No. _____

In the
Supreme Court of the United States

HI-TECH PHARMACEUTICALS, INC.; JARED WHEAT, individually and as officers of the corporations; STEPHEN SMITH, individually and as officers of National Urological Group, Inc. and National Institute for Clinical Weight Loss, Inc.; NATIONAL UROLOGICAL GROUP, INC., d.b.a. Warner Laboratories; et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION; CERTUSBANK, N.A.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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December 27, 2023

QUESTIONS PRESENTED

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), permits the Commission to obtain a "permanent injunction" in court to stop violations of the Act while the Commission pursues administrative proceedings under Section 5(b), 15 U.S.C. § 45(b). For decades, the Commission relied on this "permanent injunction" provision to bypass administrative proceedings and obtain compensatory equitable remedies for violations of the Act directly in court. This interpretation, which had been accepted by nearly all the lower federal courts, was rejected in *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67 (2021). Despite *AMG Capital*, the Commission continues to bypass administrative proceedings; it does so by seeking and obtaining compensatory equitable remedies in court as sanctions for civil contempt of Section 13(b) permanent injunctions. The lower federal courts are uniformly rejecting *AMG Capital* as a basis for relief from such contempt judgments under Federal Rule of Civil Procedure 60(b)(6).

The questions presented are:

1. Can a fundamental change in decisional law independently support relief from a judgment under Rule 60(b)(6)?

2. Can the Federal Trade Commission obtain compensatory equitable remedies as sanctions for civil contempt of a Section 13(b) permanent injunction when those remedies are not directly available under Section 13(b)?

PARTIES TO THE PROCEEDING

Petitioners Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith were defendants and appellants below. Respondent Federal Trade Commission was plaintiff, counter-defendant, and appellee below.

National Urological Group, Inc. d.b.a. Warner Laboratories was defendant and counter-plaintiff below. National Institute for Clinical Weight Loss, Inc. was defendant below. Thomasz Holda was defendant below. Michael Howell was defendant below. Terrill Mark Wright, M.D. was defendant below. CertusBank, N.A. was plaintiff below.

CORPORATE DISCLOSURE STATEMENT

Hi-Tech Pharmaceuticals, Inc. is not a publicly traded company. It has no parent company, and no company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit, listed here in chronological order:

- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. June 4, 2008), reported at 645 F. Supp. 2d 1167;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 09-10617 (11th Cir. Dec. 15, 2009), reported at 356 F. App'x 358;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. May 14, 2014), available at 2014 WL 3893796;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 14-13131 (11th Cir. May 5, 2015), reported at 785 F.3d 477;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. Oct. 10, 2017), available at 2017 WL 6759868;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 17-15695 (11th Cir. Sept. 18, 2019), reported at 786 F. App'x 947;
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. Sept. 30, 2021), available at 2021 WL 5774177; and
- *Fed. Trade Comm'n v. Nat'l Urological Grp., Inc.*, No. 21-14161 (11th Cir. Aug. 29, 2023), reported at 80 F.4th 1236.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Federal agencies have no inherent power; they have only those powers that Congress expressly gives them.

Section 13(b) of the Federal Trade Commission Act empowers the Commission to obtain temporary and permanent injunctions to stop unlawful conduct while the Commission pursues administrative proceedings. Pub. L. No. 93–153, 87 Stat. 576, § 408(f) (Nov. 16, 1973), *codified at* 15 U.S.C. § 53. Section 19 permits the Commission to obtain monetary remedies in court to compensate consumers aggrieved by violations of the Act. Pub. L. No. 93–637, 88 Stat. 2183, § 206 (Jan. 4, 1975), *codified at* 15 U.S.C. § 57b. To obtain equitable monetary remedies, however, the Commission must satisfy one of two statutory prerequisites: (1) the Commission must be enforcing a final cease-and-desist order obtained through Section 5(b) administrative proceedings, 15 U.S.C. § 45(b); or (2) the Commission must be enforcing one of its own rules, enacted per the Act's own detailed rulemaking requirements, 15 U.S.C. § 57b; *see* 15 U.S.C. § 57b(a) (addressing statutory prerequisites); *see also* 15 U.S.C. § 45(l); 15 U.S.C. §§ 57a & 57b-3 (addressing rulemaking requirements).

For decades, the Commission used Section 13(b)'s "permanent injunction" provision to win equitable monetary remedies directly in court, without pursuing administrative proceedings. In *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67 (2021), this Court held that the Commission lacks the power "to obtain monetary relief directly from courts, thereby effectively bypassing the

[administrative] process set forth in § 5 and § 19." *Id.* at 75.

Despite *AMG Capital*, the Commission continues to bypass this statutory process by obtaining compensatory equitable remedies as sanctions for civil contempt of Section 13(b) permanent injunctions. That is what happened in this case. In an action affirmed on appeal before *AMG Capital* was decided, the Commission obtained against Petitioners a $40 million contempt sanction consisting of disgorgement and restitution. When Petitioners sought relief under Federal Rule of Civil Procedure 60(b)(6) based on the authority of *AMG Capital*, the lower courts denied it.

This petition presents two issues warranting this Court's review.

First, the Court should grant review to resolve a longstanding circuit split concerning the availability of relief under Federal Rule of Civil Procedure 60(b)(6) based on post-judgment changes in decisional law. Dicta from this Court strongly suggest that a clear, authoritative change in decisional law—like *AMG Capital*'s ruling—can by itself constitute an extraordinary circumstance warranting relief from a judgment under Rule 60(b)(6). Some circuits agree with these dicta, and some disagree. The Court should grant review and hold that a fundamental change in decisional law can independently constitute an extraordinary circumstance warranting relief under Rule 60(b)(6).

Second, the Court should grant review to address whether the Commission can obtain compensatory equitable remedies as sanctions for civil contempt of a Section 13(b) permanent injunction when those

remedies are not directly available under Section 13(b). The Court should hold that *AMG Capital*'s reasoning—that the FTC Act precludes the Commission from skipping administrative proceedings to obtain equitable monetary remedies directly in court under Section 13(b)—applies equally in the context of remedying contempt of a Section 13(b) permanent injunction.

Reviewing each issue is imperative because the lower federal courts are uniformly refusing to treat *AMG Capital* as an exceptional circumstance under Rule 60(b)(6) and refusing to apply *AMG Capital* to civil contempt. When this Court decided *AMG Capital*, all but one circuit had agreed that the Commission was entitled to obtain compensatory equitable remedies directly in court under Section 13(b). The Commission and the lower courts are now circumventing *AMG Capital*'s restoration of limits on the Commission's enforcement power by imposing the same compensatory equitable remedies as sanctions for contempt of Section 13(b) injunctions.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 80 F.4th 1236 and reproduced at App.1–16. The opinion of the United States District Court for the Northern District of Georgia is reported at 2021 WL 5774177 and reproduced at App.44–58.

JURISDICTION

The Court of Appeals issued its opinion and judgment on August 29, 2023. App.1–16. On November 13, 2023, this Court entered an order

granting Petitioners an extension of time until December 27, 2023, to file this Petition. *See* U.S. Sup. Ct. Docket No. 23A427. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(6) 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: … (6) any other reason that justifies relief." Rule 60 is reproduced at App.418–19.

The relevant portions of the statutory framework governing the Commission's enforcement authority are reproduced at App.396–417.

STATEMENT OF THE CASE

Hi-Tech sells dietary supplements. Dietary supplements are overseen by two federal agencies.

The Food and Drug Administration regulates dietary supplements and their labeling under the Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325 (Oct. 25, 1994).

The Federal Trade Commission regulates dietary-supplement advertising by enforcing general prohibitions against "false advertis[ing]" and "unfair or deceptive trade practices" in Sections 5 and 12 of the FTC Act. 15 U.S.C. § 45(a)(1); 15 U.S.C. § 52. The Commission has the exclusive authority to enforce the Act. 15 U.S.C. § 56.

A. The Federal Trade Commission obtained a permanent injunction and equitable monetary remedies against Hi-Tech, Wheat, and Smith under Section 13(b) of the FTC Act.

In 2004, the Commission filed a Section 13(b) enforcement action against Hi-Tech, Wheat, Smith, and others, contending that Hi-Tech's advertising of dietary supplements violated the FTC Act. Doc. 1; *see* 15 U.S.C. § 53(b).[1] The Commission sought a permanent injunction under Section 13(b) plus equitable monetary relief comprising disgorgement and restitution. The United States District Court for the Northern District of Georgia had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1345. The Commission did not pursue temporary injunctive relief under Section 13(b), and it has never filed a related administrative action.

This approach characterized the Commission's former consumer-redress program. Beginning in 1914, when Congress created the Commission, until the 1970s, the Commission enforced the Act through its own administrative proceedings. *See* Federal Trade Commission Act, 63rd Congress, ch. 311, 38 Stat. 717 (Sept. 26, 1914). This involved obtaining an administrative order requiring a party to cease and desist from conduct that violates the Act.

In the 1970s, Congress amended Section 13(b) of the FTC Act to permit the Commission to obtain a "permanent injunction" in district court without first

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[1] Docket citations refer to *Federal Trade Commission v. National Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga.).

obtaining an administrative cease-and-desist order. Pub. L. No. 93–153, 87 Stat. 576, § 408(f) (Nov. 16, 1973), *codified at* 15 U.S.C. § 53. Congress also amended Section 19 of the Act to permit the Commission to obtain equitable monetary remedies in court to compensate consumers aggrieved by violations of the Act. Pub. L. No. 93–637, 88 Stat. 2183, § 206 (Jan. 4, 1975), *codified at* 15 U.S.C. § 57b.

Almost immediately, the Commission fashioned a different enforcement scheme for obtaining equitable monetary remedies that circumvented the statutory prerequisites for obtaining these remedies in court. The Commission argued that Section 13(b)'s words "permanent injunction" permitted it to obtain, ancillary to the entry of the injunction, all equitable monetary remedies awardable by courts in equity, including disgorgement and restitution to consumers for past violations of the Act. *AMG Capital*, 593 U.S. at 71–74.

Nearly all federal courts accepted this interpretation. *F.T.C. v. Ross*, 74 F.4th 186, 189–90, 193 & n.2 (4th Cir. 2023). With the lower courts' blessing, the Commission thus bypassed the Act's prerequisites for obtaining equitable monetary remedies in court, using Section 13(b) "to win equitable monetary relief directly in court with great frequency." *See AMG Capital*, 593 U.S. at 74; *see generally* Aiste Zalepuga, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. 2083 (2021); J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1 (2013).

In 2008, having concluded that Hi-Tech's advertising claims about its dietary supplements were unsubstantiated, in violation of the Act, the district court granted summary judgment for the Commission. App.301–95. The district court ordered Hi-Tech, Wheat, and Smith jointly and severally to disgorge to consumers over $15 million—Hi-Tech's gross receipts from selling the supplements. App.329–30, 386–92, 395; *see* App.272–300. The district court based this award on the Eleventh Circuit's then-prevailing interpretation of Section 13(b) as permitting the Commission to obtain all kinds of equitable relief, including monetary relief, without satisfying either of the statutory prerequisites for obtaining it. App.386–92; *see F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) ("[S]ection 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits."). (The $15 million judgment has been satisfied. App.4.)

The district court also entered a permanent injunction against Hi-Tech, Wheat, and Smith under Section 13(b). App.272–98, 380–86; *see* Doc. 1 at 29–30; Doc. 172-1 at 42–47. The permanent injunction has broadly prohibited them from making, in violation of the FTC Act, unsubstantiated advertising claims about any dietary supplement that Hi-Tech might sell. App.280–86.

B. The Commission later obtained equitable monetary remedies as sanctions for civil contempt of the Section 13(b) permanent injunction.

In 2011, the Commission contended that Hi-Tech had been making unsubstantiated advertising claims about four new dietary supplements. Instead of filing an administrative action or an action in court to enforce an FTC rule, the Commission moved to hold Hi-Tech, Wheat, and Smith in civil contempt of the permanent injunction previously entered in this case. Docs. 332 & 332-1.

The Commission sought contempt on the ground that Hi-Tech's advertising claims about the supplements' efficacy violated the Act because those claims should have been, but were not, supported by the same kind of clinical trials required for the pre-market approval of drugs. App.275. Agreeing with the Commission, and finding that Hi-Tech's claims weren't substantiated, the district court held Hi-Tech, Wheat, and Smith in civil contempt. App.183–256, 262–67.[2]

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[2] Although the Commission's own guidance does not require drug-level randomized clinical trials to substantiate all efficacy claims for dietary supplements, Doc. 876-4, by 2011 the Commission was reinterpreting its guidance in hopes of requiring them invariably. Despite statutes permitting supplements to be sold without pre-market approval, *see* Pub. L. No. 103-417, 108 Stat. 4325, the Commission sought to "restor[e] the rigors of the drug approval process in everything but name," J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2194 (2015). Some drug-level randomized clinical trials can cost tens or even hundreds of millions of dollars

In 2014, the district court awarded the Commission contempt sanctions consisting of the same compensatory equitable remedies that it had awarded earlier on summary judgment directly under Section 13(b): the disgorgement of Hi-Tech's gross receipts—this time, over $40 million—for consumer redress. App.202–04. (Hi-Tech's net profits from these sales were $5,534,690. Doc. 621 at 12–13; Doc. 629 at 14–15.) This sanction was reversed on direct appeal for reasons unrelated to this petition. *See F.T.C. v. Nat'l Urological Grp., Inc.*, 785 F.3d 477 (11th Cir. 2015).

After an evidentiary hearing on remand, in 2017 the district court reimposed, as the primary remedy for civil contempt, the same $40 million disgorgement and restitution award. App.176–81. As before, the district court ordered Hi-Tech, Wheat, and Smith jointly and severally to disgorge to consumers Hi-Tech's gross receipts from sales of supplements in violation of the Act. *Id.*

This sanction was affirmed on direct appeal. *F.T.C. v. Nat'l Urological Grp., Inc.*, 786 F. App'x 947 (11th Cir. 2019), *cert denied sub nom. Hi-Tech Pharms., Inc. v. F.T.C.*, 141 S. Ct. 659 (No. 19-1445, Nov. 2, 2020). The record indicates that $2.3 million of the $40 million contempt sanction has been collected. App.5.

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to complete. *See, e.g.*, Aylin Sertkaya, et al., *Key Cost Drivers of Pharmaceutical Trials in the United States*, CLINICAL TRIALS (2016),https://www.reasearchgate.net/publication/293640487_Key_cost_drivers_of_pharmaceutical_clinical_trials_in_the_United_States.

C. In *AMG Capital*, this Court struck down the Commission's unauthorized use of Section 13(b) to obtain equitable monetary remedies.

On July 9, 2020, this Court granted certiorari in *AMG Capital Management, LLC v. Federal Trade Commission*. 141 S. Ct. 194. Recognizing *AMG Capital*'s importance, Hi-Tech, Wheat, and Smith moved to stay the enforcement of the contempt judgment. Doc. 1096; Doc. 1096-1.

While the motion was pending, *AMG Capital* was decided. 593 U.S. 67 (Apr. 22, 2021). As recounted in *AMG Capital*, in that case the Commission had filed an enforcement action against short-term payday lenders for their unfair and deceptive acts and practices in violation of the FTC Act. *Id*. at 70. Relying directly on Section 13(b), the Commission obtained both a permanent injunction and $1.27 billion in restitution and disgorgement and "other equitable relief reasonably related to [the] alleged business practices." *Id.* at 71. This Court reversed. It held that the words "permanent injunction" in Section 13(b) do not authorize the Commission "to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *Id.* at 70.

This ruling, which removed the interpretive underpinning for the Commission's decades-long consumer-redress program, appeared to put an end to the Commission's unauthorized use of Section 13(b) to enforce the Act.[3]

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[3] *AMG Capital* focused on administrative proceedings as the predicate for seeking equitable monetary remedies for violations

D. Hi-Tech, Wheat, and Smith sought, but were denied, Rule 60(b)(6) relief from the contempt judgment based on *AMG Capital*.

Soon after *AMG Capital* was decided, Hi-Tech, Wheat, and Smith moved for relief from the contempt judgment based on, among other grounds, Federal Rule of Civil Procedure 60(b)(6) and *AMG Capital*. Doc. 1100; Doc. 1101. They contended that *AMG Capital*'s reasoning—that the Commission may not use Section 13(b)'s "permanent injunction" provision to bypass statutory prerequisites for obtaining equitable monetary remedies in court—applies equally in the context of sanctioning civil contempt of a Section 13(b) permanent injunction. The district court denied relief. App.44–58. It held that this Court's "ruling in *AMG Capital* has no bearing on the injunction" itself, and so it couldn't be unjust to continue enforcing the contempt judgment. App.52–53.

Hi-Tech, Wheat, and Smith timely appealed. Doc. 1109. The United States Court of Appeals for the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. Hi-Tech, Wheat, and Smith argued that "when Congress restricted the agency's authority to seek certain equitable relief, it also restricted district courts' ability to grant that relief," whether directly

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of the FTC Act under Section 5(l) and Section 19. 15 U.S.C. § 45(l); 15 U.S.C. § 57b(a)(2). The Court noted that Section 19 predicates similar equitable relief on enforcing a Commission-promulgated rule, 15 U.S.C. § 57b(a)(1)—the second of its alternative statutory prerequisites for obtaining compensatory equitable relief in court. *See AMG Capital*, 593 U.S. at 73.

under Section 13(b) or indirectly as a contempt sanction for violating a Section 13(b) injunction. App.10. The Eleventh Circuit affirmed. App.16.

Like the district court, the Eleventh Circuit read *AMG Capital* too narrowly. It held that sanctioning civil contempt of the Section 13(b) permanent injunction via disgorgement and restitution stems from the district court's inherent equitable power, which it says is unaffected by any statutory limitation in the FTC Act. "When a district court enters an injunction, whether under § 13(b) or any other authority, it generally retains inherent contempt powers to remedy violations of its own orders." App.11. *AMG Capital*, the Eleventh Circuit reasoned, "said nothing about how courts could enforce injunctions imposed under § 13(b). Neither the text of the Act nor the Supreme Court's decision in *AMG* expressly limits a district court's contempt powers in this context." App.12–14.

Having deemed *AMG Capital*'s fundamental change to the Commission's enforcement power irrelevant to remedying contempt of a Section 13(b) permanent injunction, the Eleventh Circuit concluded that Hi-Tech, Wheat, and Smith "failed to show extraordinary circumstances justifying relief under Rule 60(b)(6)." App.15.

REASONS FOR GRANTING THE PETITION

The Court should grant review to decide whether a fundamental change in decisional law, standing alone, can ever amount to the extraordinary circumstance necessary for relief from a judgment under Rule 60(b)(6). The federal circuits have been

deeply split over this question for many years. Courts and litigants need clarity and consistency. *Cf. Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983). This Court should hold, in accord with dicta from several of its prior decisions, that on rare occasions a fundamental change in the law—like that effected by *AMG Capital*—can independently support relief under Rule 60(b)(6).

The Court should also grant review to decide whether *AMG Capital*'s interpretation of the FTC Act compels precluding the Commission from asking for and obtaining compensatory equitable remedies as sanctions for civil contempt of a Section 13(b) permanent injunction. Since this Court decided *AMG Capital*, the lower courts have been uniformly holding that the Commission may obtain as contempt sanctions all the equitable monetary remedies, including disgorgement and restitution, that courts have the inherent power to award for civil contempt. This permits the Commission to continue obtaining consumer redress in court without meeting either of the FTC Act's prerequisites. The Court should prohibit the Commission from continuing to circumvent these statutory prerequisites.

I. The Court should resolve a deep circuit split over whether a change in decisional law by itself can support relief from a judgment under Rule 60(b)(6).

The Court should grant the petition to resolve a circuit split over whether a post-judgment change in decisional law can independently support relief from a judgment under Rule 60(b)(6). U.S. Sup. Ct. R. 10(a).

Acknowledging this split, Associate Justice Sonia Sotomayor has recently called on the Court to squarely decide this question. Concurring in the denial of a certiorari petition, Justice Sotomayor explained that "*Gonzalez* [*v. Crosby*, 545 U.S. 524, 536 (2005)] left open the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief." *Crutsinger v. Davis*, 140 S. Ct. 2, 2–3 (2019) (Sotomayor, J.). Justice Sotomayor has recommended that, "[i]n an appropriate case, this issue could warrant the Court's review." *Id.* at 3. This is an appropriate case.

A. The circuits have long been deeply split over whether a change in decisional law can independently support relief from a judgment under Rule 60(b)(6).

Federal Rule of Civil Procedure 60(b)(6) provides that a "court may relieve a party … from a final judgment" for "any other reason that justifies relief." This catchall provision is available only when subsections 60(b)(1) through (b)(5) are inapplicable. *Kemp v. United States*, 596 U.S. 528, 533 (2022). A motion under Rule 60(b)(6) must be made within a "reasonable time" after the judgment at issue was entered. *See* Fed. R. Civ. P. 60(c)(1). Courts typically consider the motion's overall procedural posture, including the extent to which the movant has displayed reasonable diligence and whether the motion can be deemed a substitute for an untaken direct appeal. *See Gonzalez*, 545 U.S. at 537–38; 11 FED. PRAC. & PROC. CIV. § 2864 (3d ed. Apr. 2023).

To avoid lightly disturbing finality, courts require movants under Rule 60(b)(6) to show "extraordinary circumstances." *Buck v. Davis*, 580 U.S. 100, 123 (2017). "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 580 U.S. at 123 (citation omitted).

Rule 60(b)(6) has been applied inconsistently by the lower courts. The courts of appeals disagree over whether a change in the law can support relief under Rule 60(b)(6) in the absence of other supporting factors. "Many courts have denied relief under those circumstances. But others have noted that the rule is not inexorable, as even the Supreme Court has recognized, and have granted relief under clause (6)." 11 FED. PRAC. & PROC. CIV. § 2864 (citing dictum in *Polites v. United States*, 364 U.S. 426, 433 (1960), and canvassing cases from lower courts); *accord Crutsinger*, 140 S. Ct. at 3 (Sotomayor, J.).

"Several Circuits recognize that a change in decisional law, by itself, may justify Rule 60(b)(6) relief." *Crutsinger*, 140 S. Ct. at 3 (Sotomayor, J.) (citing cases); *see, e.g.*, *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997) ("Although the door is not quite closed, there is good sense—as well as much precedent—to make this [relief under Rule 60(b)(6) based on a change in the law] the rarest of possibilities."); *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013) ("[A]s a general matter, a mere change in decisional law does

not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6). That general rule, however, is not absolute." (citation omitted)); *Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014) ("[W]e have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a more qualified position: that intervening changes in the law rarely justify relief from final judgments under 60(b)(6)."); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1154 (8th Cir. 2013) ("A change in governing law can represent so significant an alteration in circumstances as to justify both prospective and retrospective relief from the obligations of a court order.").

"Other[circuits], including the Fifth Circuit, appear to have announced a contrary, categorical rule: A 'change in decisional law after entry of judgment does not constitute extraordinary circumstances and is not alone grounds for relief from a final judgment.'" *Crutsinger*, 140 S. Ct. at 3 (Sotomayor, J.) (quoting *Raby v. Davis*, 907 F.3d 880, 884 (5th Cir. 2018) and citing cases); *see, e.g., Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) ("[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) ("Our precedents hold that '[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)); *Johnston v. Cigna Corp.*, 14 F.3d 486, 497 (10th Cir. 1993) ("Absent a post-judgment change in the law *in a factually-related case,*

… we have held that 'a change in the law or in the judicial view of an established rule of law' does not justify relief under Rule 60(b)(6)." (emphasis added & citation omitted)); *Arthur v. Thomas*, 739 F.3d 611, 633 (11th Cir. 2014) ("Something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief." (citation omitted)); *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." (citations omitted)).

Yet other circuits are hard to pin down, and their rules have been classified differently. *See, e.g., Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (agreeing "with the Third Circuit's approach in *Cox*, in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law never can support relief under Rule 60(b)(6)," but perhaps requiring something "more" in context of multi-factor analysis); *Phelps v. Alameida*, 569 F.3d 1120, 1131–40 (9th Cir. 2009) (rejecting "a per se rule that changes in the law can never support a Rule 60(b)(6) motion" but perhaps requiring other supporting factors as well in context of multi-factor analysis); *Feiss v. United States*, 2021-1986, 2022 WL 396106, at *1 (Fed. Cir. Feb. 9, 2022) (perhaps requiring that "extraordinary circumstances [must] exist independent of the asserted material change in law"); *cf. Crutsinger*, 140 S. Ct. at 3 (classifying *Ramirez* as adopting rule that a change in the law alone can suffice). Uncertainty has arisen in part from differing interpretations of this Court's opinion in *Gonzalez*, 545 U.S. 524, which

considered multiple factors, including a change in the law, in applying Rule 60(b)(6) in the habeas context.

Although the Sixth Circuit has been viewed as rejecting Rule 60(b)(6) based on a change in decisional law alone, its position is equivocal. *Compare, e.g.*, *Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018) (stating that the Sixth Circuit has "determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief") *with Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (holding that the Sixth Circuit has *not* "foreclose[d] the possibility that only a change in decisional law might, in some circumstances, merit such relief").

B. Dicta from this Court suggest that a change in decisional law can, in rare cases, independently support relief from a judgment under Rule 60(b)(6).

1. Dicta in three opinions by this Court strongly indicate that, were it to squarely decide the question, it would likely hold that a significant enough change in decisional law by itself can, in rare cases, warrant relief under Rule 60(b)(6).

First, in *Polites*, this Court denied relief from a judgment under Rule 60(b)(5) and (6) because the judicial decision at issue "did not in fact work the controlling change in the governing law which [appellant] asserted." *Polites*, 364 U.S. at 433. But the Court observed that it "need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law." *Id.* at 433. *Polites* thus left open the

possibility that a "clear and authoritative change in governing law" could, in the right case, independently support relief from a judgment.

Second, in *Agostini v. Felton*, the Court granted relief under Rule 60(b)(5) from a permanent injunction requiring a school system to comply with the Establishment Clause of the First Amendment. 521 U.S. 203, 208–09, 237 (1997). This ruling was based solely on a significant change in the law: "[O]ur Establishment Clause law has 'significant[ly] change[d]' since we decided *Aguilar* [*v. Felton*, 473 U.S. 402 (1985)]. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does." *Agostini*, 521 U.S. at 237 (citations omitted). In dictum, the Court observed that "[i]ntervening developments in the law by themselves rarely"—not never—"constitute the extraordinary circumstances required for relief under Rule 60(b)(6) …." *Id*. at 239.

Third, in *Gonzalez*, the Court denied relief from a criminal conviction under Rule 60(b)(6) both because the petitioner had not shown diligence in pursuing relief and because "it is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of a statute of limitations. 545 U.S. at 536. But, in dictum, the Court still held the door open for a post-judgment change in decisional law by itself to support relief under Rule 60(b)(6): "A change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment …." *Id*. at 537 n.9; *see id*. at 531 (mentioning motion for relief based on "a subsequent change in substantive law").

Courts asked to grant relief under Rule 60(b)(6) based on a change in decisional law have interpreted dicta in *Polites*, *Agostini*, and *Gonzalez* inconsistently. *Compare, e.g.*, *Cox*, 757 F.3d at 121 (interpreting *Agostini* as supporting the rule that a change in the law alone can warrant relief, albeit rarely); *Phelps*, 569 F.3d at 1131–34 (relying on *Polites* seemingly to reject "a per se rule that changes in the law can never support a Rule 60(b)(6) motion") *with Ross*, 74 F.4th at 194 (interpreting dicta in *Agostini* and *Gonzalez* as foreclosing relief based on a change in the law alone); *Kramer*, 481 F.3d at 792 (interpreting *Agostini* and *Gonzalez* as indicating that a change in the law standing alone cannot constitute an extraordinary circumstance).

2. In *Kemp*, this Court held that "judicial errors of law" can constitute a "mistake" supporting relief from a judgment under Rule 60(b)(1). 596 U.S. at 539. Citing *Polites*, *Gonzalez*, and *Buck*, Justice Sonia Sotomayor joined in *Kemp*'s majority opinion only "with the understanding that nothing in it casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law." *Kemp*, 596 U.S. at 540 (Sotomayor, J., concurring) (noting that, in *Buck*, "the petitioner was 'entitle[d] to relief under Rule 60(b)(6)' because of a change in law and intervening developments of fact"). *Kemp*'s holding and Justice Sotomayor's concurrence together heighten the need for clarity concerning the related question whether relief under Rule 60(b)(6) is available based on a post-judgment change in decisional law.

C. This is an appropriate case for resolving the longstanding circuit split.

This case is an "appropriate case" for deciding whether a change in governing law by itself can warrant relief under Rule 60(b)(6). *Crutsinger*, 140 S. Ct. at 3.

This case cleanly presents the circuit split. Hi-Tech, Wheat, and Smith sought relief under Rule 60(b)(6) based solely on *AMG Capital*'s restoration of congressional limitations on the Commission's enforcement powers. Having moved to stay the judgment soon after this Court granted certiorari in *AMG Capital*, and having sought Rule 60(b) relief promptly after it was decided, Hi-Tech, Wheat, and Smith's motion was timely and reflects reasonable diligence. Fed. R. Civ. P. 60(c)(1); *Gonzalez*, 545 U.S. at 537–38 (discussing diligence); Doc. 1096; Doc. 1096-1; Doc. 1101; Doc. 1101-1. Nor was their Rule 60(b) motion an attempted substitute for an untaken direct appeal. *See Gonzalez*, 545 U.S. at 537–38 (discussing lack of direct appeal); *Ackermann v. United States*, 340 U.S. 193, 198 (1950) (same).

Confusion about the availability of relief based on a fundamental change in decisional law under Rule 60(b)(6), a well-established procedural mechanism, has persisted for too long. The Court should grant review and hold that a clear and authoritative change in decisional law standing alone can, in rare cases, amount to an extraordinary circumstance warranting relief from a judgment under Rule 60(b)(6).

This circuit split and the question whether *AMG Capital* can support relief from a judgment under Rule 60(b)(6) have also been presented in another recent

petition for certiorari. *See* Pet. (Oct. 18, 2023), *Ross v. F.T.C.*, No. 23-405, at *i, 31–37 (U.S. Sup. Ct.). *Ross*'s petition differs from this one insofar as it seeks relief from an award of equitable monetary remedies ancillary to the entry of a Section 13(b) permanent injunction. *Id*. at 5–10. Were *Ross*'s petition granted to address whether *AMG Capital* can independently support relief under Rule 60(b)(6), the Court should also grant this petition and consider it with *Ross*.

D. The Court should hold that *AMG Capital* changed the law so fundamentally that it can independently support relief under Rule 60(b)(6).

The Court should also hold that *AMG Capital* is one of those rare cases that can itself support relief under Rule 60(b)(6). Over nearly 40 years, the Commission obtained billions of dollars in equitable monetary remedies directly in court under Section 13(b), doing so without having to meet either of the FTC Act's prerequisites for obtaining such remedies. When this Court decided *AMG Capital*, it removed, with the tap of a key, the cornerstone for this widely accepted consumer-redress program, which had been built on the "permanent injunction" provision of Section 13(b). "It is not often that the nation's highest court completely repudiates a federal agency's long-standing view of its authority. Yet that is exactly what occurred" with *AMG Capital*. M. Sean Royall, et al., *A Watershed Moment? What Comes Next for the FTC in the Wake of* AMG, ANTITRUST, 35-SUM ANTITR 103, 103 (2021).

If *AMG Capital*'s interpretation of the Act were considered relevant to civil contempt (and the Court

should hold that it is), then the $40 million compensatory contempt sanction awarded in this case should be viewed as lacking statutory authority. Permitting this judgment to stand would be unjust and risk undermining the public's confidence in the judicial process. *See Buck*, 580 U.S. at 123.

In affirming the denial of Rule 60(b)(6) relief from monetary awards obtained directly under Section 13(b), the lower courts have consistently deemed *AMG Capital*'s restoration of statutory limits on Commission enforcement powers to be non-extraordinary. *See, e.g., Ross*, 74 F.4th at 194; *F.T.C. v. Hewitt*, 68 F.4th 461, 470 (9th Cir. 2023); *F.T.C. v. Ivy Capital, Inc.*, 340 F.R.D. 602, 606–07 (D. Nev. 2022). But by emphasizing that this Court's "novel position" in *AMG Capital* "wiped out the almost entirely uniform approach of the federal circuits," *Ross* just underscores how dramatically *AMG Capital* reined in the Commission's consumer-redress program. *Ross*, 74 F.4th at 189, 194; *see Hewitt*, 68 F.4th at 468 (reasoning that, "most importantly, the equitable monetary judgment was consistent with Ninth Circuit precedent at the time, as well as the prevailing view in most other circuits").

The Fourth Circuit also frets unjustifiably that "a conclusion that such a circumstance [as *AMG Capital*] justifies vacatur would effectively eviscerate finality interests and open the floodgates to newly meritorious 60(b)(6) motions each time the law changes." *Ross*, 74 F.4th at 194. *Ross* forgets that the "*whole purpose* of Rule 60(b) is to make an *exception* to finality." *Buck*, 580 U.S. at 126 (quoting *Gonzalez*, 545 U.S. at 529 (emphasis added)).

By limiting relief to timely motions in rare cases involving a clear, authoritative change in decisional law, the Court would adequately ensure that post-judgment changes in the law would not routinely provide a mechanism for Rule 60(b)(6) relief.

II. The Court should decide whether the FTC Act permits the Commission to obtain compensatory equitable remedies for civil contempt of a Section 13(b) injunction.

This case presents a follow-up question that arises naturally and necessarily from *AMG Capital*: Can the Commission ask for and obtain compensatory equitable remedies as sanctions for civil contempt of a Section 13(b) permanent injunction?

This is "an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10(c). The lower courts are consistently deciding this "important federal question in a way that conflicts with" *AMG Capital*. *See id*. The Court should grant the petition to resolve this question now, and it should hold that the FTC Act, as interpreted by *AMG Capital*, precludes the Commission from obtaining compensatory equitable remedies for civil contempt of a Section 13(b) permanent injunction.

A. The lower courts are refusing to apply *AMG Capital* to civil contempt, even though its reasoning applies equally in that context.

1. For decades, the Commission had relied on the words "permanent injunction" in Section 13(b) of the Act "to win equitable monetary relief directly in court

with great frequency." *AMG Capital*, 593 U.S. at 74. *AMG Capital* appeared to end this practice, holding that the Commission cannot obtain consumer redress directly under Section 13(b).

AMG Capital explained that Section 13(b)'s "permanent injunction" provision has the "limited purpose" of "stopping seemingly unfair practices from taking place while the Commission determines their lawfulness" through administrative proceedings. *AMG Capital*, 593 U.S. at 75–76; *see* 15 U.S.C. § 53(b). Section 13(b) "focuses upon relief that is prospective, not retrospective." *AMG Capital*, 593 U.S. at 76. Obtaining temporary or permanent injunctions under Section 13(b) contemplates that the Commission will undertake "traditional administrative proceedings." *Id.* at 73. For the Commission to seek equitable monetary remedies to compensate consumers for past violations of the Act, such as the "refund of money or return of property," 15 U.S.C. § 57b(b), or "other and further equitable relief," 15 U.S.C. § 45(l), the Commission must meet (among other conditions) one of two statutory prerequisites: obtaining an administrative cease-and-desist order or suing to enforce one of the Commission's rules. *See* 15 U.S.C. § 45(l); 15 U.S.C. § 57b(a); *AMG Capital*, 593 U.S. at 73, 77–78. Otherwise, *AMG Capital* holds, the Commission may not ask for or obtain equitable monetary remedies in court.[4]

2. The lower courts are consistently rejecting *AMG Capital* as a basis for Rule 60(b)(6) relief from

[4] Additional statutory conditions and limitations on equitable monetary relief, not directly relevant here, are identified in *AMG Capital*, 593 U.S. at 77.

civil-contempt judgments for violations of Section 13(b) permanent injunctions.

In this case, the Eleventh Circuit held that *AMG Capital*'s restoration of statutory limits on the Commission's enforcement authority is not an "exceptional circumstance" because *AMG Capital*'s reasoning doesn't apply to civil contempt. App.15. "The violation of an injunction is a contempt against an entire court insofar as it flouts the court's basic authority to preserve order and administer justice. This authority exists independently of the underlying statute's prescribed remedies." App.12.

To reach this conclusion, the Eleventh Circuit relied in part on the Fourth Circuit's decision in *Federal Trade Commission v. Pukke*, 53 F.4th 80 (4th Cir. 2022), *cert. denied sub nom. Pukke v. F.T.C.*, 22-958, 2023 WL 6377807 (U.S. Oct. 2, 2023).

In *Pukke*, the Fourth Circuit also characterized contempt of a Section 13(b) permanent injunction as purely a matter of courts' inherent equitable power. As stated in *Pukke*, the Commission filed an enforcement action against real-estate promoters for false advertising and unlawful telemarketing, obtaining both equitable monetary remedies and a permanent injunction under Section 13(b). *Pukke*, 53 F.4th at 97–99. The district court later held the promoters in civil contempt for continuing their unlawful telemarketing. *Id*. at 98–99. The district court coercively incarcerated them and, to compensate consumers for past violations of the Act and the Telemarketing Sales Rule, imposed a $120 million civil-contempt sanction consisting of disgorgement and restitution. *Id*. at 99–101; *see* 16 C.F.R. § 310.3. While not raising precisely

the same issue concerning *AMG Capital* presented here, the contemnors still sought relief in part under Rule 60(b) based on *AMG Capital*. The Fourth Circuit affirmed, holding that *AMG Capital* "did not impair courts' ability to enter injunctive relief under Section 13(b)," *Pukke*, 53 F.4th at 106, and that "there is 'no question that courts 'have inherent power to enforce compliance with their lawful orders through civil contempt,'" *id*. at 102–03 (citation omitted).

Similarly emphasizing courts' inherent equitable power to sanction contempt, various lower courts have held that *AMG Capital* does not undermine awarding equitable monetary remedies for civil contempt of Section 13(b) permanent injunctions. *See, e.g.*, *F.T.C. v. Zurixx, LLC*, 22-4042, 2023 WL 2733500, at *6 (10th Cir. Mar. 31, 2023) (holding that *AMG Capital* did not affect award of attorneys' fees as civil-contempt sanction); *F.T.C. v. Noland*, --- F. Supp. 3d ---, CV-20-00047-PHX-DWL, 2023 WL 3372517, at *60 (D. Ariz. May 11, 2023) (directly awarding monetary relief for contempt of a Section 13(b) permanent injunction based on courts' inherent contempt power and holding that, "[p]ut simply, *AMG Capital* does not affect the scope of relief available in the Contempt Action"); *F.T.C. v. Mytel Int'l, Inc.*, 2:87-CV-07259-SPG-SS, 2022 WL 3350391, at *6 (C.D. Cal. Aug. 11, 2022) (holding that "*AMG Capital* does not detract from [the district court's] well-established inherent authority to hold parties in civil contempt for disobeying its orders"); *F.T.C. v. Acquinity Interactive, LLC*, 14-60166-CIV, 2021 WL 3603594, at *7 (S.D. Fla. Aug. 13, 2021) (holding that "contempt remedies are not limited by the bounds of the FTC Act, though Courts turn to statutes such as Section 13(b) prior to *AMG*,

Section 19 of the Act, or other similar statutes, which provide guidance to courts when they seek to craft an appropriate remedy in response to a finding of contempt"); *see also* Louis Altman, et al., 7 CALLMANN ON UNFAIR COMP., TR. & MONO. § 25:33 (4th ed. Dec. 2023).

B. Congress has limited the Commission's power to obtain, and the lower courts' power to award, compensatory equitable remedies for civil contempt of a Section 13(b) permanent injunction.

Simply invoking courts' inherent equitable power, as the lower courts have done, provides no satisfactory answer to a pivotal question: How does the FTC Act, as interpreted by *AMG Capital*, permit the Commission to obtain compensatory equitable remedies as sanctions for civil contempt of a Section 13(b) injunction when neither statutory prerequisite for obtaining such relief has been met?

1. The lower courts wrongly characterize remedying contempt of a Section 13(b) permanent injunction as purely a matter of the lower federal courts' inherent equitable power, unfettered by any limitations imposed by the FTC Act.

Although federal district courts and courts of appeals have inherent equitable power, including the power to sanction the civil contempt of court orders, *Shillitani v. United States*, 384 U.S. 364, 370 (1966), this power is not insulated from statutory limitation. The lower courts' contempt power in Section 13(b) enforcement actions may be limited expressly by the FCT Act or "by a necessary and inescapable inference" from it. *See AMG Capital*, 593 U.S. at 79 (quoting

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291 (1960) and *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

The lower federal courts' contempt power may be limited by statute because that power was originated by Congress in the Judiciary Act of 1789, when these courts themselves were created. *See* An Act to Establish the Judicial Courts of the United States (Judiciary Act of 1789), 1st Congress, ch. 20, § 17, 1 Stat. 73, 83 (Sept. 24, 1789); *see also* An Act Declaratory of the Law Concerning Contempts of Court, 21st Congress, ch. 99, 4 Stat. 487 (Mar. 2, 1831). Although the lower courts' contempt power is broad, "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991); *see* U.S. Const. art. III, § 1; Judiciary Act of 1789, §§ 3–4, 1 Stat. at 73–75. The "manner in which the court's prosecution of contempt is exercised therefore may be regulated by Congress," so long as such regulation neither abrogates this power entirely nor renders it practically inoperative. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798–99 (1987); *accord Bloom v. State of Ill.*, 391 U.S. 194, 196 n.1 (1968).

Congress creates federal agencies, too. *See* U.S. Const. art. I, § 8. The Commission didn't exist until Congress created it in 1914 by enacting the FTC Act. Agencies "are unlike federal courts where, '[u]nless otherwise provided by statute," as here, "all ... inherent equitable powers ... are available …." *See Liu v. Sec. & Exch. Comm'n*, 591 U.S. ---, 140 S. Ct. 1936,

1946–47 (2020) (citation omitted). "Agencies have only those powers given to them by Congress." *West Virginia v. Envt'l Prot. Agency*, 597 U.S. ---, 142 S. Ct. 2587, 2609 (2022). So, a federal agency "'literally has no power to act' unless and until Congress authorizes it to do so by statute." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) (citations omitted).[5]

2. It follows from *AMG Capital*'s interpretation that the FTC Act restricts, "by a necessary and inescapable inference," what equitable monetary remedies the Commission can obtain in court for civil contempt of a Section 13(b) permanent injunction *See AMG Capital*, 593 U.S. at 79.

First, unlike with Federal Rule of Civil Procedure 65, the opportunity to obtain a Section 13(b) permanent injunction is available only to the Commission. Section 13(b) permanent injunctions can command compliance only with the Act or a Commission rule: The Commission "may bring suit in a district court of the United States to enjoin any such act or practice" that would violate "any provision of law enforced by" the Commission. 15 U.S.C. § 53(b). Remedying contempt of Section 13(b) permanent injunctions depends inherently on the Act and must be consistent with the Act's language and structure, including its limits on the Commission's enforcement power. *See AMG Capital*, 593 U.S. at 74–78.

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[5] That's why "it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings" or otherwise. *See Liu*, 140 S. Ct. at 1946–47.

Second, *AMG Capital*'s interpretation of the Act applies equally in the context of civil contempt. The Act does not permit the Commission to obtain equitable monetary remedies *in court* under any circumstance without first meeting one of the Act's prerequisites (obtaining an administrative cease-and-desist order or suing to enforce an FTC rule). *AMG Capital*, 593 U.S. at 74–78. This statutory limitation is not restricted to the award of damages ancillary to the entry of a Section 13(b) permanent injunction.

Outside the contempt context, lower courts have acknowledged that *AMG Capital*'s interpretation precludes the Commission from obtaining any compensatory equitable remedy *in court* without first completing a related administrative proceeding. "[W]hen the FTC *goes to federal court* under Section 13(b), it is limited to pursuing injunctive relief; to obtain other forms of relief, such as monetary damages, the FTC *must resort to administrative proceedings* under Section 5(b)." *Illumina, Inc. v. F.T.C.*, --- F.4th ---, No. 23-60167, 2023 WL 8664628, at *3 (5th Cir. Dec. 15, 2023) (emphasis added); *accord, e.g., F.T.C. v. On Point Capital Partners LLC*, 17 F.4th 1066, 1082 (11th Cir. 2021) ("[W]hen the FTC *brings an enforcement action* under § 53(b), it is not authorized to recover equitable monetary relief." (citing *AMG Capital*, 593 U.S. at 70) (emphasis added)).

Third, the lower courts lack the authority to use their inherent equitable power to award remedies to the Commission that Congress has not authorized the Commission to receive in the first place. As explained above, the Commission cannot pursue compensatory

equitable remedies in court without first satisfying one of the Act's prerequisites for doing so. *See* 15 U.S.C. § 45(l); 15 U.S.C. § 57b(a); *AMG Capital*, 593 U.S. at 77–78. Insofar as Congress has not given the Commission the power to pursue compensatory equitable remedies in court, a court lacks the power to award those remedies to the Commission.

A necessary and inescapable inference from the Act, as interpreted by *AMG Capital*, is that a court cannot award the Commission compensatory equitable remedies even to remedy civil contempt unless the Commission has met one of the statutory prerequisites. *AMG Capital*, 593 U.S. at 79. By relying on courts' inherent equitable power for an exception, the Commission and the lower courts depart from the Act's "coherent enforcement scheme." *Id*. at 78.

3. In *AMG Capital*, the Court rejected as inconsistent with the Act the Commission's reliance on Section 13(b) to skip administrative proceedings. "It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations." *AMG Capital*, 593 U.S. at 77. "Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its traditional § 5 administrative proceedings." *AMG Capital*, 593 U.S. at 78.

Despite *AMG Capital*, the lower courts continue to permit the Commission to obtain compensatory equitable remedies under Section 13(b) in court

without meeting either of the Act's prerequisites. The Commission is "thereby effectively bypassing the process set forth in § 5 and § 19" of the Act. *AMG Capital*, 593 U.S. at 75. A small statutory tail continues to wag a very large dog, and elephants remain hidden in statutory mouseholes. *Id.* at 76–78.

C. Applying *AMG Capital* to remedying contempt of Section 13(b) permanent injunctions would not abrogate the lower courts' contempt power.

The lower courts have objected that applying *AMG Capital* in the contempt context "would mean that the Supreme Court affirmed the FTC's statutory authority to seek a permanent injunction under § 13(b) while simultaneously removing the teeth from any such injunctions," thereby leaving district courts "[w]ithout the ability to enforce lawfully acquired injunctions." *Mytel*, 2022 WL 3350391, at *6; *cf. Pukke*, 53 F.4th at 103 (stating that applying *AMG Capital* to contempt would leave a court "without the ability to enforce its own orders," with the result that "the judicial system becomes all bark and no bite"). In other words, the lower courts complain that applying *AMG Capital*'s reasoning to contempt would supposedly nullify the courts' power to remedy contempt. *Cf. Young*, 481 U.S. at 798–99.

These reports of contempt's death are greatly exaggerated. The lower courts overlook the fact that district courts can sanction contempt of a Section 13(b) injunction in ways other than by awarding compensatory monetary relief to remedy past violations of the FTC Act. A court can still wield its "inherent power to vindicate its own authority,"

App.12, without awarding the Commission the same substantive equitable remedies available only under Section 5(l) and Section 19(b) of the Act. 15 U.S.C. § 45(l); 15 U.S.C. § 57b(b). Courts can remedy contempt, and vindicate their own authority, consistently with the Act by imposing criminal and civil contempt remedies that focus on stopping violations of the Act, such as coercive incarceration and reasonable fines.

The Act itself, for example, already contemplates that disobeying a district court order directing compliance with an administrative subpoena or other "lawful requirement of the Commission" can be punished via imprisonment and fines of $1,000 to $5,000. *See* 15 U.S.C. § 50; *cf.* 15 U.S.C. § 49 (providing that failure to obey court order to respond to administrative subpoena "may be *punished* by such court as a contempt") (emphasis added); 15 U.S.C. § 57b-1(h) (providing that disobedience of court orders effectuating civil investigative demands "shall be *punished* as a contempt") (emphasis added). Punitive fines and imprisonment have teeth. The Act also already contemplates that reasonable civil fines can remedy violations of orders entered under the Act. *See* 15 U.S.C. § 45(l)–(m) (capping civil fines at $10,000 per violation of cease-and-desist order or knowing rule violation).

Limiting sanctions for civil contempt of Section 13(b) injunctions to such remedies as criminal and civil fines and incarceration or other punitive and coercive remedies would, unlike imposing disgorgement of revenue for consumer redress, dovetail with the "permanent injunction" provision's "limited purpose" of "stopping seemingly unfair

practices from taking place while the Commission determines their lawfulness." *See AMG Capital*, 593 U.S. at 75–78; *see also id*. at 77 ("Congress in § 5(l) and § 19 gave district courts the authority to impose limited monetary penalties ….") (emphasis altered); *cf.* 15 U.S.C. § 53(b); 15 U.S.C. § 57b(b).

D. This case provides an excellent vehicle for deciding whether *AMG Capital* applies to contempt, a question which the Court should not wait to resolve.

AMG Capital's reasoning lends itself to litigants raising it the contempt context. The critical next step from *AMG Capital* is to decide whether the Commission can continue to obtain compensatory equitable remedies in court via sanctions for civil contempt of Section 13(b) permanent injunctions.

This question is squarely presented by this case. The Commission filed an enforcement action in district court under Section 13(b), obtained a Section 13(b) permanent injunction, never filed a related administrative proceeding, and received as contempt sanctions the very same kind of compensatory equitable remedies—disgorgement and restitution—addressed by *AMG Capital*.[6]

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[6] Were the Commission to respond to this petition, it might contend, as it did below, that the Court should not consider this case because Hi-Tech, Wheat, and Smith are supposedly bad persons with unclean hands, undeserving of equitable relief. But such rhetoric is irrelevant to deciding the larger issues presented for review. A federal agency may not justify its unwarranted exercise of power simply by pointing to a regulated party's misconduct. *See Liu*, 140 S. Ct. at 1947 n.4.

Although, at the time of this filing, *AMG Capital* has been the law for less than three years, the Court should not delay addressing its effect on Section 13(b) contempt proceedings. The lower courts are already mounting a position at odds with *AMG Capital* and the FTC Act. *See* U.S. Sup. Ct. R. 10(c). Countless Section 13(b) injunctions broadly prohibiting violation of the Act remain on record, ready to be enforced at any moment. The Commission continues to seek and obtain more of them. And litigants will continue seeking Rule 60(b)(6) relief from contempt sanctions consisting of disgorgement and restitution for violating Section 13(b) injunctions.

Moreover, the Commission continues to obtain, as here, consumer redress composed of the joint-and-several disgorgement of net receipts (not merely profits) from sales violative of the FTC Act. This renders a civil remedy improperly punitive. *See* App.176–81, 202–04, 287–88; *Liu*, 140 S. Ct. at 1941, 1946–50; *Kokesh v. Sec. & Exch. Comm'n*, 581 U.S. 455, 465 (2017); *cf. Shillitani*, 384 U.S. at 370.

As one district court has already acknowledged, "at some point in the near future, it may be necessary to decide whether the FTC's request for monetary sanctions in [a contempt action] is foreclosed by *AMG Capital*." *F.T.C. v. Netforce Seminars*, CV 00-02260-PHX-DWL, 2022 WL 1569076, at *3 (D. Ariz. May 18, 2022). It is necessary now. Courts and the public urgently need to know whether the Commission may continue its former consumer-redress program by means of civil contempt.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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