NO. 23-704

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

REPLY BRIEF FOR PETITIONERS

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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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

REPLY BRIEF

In *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67 (2021), this Court struck down the Federal Trade Commission's program of using the FTC Act's "permanent injunction" provision to obtain equitable monetary remedies for violations of the Act. 15 U.S.C. § 53(b). The Commission continues, however, to obtain equitable monetary remedies under Section 13(b). It seeks them, and courts award them, as sanctions for civil contempt of Section 13(b) permanent injunctions.

The Commission says the Court need not decide whether this fits into the Act's "coherent enforcement scheme." *AMG Capital*, 593 U.S. at 78. According to the Commission, Congress cannot limit the lower courts' inherent power to award equitable monetary remedies just by limiting the Commission's power to seek or obtain them. But this view departs from *AMG Capital*'s reading of the Act's language and structure. The Court should grant review and hold that the Act does not empower the Commission to seek or obtain, or courts to award, compensatory equitable remedies for civil contempt of a Section 13(b) permanent injunction.

This issue arose with Petitioners' motion for relief from a $40 million civil contempt judgment under Federal Rule of Civil Procedure 60(b)(6). The courts below denied relief. They held that *AMG Capital* has no bearing on courts' power to remedy contempt under Section 13(b). They thus concluded that, for Rule 60(b)(6) purposes, *AMG Capital* is no exceptional circumstance. The Court should grant review of this issue also and reverse. As to courts' power to remedy contempt of a Section 13(b) permanent injunction,

AMG Capital has "worked a radical change in the law." *Cf. F.T.C. v. Credit Bureau Ctr., LLC,* 81 F.4th 710, 716–17 (7th Cir. 2023). This change is an exceptional circumstance.

The question whether *AMG Capital* is an exceptional circumstance is entwined with the question whether a change in the law can independently support relief under Rule 60(b)(6). For Petitioners to obtain relief, each question must be answered affirmatively. The Commission says the latter question, about which the circuits disagree, is unsuitable for review here because the Eleventh Circuit expressly held only that *AMG Capital* is not an exceptional circumstance. It did not expressly say that *AMG Capital*, as a mere change in the law, cannot independently support relief. App.15. The Court should nonetheless review this question because the two questions arise together from Rule 60(b)(6) and are necessary to each other.

In any event, by exercising its discretion to resolve the circuit split over whether a change in the law alone can ever support Rule 60(b)(6) relief, the Court would not undermine the policies behind its pressed-and-decided rule. The issue was briefed below. The record is complete. When the Eleventh Circuit denied Petitioners relief under Rule 60(b)(6), *AMG Capital* was the only circumstance it addressed. And binding Eleventh Circuit precedent holds that "mere" changes in the law cannot independently support relief under Rule 60(b)(6).

Alternatively, were the Court to grant review and hold that *AMG Capital* is an exceptional circumstance because it affects courts' power to remedy contempt of Section 13(b) injunctions, the Court should remand to

the Eleventh Circuit the question whether *AMG Capital* alone can support relief from the judgment.

I. The Court should decide whether *AMG Capital* affects courts' power to award equitable monetary remedies for civil contempt of a Section 13(b) permanent injunction.

This case straightforwardly presents the question whether *AMG Capital* affects courts' power to remedy civil contempt of a Section 13(b) permanent injunction. The answer to this question will determine whether *AMG Capital* can be an exceptional circumstance under Rule 60(b)(6). The Court should reject the Commission's argument that the FTC Act cannot limit courts' inherent equitable power, for much the same reasons the Court rejected a similar argument in *AMG Capital*. Resp.8–12.

1. In *AMG Capital*, this Court unanimously held that, based on the "language and structure of § 13(b), taken as a whole," Section 13(b)'s "permanent injunction" provision "focuses upon relief that is prospective not retrospective." 593 U.S. at 75–76. If the Commission wishes to obtain an equitable monetary remedy, such as disgorgement, for a past violation of the Act, it must meet one of two statutory prerequisites. It must either: (1) sue under Section 19(a)(1) to enforce one of the Commission's rules; or (2) sue under Section 19(a)(2) to enforce a final cease-and-desist order obtained through a Section 5 administrative proceeding. 15 U.S.C. § 57b; *AMG Capital*, 593 U.S. at 74–78; Pet.25.

The Commission makes no attempt to reconcile its position here with *AMG Capital*'s structural reading of the Act. It tries to wave *AMG Capital* off by contending it doesn't speak in "categorical terms" and had no occasion to address contempt. Resp.12. But, like the lower courts that have addressed the issue, the Commission invokes courts' inherent equitable power without grappling with *AMG Capital*'s reasoning, which appears to apply equally to remedying contempt of a Section 13(b) permanent injunction.

2. The Commission's invocation of the lower courts' inherent equitable power echoes the similar argument the Commission had advanced in *AMG Capital*. Resp.7–10. The Commission "point[ed] to traditional equitable practice and to two previous cases where [the Court] interpreted provisions authorizing injunctive relief to authorize equitable monetary relief as well." *AMG Capital*, 593 U.S. at 78 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960)).

But *AMG Capital* explains that Congress "does not automatically authorize" a court to provide equitable monetary relief just by expressly providing for injunctions. 593 U.S. at 79. The relevant principle there, which the Commission brushes aside as irrelevant here, is that "the text and structure of the statutory scheme at issue *can*, 'in so many words, or by a necessary and inescapable inference, restric[t] the court's jurisdiction in equity.'" *Id.* (quoting *Porter*, 328 U.S. at 398 (emphasis added)). Applying this principle, *AMG Capital* held that Congress *does* intend the FTC Act to restrict courts' power to award equitable monetary relief under Section 13(b).

Insofar as the Commission contends that *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), is controlling, it takes another stab at essentially the same inherent-authority argument this Court rejected in *AMG Capital*. Resp.8, 12. Citing *McComb*, the Commission suggests that the lower courts can *always* award whatever compensation is needed for "full remedial relief" of contempt, regardless of what an applicable federal statute might say. Resp.8 (quoting *McComb*, 336 U.S. at 193). This proposition is inconsistent with *Mitchell*, *Porter*, and *AMG Capital*, which explain how Congress can limit the broad equitable power of the courts it has created. Pet.28–30. It's even inconsistent with *McComb*.

Although the Commission acknowledges that *McComb* addressed the Fair Labor Standards Act of 1938, the Commission ignores the statutory text that *McComb* was applying (which *McComb* itself never quotes). Resp.8–9. In *McComb*, an employer violated an injunction that commanded compliance with Sections 6 and 7 of the FLSA, which respectively set a minimum wage and a rate for overtime wages. *McComb*, 336 U.S. at 189; *see* Pub. L. 75-718, 52 Stat. 1060, 1062–63, §§ 6–7 (June 25, 1938), *codified at* 29 U.S.C. §§ 206 & 207. *McComb* held that the district court could award employees the previously unpaid difference between their actual pay and the higher statutory rate as damages for civil contempt. *McComb*, 336 U.S. at 193–95.

Unlike here, however, the statutory scheme in *McComb* strongly supported awarding a compensatory equitable remedy for contempt. The FLSA expressly said courts "shall have jurisdiction … to restrain violations of section 15." Pub. L. 75-718, 52 Stat.

at 1069, § 17, *codified at* 29 U.S.C. § 217. Section 15 forbade employers from *not* paying minimum and overtime wages. *Id.* at 1068, § 15(a)(2), *codified at* 29 U.S.C. § 215(a)(2). "Restraining" a violation of a requirement to pay wages per "a formula by which the amounts can be simply computed" could only mean requiring those wages to be paid. *McComb*, 336 U.S. at 194. Permitting payment of past unpaid wages as a contempt remedy to ensure "full remedial relief," *id.* at 193, was entirely consistent with the FLSA's language and structure.

Moreover, for support *McComb* cites *Porter*, which affirmed using the "broad equitable jurisdiction that inheres in courts where the proposed exercise of that jurisdiction is *consistent with the statutory language and policy* …." *Porter*, 328 U.S. at 403 (emphasis added); *McComb*, 336 U.S. at 193. Rather than pitting courts' inherent equitable power against Congress, *McComb* embodies the interpretive principle that Congress "acts cognizant of the historic power of equity to provide complete relief *in light of the statutory purposes*." *See Mitchell*, 361 U.S. at 292 (emphasis added).

McComb thus does not support the Commission's position that lower courts have the "inherent" power to award all contempt remedies they deem appropriate, regardless of the applicable text, structure, and purpose of governing statutes. Instead, *McComb* ensured that the contempt power was neither "'abrogated nor rendered practically inoperative'" through statutory interpretation. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799 (1987) (quoting

Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., 266 U.S. 42, 66 (1924)).[1]

3. Taking an adjacent angle, the Commission contends that, even if Congress puts limits on the *Commission's* power to obtain certain remedies, that cannot affect the lower *courts'* power to award whatever remedies they choose. Resp.10. This position, which the Commission bases ultimately on *McComb*, is wrong for the reasons stated above.

It is also irreconcilable with *AMG Capital*. In *AMG Capital*, this Court reasons that, when the Commission (which Congress created) cannot "seek" or "obtain" a remedy under Section 13(b) not afforded to it by the FTC Act, then the lower federal courts (which Congress also created) lack the power to "award" that remedy to the Commission. *AMG Capital*, 593 U.S. at 70, 75, 82. The inquiry whether—or to what extent—a congressional limitation on an agency's power to obtain a remedy also limits the lower courts' power to award the agency that same remedy depends on "the text and structure of the statutory scheme at issue." *See id.* at 79.

Unlike in *McComb*, this case "*is* … a situation where a statute has created a right and has provided a special and exclusive remedy, thereby negativing any jurisdiction that might otherwise be asserted." *See Porter*, 328 U.S. at 403 (emphasis added). This action was filed solely under the FTC Act's authority. Only the Commission could file it. Pet.4–5. The injunction

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[1] Nor does *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), support the Commission's inherent-authority position. Resp.13. *Goodyear* addressed litigation-related misconduct, not contempt, without reference to a governing statutory scheme.

was sought, entered, and enforced based on the authority of Section 13(b) alone. The Commission has no "inherent" power of its own. Pet.30. Insofar as the FTC Act has not given the Commission the power to seek or obtain an equitable remedy, it follows that Congress has also limited the lower courts' power to award that same remedy to the Commission. The Commission offers no compelling reason why this principle does not apply to remedying contempt under Section 13(b).

4. The Commission suggests that the lower courts' consensus that *AMG Capital* "ha[s] no bearing on … contempt sanctions," App. 15, means there's no need for this Court's review. Resp.14–15. But certiorari is appropriate when lower federal courts have, as here, "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). The consensus conflicts with *AMG Capital*, which itself overturned a position followed for decades by all but one circuit.

5. The Commission worries that applying *AMG Capital*'s reasoning to contempt would deprive courts of any practical ability to enforce their orders in FTC Act cases. Resp.13–14. It obviously makes no sense to interpret a statute authorizing injunctions in a way that would leave courts unable to enforce them. "[W]hile the exercise of the contempt power is subject to reasonable regulation [by Congress], 'the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.'" *Young*, 481 U.S. at 799 (quoting *Michaelson*, 266 U.S. at 66). Courts should thus fashion contempt remedies that will "give effect to the policy of the legislature" in the FTC Act. *Cf. Mitchell*, 361 U.S. at 292 (emphasis added).

For this reason, Petitioners have explored contempt remedies already contained in the Act. Pet.33–35. The Commission criticizes this approach as providing "no plausible basis" for shaping courts' contempt power. Resp.14. But to determine how Congress intends courts to remedy civil contempt of Section 13(b) injunctions, it seems appropriate to look to the Act's "coherent enforcement scheme," just as this Court did in *AMG Capital*. 593 U.S. at 78. Any answer must be consistent with *AMG Capital* and the Act.

The need for an answer arises necessarily from *AMG Capital*. This Court held that the Commission may not seek or obtain, and courts may not award, equitable monetary remedies under Section 13(b) unless the Commission has first met one of the Act's prerequisites. This holding immediately called into question the propriety of the Commission seeking and obtaining, and courts awarding, the same equitable monetary remedies for contempt of a Section 13(b) permanent injunction when—as here—neither of the Act's prerequisites has been met. Nothing in *AMG Capital* suggests that Congress intends for the Act to function any differently in the context of contempt.

* * *

The Court should grant the Petition to decide whether the Commission may seek and obtain equitable monetary remedies for violations of the Act via contempt when it has not met either of the Act's prerequisites. The Court should hold that *AMG Capital*'s reasoning precludes the Commission from seeking and obtaining, and courts from awarding, equitable monetary remedies this way. And for this and other

reasons, the Court should conclude that *AMG Capital* is an exceptional circumstance under Rule 60(b)(6).

II. The Court should decide whether *AMG Capital* is an exceptional circumstance that can independently support relief from a contempt judgment under Rule 60(b)(6).

The Eleventh Circuit held that *AMG Capital* is not an exceptional circumstance under Rule 60(b)(6) on the ground that it has no bearing on contempt. App.15. The Eleventh Circuit did not expressly state that *AMG Capital* could never independently support relief under Rule 60(b)(6). The Commission says this case is thus unsuitable for reviewing the Rule 60(b)(6) split of authority. Resp.7, 15–16. Were the Court to agree, it should still grant review to decide whether *AMG Capital* affects contempt and so can be an exceptional circumstance under Rule 60(b)(6). Yet the Court should also consider whether *AMG Capital* wrought such a clear and decisive change in the law that it can independently support relief from a contempt judgment.

1. As a Court of review rather than "first view," this Court typically declines to consider issues that "were not addressed by the Court of Appeals." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). But this appeal doesn't hinge on a threshold question, such as standing, whose erroneous decision precluded the Court of Appeals from reaching a separate merits question for which review is also sought. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 226 (2011). Whether *AMG Capital* is an exceptional circumstance and whether it can independently support relief under Rule 60(b)(6) are interrelated questions, each "encompassing the other."

See Yee v. City of Escondido, Cal., 503 U.S. 519, 537 (1992). The questions should be decided together.

2. Regardless, "[a]ny issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002). The Court would not contravene the policies underlying its traditional pressed-and-decided rule, *United States v. Williams*, 504 U.S. 36, 41 (1992), by exercising its discretion to grant certiorari to address the Rule 60(b)(6) split.

There's no debate that Petitioners filed their Rule 60(b)(6) motion within a reasonable time, were diligent, and do not assert their claim as a substitute for an untaken direct appeal. Pet.14, 21. The parties "*have* … had the opportunity to brief and argue [the issue's] significance." *Cf. Hernandez v. Mesa*, 582 U.S. 548, 553 (2017) (emphasis added); N. Dist. Ga. No. 1:04-cv-03294, Doc. 1101-1 at 13–15; 11th Cir. No. 21-14161, Doc. 26 (Mar. 4, 2022) at 48–51. The record on the issue is complete, thus meeting the "need for a properly developed record on appeal." *Cf. Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *AMG Capital* was the *only* circumstance the Court of Appeals addressed under Rule 60(b)(6). App.15. And the Eleventh Circuit has already announced its position: "[A] change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014). "[S]omething more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," such as a factual connection to the newly decided case. *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987).

Given these circumstances, this is an "appropriate case" for the Court to exercise its discretion to decide whether a change in the law alone can ever support Rule 60(b)(6) relief—an unsettled question long overdue for resolution. *See Crutsinger v. Davis*, 140 S. Ct. 2, 3 (2019) (Sotomayor, J.).

3. Alternatively, were the Court to grant review and decide that *AMG Capital* is an exceptional circumstance because its rationale affects contempt, then the Court should remand this case to the Eleventh Circuit for it to decide whether *AMG Capital* can, without something "more," support relief from the contempt judgment under Rule 60(b)(6). *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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