurisdiction,' constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." *Cooper v. Productive Transp. Servs.*, 147 F.3d 347, 352 (4th Cir. 1998) (quoting *Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978)). Among other things, "Article III of the Constitution requires a litigant to possess standing to sue in order for a lawsuit to proceed in federal court." *Ali v. Hogan*, 26 F.4th 587, 595 (4th Cir. 2022). The absence of Article III standing is fatal to subject matter jurisdiction. *See id.* ("want of Article III standing to sue [results in a] lack of subject matter jurisdiction").

Article III standing—an "irreducible constitutional minimum"—requires "a likelihood that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Without an authorized remedy, there is no potential for redressability, and, thus, no standing. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 107 (1998) (standing requires "an acceptable Article III remedy" that will "redress a cognizable Article III injury"). Indeed, "[a]lthough a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it . . . its decree is void." *United States ex rel. Wilson*

v. Walker, 109 U.S. 258, 266 (1883); *accord id*. at 267 ("Th[e order] was beyond the power conferred by statute, and not within the jurisdiction of the court. The order was, therefore, void."). Thus, a cognizable remedy is part and parcel to Article III, Constitutional subject matter jurisdiction (including standing), regardless of any general statutory sources of subject matter jurisdiction.[7]

Further, Article III constitutional standing (and, thus, subject matter jurisdiction) must be shown for each remedy. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *Summers v. Earth Island Trust Inst*., 555 U.S. 488, 493 (2009); *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).) Indeed, it is a "*simple rule*" that a party "must have *standing* to seek *each form of relief* requested." *Town of Chester v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1651 (2017) (emphasis added); *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 185 (2000) (same). Thus, the FTC's standing to seek injunctive relief for a federal claim does not mean that it also had standing to seek a monetary remedy under the same claim: " 'a plaintiff must demonstrate standing for *each claim* he seeks to press' *and* 'for *each form of relief*' that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added,

[7] Plainly, resolving the issue whether a court has federal question jurisdiction over a claim under 28 U.S.C. § 1331 (and/or some other statutory grounds) does not simultaneously answer the question whether the court also possesses the authority to fashion a particular remedy for that claim, in accordance with Article III of the Constitution.

quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

More particularly, subject matter jurisdiction over a statutory claim for monetary damages does not exist absent legislative authority creating a monetary remedy. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002) ("§ 502(a)(3) [of ERISA], by its terms, only allows for *equitable* relief. . . . Because petitioners are seeking legal relief . . . § 502(a)(3) does not authorize this action."); *Army & Air Force Exchange v. Sheehan*, 456 U.S. 728, 739, 741 (1982) (Subject matter "jurisdiction over respondent's complaint [for money damages] cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages. . . . [T]he Tucker Act did not confer jurisdiction over respondent's claims for monetary relief."). Put simply, Article III standing for a monetary remedy does not exist unless the law allows for the monetary remedy. The FTC lacked Article III standing to seek a monetary remedy (as we know from the 9-0 *AMG* holding), and the district court lacked Article III subject matter jurisdiction to provide one.

Because the FTC lacked standing to pursue monetary relief, the district court lacked subject matter jurisdiction to grant it, and its judgment is void. *See*, *e.g.*, *Baumlin & Ernst, Ltd. v. Gemini, Ltd.*, 637 F.2d 238, 241 (4th Cir. 1980) ("For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness usually arises for lack of subject matter

jurisdiction. . . . It may also arise if the court's actions involve a plain usurpation of power. . . ." (internal quotations omitted)). Where a judgment is void, a court must vacate it. *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 94 (1st Cir. 2007). There is no discretion to do otherwise. *See id*. ("[A] district court has no discretion when deciding a motion brought under Rule 60(b)(4) because a judgment is either void or it is not." (internal quotations omitted)).

Petitioner found no instance in which this Court afforded a lower court discretion in the assessment of subject matter jurisdiction. It is a binary determination. A court either has subject matter jurisdiction or it does not. *See Jackson v. FIE Corp*., 302 F.3d 515, 524 (5th Cir. 2002) ("'the judgment is either void or it is not.'" (internal quotations omitted)); *Burke v. Smith*, 252 F.3d 1260, 1267 (11th Cir. 2001) (same). "Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgment themselves are by definition either legal nullities or not." *SEC v. Novinger*, 40 F.4th 297, 301 (5th Cir. 2022). "[T]he whole point of Rule 60(b)(4) is to undo a district court's *erroneous* assertion of subject-matter jurisdiction." *Mitchell*, 8 F.4th at 421 (emphasis added). No "arguable basis" inquiry somehow transfers subject matter jurisdiction to a court lacking it in the first instance. Further, most (if not all) circuits, including the Fourth Circuit, apply *de novo* review to voidness determinations under Rule 60(b)(4). *See*, *e.g*., *Ross*, 74 F.4th at 190. But the "arguable basis" standard incongruously and inherently permits a range of discretion

when it comes to assessments of subject matter jurisdiction.

Further, recognizing an "arguable basis" escape valve would, as a practical matter, read Rule 60(b)(4) out of the Federal Rules. Every court believes it has more than an "arguable basis" for its own rulings, including rulings that it possesses Article III jurisdiction. "I erred inarguably" is not something judges are expected to say.

Indeed, this Court has long instructed that judgments and orders in excess of subject matter jurisdiction "are not voidable, but simply void." *Elliot v. Peirsol's Lessee*, 26 U.S. 328, 340 (1828) (cited in *Bell*, 734 F.3d at 1180); *accord Gonzalez*, 545 U.S. at 534 ("Rule [60(b)] also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject matter jurisdiction . . . since *absence of jurisdiction altogether deprives a federal court of the power to adjudicate* the rights of the parties." (emphasis added)); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 80 (1988) (if "the District Court [lacked] subject-matter jurisdiction . . . then the subpoenas *duces tecum* are void, and the civil contempt citation must be reversed"); *Costello v. United States*, 365 U.S. 265, 285 (1961) ("[F]undamental jurisdictional defects . . . render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter."). "A judgment remains void even after final judgment if the issuing court lacked subject-matter jurisdiction, regardless of whether there existed an 'arguable basis'

for jurisdiction." *Bell*, 734 F.3d at 1181. In a closely-related Rule 60(b) context, this Court recently refused to credit the arguable nature of a legal error, such as whether the challenged error is "obvious." *Kemp v. United States*, 142 S. Ct. 1856, 1863 (2022) ("[W]e question the administrability of a rule that requires courts to decide not only whether there was a 'mistake' but also whether that mistake was sufficiently 'obvious[]'" for purposes of Rule 60(b)(1)). The same logic holds under Rule 60(b)(4).

II. The Court Should Decide That Contemporary Law Governs Rule 60 Motions.

The Court of Appeals alternatively erred in resting its finding of an "arguable basis" on precedent that has been unanimously overruled. Applying *Wendt*, 431 F.3d at 414, it reasoned that the "mere disagreement of multiple authorities on a given issue evinced that an arguable basis . . . existed." (App. 11-14.) In doing so, it improperly relied on erroneous statutory interpretations predating this Court's superseding *AMG* decision. And it ignored *AMG* itself in deciding that the district court had an "arguable basis" for its exercise of subject matter jurisdiction. The Court should communicate its views about tribunals and legislatures who flout directly-on-point rulings from this Court.

A. The Courts Of Appeals Are Split Regarding Applicability Of Contemporary Law In Evaluating The "Arguable Basis" Standard.

The approach taken by the Fourth Circuit is contrary to at least the DC Circuit. *See Lee Memorial Hosp. v. Becerra*, 10 F.4th 859, 862, 866 (D.C. Cir. 2021) (evaluating "arguable basis" by reference to *Smith v. Berryhill*, 139 S. Ct. 1765 (2019)—a decision issued after the district's 2016 grant of summary judgment). Regardless, "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc*., 511 U.S. 298, 312-13 (1994) (emphasis added). This Court's statutory interpretation cannot be ignored in any context.

B. This Court Should Clarify That An "Arguable Basis" Evaluation Requires Consideration Of Today's Law.

Being one in a crowd of erroneous decisions does not render a decision "arguable" after this Court unanimously decides that error exists. But in evaluating the merits of a Rule 60(b)(4) motion brought after this Court's 2021 *AMG* decision, the Court of Appeals ignored *AMG* and found that an "arguable basis" could rest on the erroneous state of law that preceded *AMG*. This cannot stand.

First, just to begin with the obvious, no words existed in Section 13(b) of the FTC Act concerning the FTC suing under that provision for monetary relief.

Second, the propagation of error by scattered circuits prior to the *AMG* decision does not validate the district court's identical error for purposes of Ross's *post-AMG* Rule 60(b)(4) motion. Even if the "arguable basis" inquiry applies, the district court's jurisdictional error must be evaluated under today's law, *i.e.*, *AMG*, a unanimous decision of this Court unequivocally holding that monetary relief under Section 13(b) was *never* an available remedy. Indeed, in denying Ross's Rule 60(b)(4) motion, the district court did not even suggest that its jurisdiction to order monetary relief was somehow proper under *AMG*. (*See* JA105-1137.) And the court of appeals "[a]ssum[ed] that *AMG* would undermine the FTC's standing to pursue restitution in a similar case today." (App. 11.)

Whether there was an arguable basis—based on the challenge Ross brings *today*—must be viewed through the lens of the law as it exists today, *i.e.*, in view of *AMG*. Indeed, "[a] judicial construction of statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13 (emphasis added). Here, the *AMG* decision determined that Section 13(b) does not authorize a monetary remedy. *Id.* at 1352. It did not create new law, but rather exposed as incorrect numerous contrary decisions from several circuits, including the Court of Appeals in Ross's original appeal. *AMG* stated what

Section 13(b) had *always* meant: monetary relief is not authorized. "It is th[e] [Supreme] Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers*, 511 U.S. at 312. There is nothing "arguable" about *AMG*.

Put differently, judicial construction of a statute applies retroactively to events that pre-date the statutory construction:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . as to all events, *regardless of whether such events predate or postdate [the] announcement of the rule*.

Harper v. Department of Taxation, 509 U.S. 86, 97 (1993) (emphasis added). Therefore, in evaluating whether the district court had an "arguable basis" to order monetary damages, one cannot ignore the *AMG* decision. The issue whether the district court had an "arguable basis" for its supposed power to enter a monetary judgment against Ross must be evaluated under the standards of *AMG*.

But the courts below wholly ignored *AMG* in their "arguable basis" discussion, citing instead a litany of pre-*AMG* precedent applying an incorrect statutory interpretation. (*See* App. 11-12; App. 29-30.) The multiplicity of erroneous pre-*AMG* decisions does not

logically enhance the "arguable" nature of any basis for a monetary remedy against Ross. An error does not acquire legitimacy through scrupulous copying. Prior decisions to the contrary of *AMG* "were not wrong according to some abstract standard of interpretative validity, but by the rules that necessarily govern [the] hierarchical federal court system." *Rivers*, 511 U.S. at 312. Under *AMG*, there is nothing "arguable" about the absence of judicial power to provide monetary relief under Section 13(b). *AMG* cannot be ignored.

To be sure, a split among the circuits on an issue may render "arguable" a position on the issue *in the moment* the split exists. *See*, *e.g.*, *Wendt*, 431 F.3d at 414. Unlike *Wendt*, however, this matter presents no unresolved question on "which view of the law is correct." *See id*. The district court here did not even suggest that its lack of authority to provide a monetary remedy was somehow defensible under now-controlling Supreme Court dictates. *Wendt* does not address the impact of a later decision unanimously exposing the erroneous side of a circuit split. Because there is no unresolved circuit split today, there is no arguable basis for the error exposed by the unanimous Supreme Court in its decision of *AMG*.[8] *Hawkins*—another Fourth Circuit decision—expressly recognized that the subject matter jurisdiction issue lacked "guidance from

[8] An error should not acquire legitimacy because of its former multiplicity. To hold otherwise would countenance the FTC's widespread improper practice of seeking monetary remedies under Section 13(b). The bottom line is that the district court's monetary judgment was void *ab initio*.

the Supreme Court. . . ." 935 F.3d at 224. *Hawkins* therefore did not confront a situation where, as here, subject matter jurisdiction turned on a post-judgment ruling by this Court. *See id*.

The Court of Appeals cited no legitimate basis for ignoring the principles of *Rivers* and *Harper*, both Supreme Court decisions requiring adherence to this Court's latest pronouncements on statutory construction. It ignored them, relying instead on *Federal Trade Commission v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023). (*See* App. 13.) In *Hewitt*, the defendant (like Ross) was ordered to pay equitable monetary relief, but the defendant neither challenged the statutory validity of such relief nor appealed the judgment (unlike Ross). 68 F.4th at 464. Nor did the defendant in *Hewitt* (unlike Ross) "challenge the court's subject-matter . . . jurisdiction. . . ." *Id*. at 466. *Hewitt* is inapposite for this reason alone. Although the Ninth Circuit in *Hewitt* went on to find an "arguable basis" for jurisdiction, it did so on the basis of "then-prevailing precedent" (before *AMG*) and made no mention of either *Rivers* or *Harper*. *See id*. *Hewitt* failed to explain how the utter lack of a statutory monetary remedy arguably could result in Article III standing for (and subject matter jurisdiction over) a monetary judgment. It thus carries no persuasive value, and, at most, reflects that the "arguable basis" escape valve will nearly always (wrongly) tempt district court judges, who cannot be expected to review objectively their own actions and conclude that they had *no* arguable basis for their prior rulings.

III. The Court Should Decide That A Change In Decisional Law Is Relevant To Relief Under Rule 60(b)(6).

Rule 60(b)(6) exists to "accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988). The Rule applies for "any other reason that justifies relief." But here, the Court of Appeals categorically rejected a change in decisional law as grounds for Rule 60(b)(6) relief, stating that "'[i]t is hardly extraordinary' when the Supreme Court arrives 'at a different interpretation' of a particular issue than lower courts after a case is no longer pending." (App. 15-16 (quoting *Gonzalez*, 545 U.S. at 536).) It relied on the rule of *Moses v. Joyner*, 815 F.3d 163, 168-69 (4th Cir. 2016), that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." (App. 16.) Again, the Fourth Circuit is out of step with other circuits and the Court should intervene to recognize that a change in decisional law provides grounds for Rule 60(b)(6) relief.

A. The Courts Of Appeals Are Split Regarding The Relevance Of A Change In Decisional Law To Rule 60(b)(6).

The Fourth Circuit's categorical refusal to consider a change in decisional law as grounds for Rule 60(b)(6) relief runs counter to the authority of this Court, as well as at least the Ninth and Eleventh Circuits. For example, in *Gonzalez*, this Court considered whether a change in law coupled with a failure to exhaust appellate remedies constituted "extraordinary

circumstances" under Rule 60(b)(6). 545 U.S. at 536-38; *see also Kemp v. United States*, 142 S. Ct. 1856, 1865 (Sotomayor, J., concurring) ("nothing in [the majority opinion] casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law"). In *Phelps v. Alameida*, citing *Gonzalez*, the Ninth Circuit recognized that there is no *per se* rule that Rule 60(b)(6) relief cannot rest on a change in decisional law. 569 F.3d 1120, 1132 (9th Cir. 2009). Similarly, in *Ritter v. Smith*, also citing *Gonzalez*, the Eleventh Circuit rejected argument that "a supervening change in the law can never present a sufficient basis for Rule 60(b)(6) relief." *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987). The Court should intervene to require compliance with its dictates in *Gonzalez*.[9]

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[9] To be sure, in *Gonzalez*, the Court stated that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of a statute related to the denial of habeas petitions based on the statute of limitations. 545 U.S. at 536. It observed that "not every interpretation of the federal statutes setting forth the requirements *for habeas* provides cause for reopening cases long since final." *Id*. at 536 (emphasis added). But critically, it also noted that, in contrast to habeas *procedural* rules, "[a] change in the interpretation of a *substantive* statute may have [Rule 60(b)(6)] consequences for cases that have already reached final judgment." 545 U.S. at 536 n.9 (emphasis original). At issue here is precisely a "change in the interpretation of a *substantive* statute." Notably, *Moses*—central to the Court of Appeals' decision—characterizes the *Gonzalez* decision as "a *cabined* conception of Rule 60(b)(6) *in the habeas context*. . . ." 815 F.3d at 168 (emphasis added).

B. This Court Should Clarify That A Change In Decisional Law Is Relevant To Rule 60(b)(6) Relief.

There can be no serious dispute that the monetary judgment against Ross never was statutorily permitted and was erroneous. *See*, *e.g.*, *Rivers*, 511 U.S. at 312-13. And the courts below did not find otherwise. But the Court of Appeals never considered whether vacating the erroneous monetary judgment would "further justice," as required. *Harman v. Pauley*, 678 F.2d 479, 481 (4th Cir. 1982).

It instead summarily dismissed Ross's request for relief based on its mistaken understanding that a "change in decisional law subsequent to a final judgment" is somehow categorically irrelevant to Rule 60(b)(6) motions in the Fourth Circuit. (App. 16 (quoting *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993)).) That legal error constitutes abuse of discretion. *See United States v. Winestock*, 340 F.3d 200, 204 (4th Cir. 2003) ("District court decisions . . . denying Rule 60(b) relief are reviewed for abuse of discretion, although 'the exercise of discretion cannot be permitted to stand if we find it rests upon' an error of law." (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997))).

First, even the Fourth Circuit has recognized that an erroneous monetary judgment provides proper grounds for Rule 60(b)(6) vacatur. In *Compton*, the Court of Appeals held that Rule 60(b)(6) "demand[ed] the vacation of [a monetary] judgment" because there

"was no basis whatsoever either in fact or in law for such a judgment," which rested on a statutory misconstruction. 608 F.2d at 107. Ross's claim for relief here similarly invokes a statutory misconstruction as grounds for relief. No principled basis exists for vacating a monetary judgment based on an error exposed by pre-judgment Fourth Circuit authority, *see id*. at 101, but refusing to do so where the error is exposed by post-judgment Supreme Court authority. The error always existed. *See*, *e.g.*, *Rivers*, 511 U.S. at 312-13. The statutes at issue both here and in *Compton* never authorized the monetary judgments at issue in the first instance. *See id*. Under *Compton*, erroneous monetary judgments based on statutory misconstruction provide grounds for Rule 60(b)(6) relief. The Court of Appeals abused its discretion by failing to recognize that legal principle.[10]

Second, this Court's precedent recognizes post-judgment changes in law as grounds for Rule 60(b)(6) relief. For example, in *Buck*, a change in law was critical to the success of the Rule 60(b)(6) motion at issue. *Id.* at 126 ("*Buck* cannot obtain [Rule 60(b)(6)] relief unless he is entitled to the benefit of this rule—that is, unless *Martinez* and *Trevino*, not *Coleman*, would govern his case were it reopened. If they would not, his claim would remain unreviewable, and Rule 60(b)(6) relief would be inappropriate."); *see also Gonzalez*, 545

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[10] *Dowell*, central to the decision below, also can be distinguished because the Rule 60(b)(6) movant there (unlike here) failed to appeal the issue for which there was a later change in decisional law. 993 F.2d at 47-48.

U.S. at 531 ("[A] motion might contend that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim"); *Polites v. United States*, 364 U.S. 426, 433 (1960) (leaving open that a "clear and authoritative change" in the law governing judgment in a case may present extraordinary circumstances); *Kemp*, 142 S. Ct. at 1865 (Sotomayor, J., concurring) ("[N]othing . . . casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law.").

In view of the foregoing Supreme Court, Ninth Circuit, Eleventh Circuit (and even limited Fourth Circuit) authority, the "extraordinary circumstances" required under Rule 60(b)(6) clearly include a change in controlling legal authority. Accordingly, to the extent that the Court of Appeals ruled that a change in law is *per se* irrelevant under Rule 60(b)(6), it also erred as a matter of law.

This error also led the Court of Appeals to diminish the significance of Ross's diligence in advocating the position ultimately adopted in *AMG*. Ross should benefit from her attempt to right incorrect circuit law. *See Henson v. Fidelity Nat'l Fin., Inc.*, 943 F.3d 434, 449 (9th Cir. 2019) ("[B]ecause the petitioner sought the benefit of a favorable change in the law, the fact that the petitioner had been diligent in advancing the legal position that was ultimately adopted by that change in the law was relevant to the equitable considerations implicated by a Rule 60(b)(6) motion." (citing *Gonzalez*, 545 U.S. at 537-38)). Beyond that, she took her

argument all the way to this Court against the headwinds of numerous circuit precedents consistently and uniformly permitting monetary relief under Section 13(b). *Ross v. FTC*, 743 F.3d at 891-92.

Unlike countless other cases where the Rule 60(b)(6) movant fails to appeal at all, Ross asserted this very position every step of the way. *See*, *e.g.*, *Dowell*, 993 F.2d at 47-48; *Aikens v. Ingram*, 652 F.3d 496, 502 (4th Cir. 2011) ("This court has repeatedly recognized that a Rule 60(b) motion is not designed to serve as an alternative for an appeal."); *see also John Beck*, 2021 U.S. Dist. LEXIS 185202 at *15 (denying Rule 60(b)(6) relief where "unlike the defendant in *Ross* [(*i.e.*, Petitioner Kristy Ross herself)], Hewitt made no arguments challenging the Court's authority to issue equitable monetary relief under Section 13(b) at the time that Judgment was entered, a factor that weighs against relief."); *Apex*, 2021 U.S. Dist. LEXIS 255314 at *14 ("In this case, as in *Ackermann* and *Master Key*, the Transact Pro Defendants decided to settle this case and *freely entered into the Stipulated Judgment*, and, as a result, cannot be relieved of those decisions simply because those decisions now seem ill conceived. Indeed, before deciding to settle, the Transact Pro Defendants were *fully aware of the challenges to the FTC's authority to recover equitable monetary relief pursuant to Section 13(b)*." (emphasis added)).

Moreover, Ross was right all along. Ross's exhaustion of her appellate remedies is all the more compelling considering that she was an individual young woman at the time of the first set of appeals. The

judgment was entered against her in her individual capacity, and she sought appellate reconsideration then (and now) without the apparatus of an enterprise behind her, as she, and she alone, contested this issue after the company she served defaulted. To refuse Rule 60(b)(6) relief under these circumstances is to penalize Ross for nothing more than the unfortunate timing of the *AMG* decision—despite all of her diligence and spot-on advocacy on her behalf—and reward the FTC for its unchecked aggression, obtaining for decades countless improper monetary judgments.

IV. This Case Presents An Ideal Vehicle For Certiorari.

Under Supreme Court Rule 10, compelling reasons warrant review here. Courts of Appeals are divided over each of the three issues for which review is sought. Additionally, this Court has never substantively addressed Rule 60(b)(4) on the critical Article III issue of circumstances in which judgments may be voided for want of subject matter jurisdiction. Also important is the sanctity of this Court's precedent and the extent to which overruled decisions may be perpetuated notwithstanding the existence of Rule 60 as an exception to finality. Petitioner respectfully submits that this Court exercise its supervisory power to reconcile the split among the Courts of Appeals and provide much needed guidance on the metes and bounds of Rule 60(b) relief. The issues are both percolated and ripe, and the purity of how the issues arrived in this Court means that no other factual or legal ground

might cloud this Court's analysis or the proper disposition of the challenged monetary judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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