No. 23-405

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

REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

The FTC effectively concedes the most important point supporting certiorari review. If any court today were to render the same $163 million Section 13(b) monetary judgment against Ms. Ross, every appeals court in the republic would strike it down as outside the FTC's statutory authority. Such a monetary judgment today would, beyond debate, offend Constitutional principles of limited government and cabined judicial power. This Court's 9-0 reasoning in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) would command any reviewing court to find such judgment void, for it would be beyond agency redress rights granted by Congress. The FTC does not disagree, if such a judgment were to issue today.

The irony is palpable that the FTC repeatedly invokes the monetary judgment here as-issued pre-*AMG*, and its eye-popping amount, to sling mud. (Resp. 3, 6, 17.) Never mind that Ms. Ross has always respected the non-void, injunctive part of the judgment against her. Never mind that the FTC never tried to garnish or collect.[1] To the FTC, the fact such judgment remains unsatisfied, and that Ms. Ross—prior to the original FTC action—chose to reside outside the country that issued it, is enough to divert this Court from the strong grounds Ms. Ross presents for certiorari review. (*Id*.) Fortunately, Supreme Court Rule 10 does not name attacks on a party's character, bootstrapped by the very error under review, as a consideration for denying the writ. Since the judicial system needs

[1] No money judgment is self-executing. A creditor has to do something if it wants the funds.

clarity and guidance on Rule 60(b), and since lower courts have shown inadequate respect for a 9-0 decision of this Court correcting a federal agency's prior abuse of power, this Court should grant certiorari.

Ms. Ross's petition showed that this Court has yet to guide lower courts on the metes and bounds of which kinds of jurisdictional defects merit "voidness" determinations under Rule 60(b)(4). (Pet. 13-19.) Ms. Ross showed that the question is binary—either a judgment (or part of it) is void or it is not. (Pet. 12, 20-25.) Ms. Ross showed that appellate courts have wrongly taken this Court's *descriptive* mention of an "arguable basis" test for Rule 60(b)(4) "voidness" as a *normative* holding of this Court. (Pet. 13-16.) And Ms. Ross showed that resulting decisional standards among the circuits are a jumble—some use an "arguable basis" framework to deny Rule 60(b)(4) relief, and some do not. (Pet. 14-19.) Ms. Ross further showed, on the "catch-all" provision of Rule 60(b)(6), that some circuits (like the Fourth Circuit) wrongly raise a categorical bar against using a change in decisional law in the discretionary analysis of the "exceptional circumstances" test. (Pet. 31-32.) Nothing in the FTC's brief undermines these points supporting certiorari.

ARGUMENT

I. No "Arguable Basis" For Subject Matter Jurisdiction Justifies Denial Of A Rule 60(b)(4) Motion.

A. The Courts of Appeals Are Divided on the "Arguable Basis" Standard.

The FTC claims no circuit split exists because the Ninth Circuit, in *FTC v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023), is the only other court to address the "precise question" in this case—*i.e.*, whether *AMG* provides "a basis for relief from a prior final judgment that awarded monetary relief under Section 13(b)." (Resp. 11.) But Ms. Ross presents the question, more broadly, whether the "arguable basis" standard excuses the absence of subject matter jurisdiction for Rule 60(b)(4) purposes.

The FTC argues that "Petitioner identifies no case in which a court of appeals has rejected the 'arguable basis' standard." (Resp. 13.) But the Petition explained:

> 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)

(Pet. 18.)

Additionally, the Fourth and D.C. Circuits contain intra-circuit divergence. The Fourth Circuit has justified the "arguable basis" test where a litigant squandered a chance to challenge subject matter jurisdiction during an appeal of the initial proceedings. *See Hawkins v. i-TV Digitalis Tavkolesi zrt.*, 935 F.3d 211, 222 (4th Cir. 2019). In contrast, it applied no "arguable basis" test in the case of a defaulting defendant in *Compton v. Alston Steamship Company*, 608 F.2d 96, 104 (4th Cir. 1979), pointing out lack of statutory authority for an awarded remedy (Pet. 15 n.3), but ignored by the FTC. Although the D.C. Circuit in *Bell* rejected the "arguable basis" standard, that court later applied such standard where the parties initially admitted that jurisdiction existed, and failed to challenge the issue on appeal. *See Lee Mem. Hosp. v. Becerra*, 10 F.4th 859, 863-64 (D.C. Cir. 2021). Considering the emphasis in *Lee* that "'a motion under Rule 60(b)(4) is not a substitute for a timely appeal,'" and the Rule 60(b)(4) movant squandered its opportunity to challenge subject matter jurisdiction, *id.* at 863, *Lee* should at most be cabined to those circumstances. Without this Court's guidance, confusion reigns below.

Regarding the Fifth Circuit, the FTC incorrectly suggests that the "arguable basis" standard implicitly applied, even though no published case articulated the "arguable basis" standard. (*See* Resp. 13.) The FTC asserts, for example, that the district court in *Mitchell Law Firm, L.P. v. Bessie Jeanne Worthy Revocable Trust*, "'obviously' lacked jurisdiction. . . ." (Resp. 13

(citing 8 F.4th 417, 420 (5th Cir. 2021)).) *Mitchell*, however, did not concern itself with whether jurisdiction was "arguable." It stated that "the 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). Subject matter jurisdiction either existed or it did not: "[w]here . . . the district court lacked subject matter jurisdiction the only function remaining to that court is that of announcing the fact and dismissing the cause." *Id*. at 422 (internal quotations omitted). The FTC also ignores *Carter v. Finner*, wherein the Fifth Circuit stated unequivocally that "Rule 60(b)(4) motions leave no margin for consideration of the district's discretion as the judgments are by definition either legal nullities or not." 136 F.3d 1000, 1005 (5th Cir. 1998) (cited at Pet. 16 n.4).[2]

Respecting the Seventh Circuit, the FTC focuses on *Hill v. Baxter Healthcare Corp*., 405 F.3d 572 (7th Cir. 2005), suggesting that the court's order after terminating the case with prejudice lacked an "arguable basis." (*See* Resp. 13.) But that scarcely means that the Seventh Circuit inherently applies the "arguable basis" standard. For example, in *United States v. Indoor Cultivation Equipment* (ignored by the FTC), the district court possessed subject matter jurisdiction over the matter in general, but—based on statutory

[2] The FTC points to an unpublished Fifth Circuit decision, *Perret v. Handshoe*, wherein the appellants squandered the opportunity to object to jurisdiction. 708 Fed. Appx. 187, 189 (5th 2018). Accordingly, *Perret* does not apply to a timely challenge to subject matter jurisdiction.

construction—lacked the power to order forfeiture of personal property. 55 F.3d 1311 (7th Cir. 1995). Without entertaining the arguable nature of the statutory construction advanced by the government, the Seventh Circuit granted Rule 60(b)(4) relief, concluding that the district court lacked the power to order forfeiture, even though the district court reached a contrary conclusion. *Indoor Cultivation Equipment*, 55 F.3d at 1312, 1317.[3]

Next, the FTC argues that the Eleventh Circuit requires the "arguable basis" test, citing *Bainbridge v. Governor of Florida*, 75 F.4th 1326, 1335 n.4 (2023) (cited at Resp. 12-13). As previously explained (*see* Pet. 17 n.4), *Bainbridge* did not involve a jurisdictional challenge, but rather, an argument that the court's injunction did not comport with the parties' stipulation. *Bainbridge*, 75 F.4th at 1335. There was no dispute that the court had power to order an injunction; the parties agreed to one. *Id*. at 1329. Thus, *Bainbridge* falls into the category of cases (discussed further below), where there was no dispute (unlike here) that the court possessed the power to provide the *type* of remedy at issue.

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[3] The FTC points to *Lee v. Christenson*, another unpublished case where the court of appeals recited the "arguable basis" standard. 558 Fed. Appx. 674, 676 (7th Cir. 2014) (cited at Resp. 14 n.3.) But the basis for the Rule 60 motion there did not involve an intervening decision that "expressly overruled th[e] precedent" on which the district court's decision was predicated. *Id*. at 675-76. In other words, *Lee* involved another squandered opportunity to mount a jurisdictional challenge in the first instance.

The FTC also relies on *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329 (11th Cir. 2015), but that case never mentions the "arguable basis" standard, simply stating that "[a] judgment can be set aside for voidness where the court lacked jurisdiction. . . ." *Id.* at 1338. Additionally, the FTC ignores *Burke v. Smith*, 252 F.3d 1260 (11th Cir. 2001) (cited at Pet. 17 n.6). Not engaging in the "arguable basis" calculus, the court stated, simply, that "[a] judgment is . . . void for Rule 60(b)(4) purposes if the rendering court was powerless to enter it." *Id*. at 1263. Once again, the evaluation was a binary, *de novo* calculus.

Finally, the FTC attempts to brush aside precedent from the Federal Circuit, arguing that the court only applies the law of the regional circuit when addressing Rule 60(b) motions. (Resp. 13 n.2.) Still, in *Garber v. Chicago Mercantile Exchange*, the Federal Circuit applied Seventh Circuit law, finding that the district court lacked subject matter jurisdiction once a joint Rule 41(a)(1) dismissal was filed. 570 F.3d 1361, 1363-64, 1366 (Fed. Cir. 2009). That court did not apply any "arguable basis" standard. *Id*. at 1366. Applying its own law, in *Schrieber Foods, Inc. v. Beatrice Cheese, Inc*., the Federal Circuit, addressed a standing issue based on patent ownership, at no point inquiring whether an "arguable basis" for standing existed. 402 F.3d 1198, 1202-04 (Fed. Cir. 2005).

At bottom, the FTC cannot legitimately dispute that the circuits have split on whether the "arguable basis" standard governs Rule 60(b)(4) motions.

B. The "Arguable Basis" Standard Should Not Govern.

As argued previously, Article III subject matter jurisdiction—including standing—is an "*irreducible* constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 560-61 (1992) (emphasis added). Being "irreducible," it cannot be simplified or qualified. It either exists or it does not; "a judgment is either void or it is not." *Shank/Balfour Betty v. IBEW Local 99*, 497 F.3d 83, 94 (1st Cir. 2007); *accord Jackson v. FIE Corp.*, 302 F.3d 515, 542 (5th Cir. 2002); *Burke*, 252 F.3d at 1267; *SEC v. Novinger*, 40 F.4th 297, 301 (5th Cir. 2022). Indeed, "[T]he whole point of Rule 60(b)(4) is to undo a district court's *erroneous* assertion of subject-matter jurisdiction to a court lacking it in the first instance." *Mitchell*, 8 F.4th at 421 (5th Cir. 2021) (emphasis added). So goes it here—one Fourth Circuit judge admitted that court "ruled incorrectly" against Ms. Ross in her original appeal. (ca4.uscourts/OArchive/mp3/22-22-2078-20230503.mp3 at 2:08-09.) As Rule 60(b)(4) rulings are reviewed *de novo*, *see*, *e.g.*, *Ross*, 74 F.4th at 190, there is no room for a discretionary exercise of subject matter jurisdiction.

Leading with a point even the Fourth Circuit did not adopt, the FTC would divorce standing defects from jurisdictional gaps. The FTC ignores specific standing requirements, suggesting that generalized jurisdictional statutes such as 28 U.S.C. § 1331 empower a court to prescribe any remedy it desires. (Resp. 4-5, 8.) But that simplistic approach ignores *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208

(2021), requiring that constitutional standing (and, thus, subject matter jurisdiction) be shown for *each remedy* sought. (*See* Pet. 21.) Thus, a district court's jurisdiction to decide federal questions does not empower it to order remedies lacking legislative authorization. Pointing out jurisdiction over a "case" or an "action" sidesteps the question Ms. Ross presents, which instead targets lack of jurisdiction to enter a certain *remedy*.

United States v. Philip Morris USA Inc., 840 F.3d 844 (D.C. Cir. 2016) (cited in Resp. 9, 11), is not to the contrary. In *Philip Morris*, there was no dispute that the court had power to order cigarette manufacturers to engage in remedial advertising. *See id.* at 848, 850. The only dispute was the extent of that advertising. *See id*. Thus, *Philip Morris* is inapposite, as it addressed only the *degree* of court-ordered relief, not a *class* of court-ordered relief (*e.g*., monetary relief).[4]

II. Contemporary Law Must Govern Rule 60 Motions.

The circuits also split on the timeframe, if alternatively "arguable basis" standards do apply. The D.C. Circuit in *Lee Memorial Hospital v. Berrera*, applied a

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[4] The FTC's reference to *NewGen, LLC v. Safe Cig*, 840 F.3d 606 (9th Cir. 2016) (cited at Resp. 10), is no more instructive. There, diversity jurisdiction was never lacking because a complaint was amended to properly allege diversity in a way that was "undoubtedly legally sufficient." *Id*. at 615. Here, the jurisdictional flaw cannot be corrected by amendment to the pleadings or otherwise.

2019 Supreme Court decision to decide whether an "arguable basis" existed for the district court's subject matter jurisdiction for a 2016-dated judgment. 10 F.4th 859, 862 (D.C. Cir. 2021) (cited in Resp. 14). Although *Lee* involved a denied Rule 60(b)(4) motion, (Resp. 14), that does not alter how that court performed the "arguable basis" calculus. The FTC next suggests that *Lee* relied on old law because the Supreme Court decision cited therein (*Smith v. Berryhill*, 139 S. Ct. 1765 (2019)) reiterated a principle from a 1976 case, *i.e.*, exhaustion of administrative remedies is a waivable requirement. (Resp. 14 (discussing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)).) But *Lee* relied on more from *Smith*, and for a different point: "if the agency dismisses a claim and a reviewing court disagrees with the ground for dismissal, 'there would be jurisdiction for the court to proceed to the merits.'" 10 F.4th at 866 (quoting *Smith*, 139 S. Ct. at 1779). *Smith* did not rely on *Eldridge* for the latter proposition. *See Smith*, 139 S. Ct. at 1779. Thus, *Lee* considered intervening (contemporary) decisional law in its "arguable basis" analysis. The Fourth Circuit's decision here highlights the split—it *flouted* contemporary decisional law (*AMG*) to deny Ms. Ross relief.

If "arguable basis" is the Rule 60(b)(4) standard, the D.C. Circuit (not the Fourth) has it right. Under *Rivers v. Roadway Express, Inc.*, it is undisputed that "[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." 511 U.S. 298, 312-13 (1994). The FTC tries

to downplay that statement through other cases such as *Harper v. Virginia Department of Taxation*, because this is allegedly not a case "open on direct review." (*See* Resp. 7, 11.) But *Harper* is not so limited and actually supports Ms. Ross, stating that this Court's "rule of federal law . . . 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." 509 U.S. 86, 97 (1993) (emphasis added).

Moreover, *Harper* did not address Rule 60, which exists as an "exception to finality"—as even the FTC concedes. (Resp. 8.) The same holds true of *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) and *George v. McDonough*, 142 S. Ct. 1953, 1962 (2022) (Resp. 7), neither of which address the Rule 60 context. In short, the purported "need for finality" is already baked into the Rule 60 calculus and deserves no independent weight. *See Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) ("policy consideration [of finality], standing alone, is unpersuasive in view" of Rule 60).

III. A Change In Decisional Law Is Relevant To Rule 60(b)(6) Relief.

The FTC misunderstands that the Fourth Circuit categorically refused under Rule 60(b)(6) to consider a change in decisional law. It recasts the holding below as finding that the *AMG* decision " 'was not sufficiently extraordinary to justify vacatur under the Rule 60(b) catch-all.' " (Resp. 6 (quoting App. 16).) But the Fourth

Circuit deems changes in decisional law as *never* relevant to Rule 60(b)(6) relief. (*See* App. at 16.) That contrasts with the Ninth and Eleventh Circuits, which do consider changes in law in their Rule 60(b)(6) analyses. (*See* Resp. 18.) The circuit split is clear.

Beyond the intervening *AMG* decision, Ms. Ross noted her diligence, not only exhausting appellate remedies but also correctly asserting the position ultimately—and unanimously—adopted by this Court in *AMG*. (*See* Pet. 35-36.) The FTC notes that the court weighed such considerations, but it failed to do so among the complete totality of circumstances—including the intervening *AMG* decision. Diligence cannot be considered in isolation.

The FTC also launches ad hominin attacks against Ms. Ross, asserting that she failed to abide by an unauthorized monetary judgment and resided outside the country—before the action against her even commenced. (Resp. 17.) But there is no evidence that Ms. Ross failed to obey the injunctive order or refused any effort by the FTC to collect the unauthorized monetary judgment. False character attacks, in any event, cannot harmonize a circuit split.

Finally, the FTC argues that a change in law "standing alone" does not suffice for Rule 60(b)(6) relief. (Resp. 17.) That is an FTC straw man, not Ms. Ross's position. Ms. Ross additionally relies on her diligence to procure the result of *AMG*, in concert with the extraordinary circumstance that a federal court issued a large money judgment unauthorized by the

FTC Act. *See, e.g.*, *Kemp v. United States*, 142 S. Ct. 1856, 1865 (2022) (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."). An intervening change in law is relevant to Rule 60(b)(6) relief. The Fourth Circuit deepened a circuit split to hold otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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