No.

In The
Supreme Court of the United States

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

v.

FEDERAL TRADE COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALLISON D. DANIEL
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
202.888.6881
adaniel@pacificlegal.org

OLIVER J. DUNFORD
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
916.503.9060
odunford@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

In 2019 the Federal Trade Commission filed a complaint under seal and obtained an *ex parte* temporary restraining order against Petitioners—a (now-shuttered) small IT company and its owner. Pursuant to the TRO, the company's operations were immediately halted, and Petitioners' business and personal assets were frozen in anticipation of a disgorgement award under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). Petitioners intended to vigorously defend their innocence, but their motion for release of some funds to pay counsel was denied. Thus cornered, Petitioners acceded to a judgment that included "equitable monetary relief" in the amount of $13,537,288.75.

Just over a year later, this Court unanimously held that §13(b) authorizes only "purely injunctive, not monetary, relief." *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 75 (2021).

Because §13(b) never allowed "the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement," *AMG*, 593 S. Ct. at 70, Petitioners moved to vacate the district court's order under Federal Rule of Civil Procedure 60(b)(6). The district court denied relief, and the Tenth Circuit affirmed because "a change in case law doesn't justify vacatur under Rule 60(b)(6)" and Petitioners "weren't involved in the events giving rise to *AMG*."

The question presented, on which the courts of appeals are openly and squarely divided, is:

Whether Rule-60(b)(6) relief based on a post-judgment change in decisional law is categorically unavailable.

PARTIES TO THE PROCEEDING

Petitioners Elite IT Partners, Inc., and James Martinos were the Defendants-Appellants in the proceedings below.

Respondent Federal Trade Commission was the Plaintiff-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Elite IT Partners, Inc., has no parent corporations, and no publicly held company owns 10% or more of the stock of the business.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Fed. Trade Comm'n v. Elite IT Partners, Inc., No. 2:19-CV-00125-RJS, 2023 WL 197300 (D. Utah Jan. 17, 2023);

Fed. Trade Comm'n v. Elite IT Partners, Inc., 653 F. Supp. 3d 1089 (D. Utah Jan. 23, 2023);

Fed. Trade Comm'n v. Elite It Partners, Inc., 91 F.4th 1042 (10th Cir. 2024), *petition for rehearing en banc denied* (March 21, 2024).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Elite IT Partners, Inc., and James Martinos respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The district court's Memorandum Decision and Order Denying Defendants' Motion to Vacate the court-approved settlement agreement can be found at *FTC v. Elite IT Partners, Inc.*, No. 2:19-CV-00125-RJS, 2023 WL 197300 (D. Utah Jan. 17, 2023). The Amended Memorandum Decision and Order Denying Defendants' Motion to Vacate can be found at *FTC v. Elite IT Partners, Inc.*, 653 F. Supp. 3d 1089 (D. Utah 2023) and is included at App. 37a–54a. The Tenth Circuit's opinion affirming the judgment is published at *FTC v. Elite IT Partners, Inc.*, 91 F.4th 1042 (10th Cir. 2024). The Tenth Circuit's published opinion and its unpublished order denying *en banc* review are included at App. 1a–18a and App. 55a–56a, respectively.

JURISDICTION

The district court entered judgment against Petitioners on January 23, 2023. After a timely appeal, the Tenth Circuit issued a decision affirming the judgment on January 23, 2024. The Tenth Circuit denied a timely petition for *en banc* rehearing on March 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Federal Rule of Civil Procedure 60(b)(6), which is reproduced at App. 57a, 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."

STATEMENT OF THE CASE

A. Background

In 2019, the FTC filed a complaint under seal alleging that Petitioner Elite IT had engaged in unfair or deceptive acts or practices in violation of the Federal Trade Commission Act and the Restoring Online Shoppers' Confidence Act. The FTC claimed that Elite IT misled consumers by falsely identifying dangers posed by, for example, "cookies" (text files placed on a user's computer by visited websites). But the district court gave Petitioners no opportunity to contest FTC's allegations, which Petitioners contend vastly underestimated if not ignored serious online threats.[1] Instead, the district court proceeded *ex parte*, accepted the Commission's allegations, and issued a temporary restraining order against Elite IT and its owner, Petitioner James Martinos. *See Ex Parte* TRO, *FTC v. Elite IT Partners, Inc.*, No. 2:19-CV-00125-RJS, (Feb. 27, 2019), Dkt. No. 15.[2]

Pursuant to the *ex parte* TRO, a court-appointed receiver arrived at Elite IT's office unannounced, immediately assumed control, placed a majority of its

---

[1] *See, e.g.*, Mirza Silajdzic, *54 Billion Internet Cookies Leaked on the Dark Web: Report*, VPNOverview (April 4, 2024), https://vpnoverview.com/news/54-billion-internet-cookies-leaked-on-the-dark-web-report/ (last visited Apr. 29, 2024) (alert noting threats posed by active and inactive cookies).

[2] All citations to "Dkt. No." refer to docket entries in the district court case below.

employees on leave without pay, and halted the company's business. The TRO also froze Petitioners' business and private assets—an action demanded by the FTC, in part, to satisfy an eventual disgorgement award under §13(b). *See* Mtn. for *Ex Parte* TRO at 21 (Feb. 25, 2019), Dkt. No. 9.

Once made aware of the FTC's complaint, Petitioners vehemently denied the allegations and began mounting a defense. But circumstances conspired against them. The receiver's shuttering of Elite IT's business meant no income, and the asset freeze prevented Petitioners from accessing business or private funds. Worse yet, the district court denied Petitioners' request to release a portion of the frozen assets to pay their attorneys. Order (Apr. 15, 2019), Dkt. No. 70. Finally, according to then-existing Tenth Circuit precedent, relief under §13(b) could have required Elite IT to disgorge its total gross receipts for the life of the company, even without proof of actual harm to any customer. *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005).

Petitioners thus had no real option but to settle. In December 2019, the district court entered a Stipulated Order for Permanent Injunction and Monetary Judgment (Stipulated Order), in which Elite IT and Martinos admitted no wrongdoing. App. 19a–36a. Among other things, the Stipulated Order entered judgment in favor of the Commission against Petitioners in the amount of $13,537,288.75, as "equitable monetary relief" under §13(b). App. 25a; *see also id.* 2a.

Immediately after the Order was entered, the receiver wound up Elite IT's business, liquidated its assets, and paid more than $1,000,000 toward the judgment. Martinos himself liquidated his retirement accounts and, with all his savings, paid more than

$235,000 toward the judgment. Because no assets remain from the business, the judgment has never been fully satisfied, and Elite IT and Martinos remain subject to its terms.

B. This Court unanimously holds that the basis for the Stipulated Order's "equitable monetary relief" is unlawful.

Just over a year after the district court entered final judgment, this Court unanimously held that §13(b) authorizes only "purely injunctive, not monetary, relief." *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 75 (2021). As a result, §13(b) does not allow—and never did allow—"the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *Id*. at 70.

C. The lower courts denied relief under Rule 60(b)(6).

Less than a year after *AMG* was issued, Martinos and Elite IT filed a motion to vacate the judgment under, in part, Federal Rule of Civil Procedure 60(b)(6). Motion to Vacate Judgment (Mar. 17, 2022), Dkt. No. 169. They explained that *AMG* abolished the legal basis not just for the Stipulated Order's "equitable monetary relief," but also for FTC's actions leading up to that order—*i.e.*, obtaining an *ex parte* order to freeze assets to satisfy eventual §13(b) relief, arguing against a release of a portion of those funds for Petitioners' defense costs, and bullying Petitioners into a settlement with threats of an "equitable monetary award" equal to the company's lifetime gross receipts.

Indeed, with this Court's unanimous holding in *AMG*, the FTC was *never* entitled to seek, and the district court was *never* authorized to award, equitable monetary relief under §13(b). *See Rivers v. Roadway*

Exp., Inc., 511 U.S. 298, 312–13 (1994) ("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.") (footnote omitted).

The district court, however, relied on Tenth Circuit caselaw and denied Petitioners' motion to vacate. App. 37a–54a. The court of appeals affirmed. App. 1a–18a.

In the Tenth Circuit, a "change in the law or in the judicial view of an established rule of law is not . . . an extraordinary circumstance which justifies [Rule 60(b)(6)] relief." *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958). And, the Tenth Circuit held, *Collins* still controls. App. 12a. The court explained, however, that a judgment may be reopened when two decisions arising out of the same transaction or occurrence reach different conclusions. In *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (*en banc*), an independent contractor of Cook & Co. caused a traffic accident. Separate lawsuits were filed against Cook, and one was removed to federal court. The federal court held that, under an Oklahoma Supreme Court decision (*Marion Machine*), Cook was not liable for the actions of its independent contractor; the Tenth Circuit affirmed. *Id.* at 721–22. The other case against Cook eventually reached the Oklahoma Supreme Court, which overruled *Marion Machine*. *Id.* at 722. The Tenth Circuit then granted the federal plaintiffs-appellants relief from judgment "to ensure consistency in the treatment of cases 'arising out of the same transaction or occurrence.'" App. 13a (quoting *Pierce*, 518 F.2d at 732).

Here, the Tenth Circuit thus rejected Petitioners' argument that the change in law announced by this Court's decision in *AMG* provided adequate grounds

for relief from judgment—because, the Tenth Circuit explained, Petitioners "weren't involved in the events giving rise to *AMG*." App. 14a.

The Tenth Court also, *sua sponte*, pointed to the district court's Stipulated Order, which said that Petitioners "waive all rights to appeal or otherwise challenge or contest the validity of this Order." App. 2a–3a. Rather than considering whether it was equitable under Rule 60(b)(6) to uphold this term, the Tenth Circuit simply concluded that it "cover[ed]" Petitioners' arguments. App. 5a (heading).

Elite IT and Mr. Martinos timely petitioned for an *en banc* rehearing, which the Tenth Circuit denied. App. 55a–56a. They now petition this Court to issue a writ of certiorari.

REASONS TO GRANT THE PETITION

The Tenth Circuit's decision deepens a circuit split on an important and recurring question: whether Rule-60(b)(6) relief based on a post-judgment change in decisional law is categorically unavailable. The resolution of that question is critical to litigants facing extraordinary circumstances arising out of a post-judgment change in decisional law and is significant to the ultimate meaning of Rule 60(b)(6)—whether it remains a fundamentally equitable tool for courts to accomplish justice. With its decision, the Tenth Circuit joins at least five other circuits in unduly restricting Rule-60(b)(6) relief and, like all circuit splits, thus conditions remedies on the happenstance of geography.

The Tenth Circuit's analysis of Rule 60(b)(6) is incorrect and conflicts with this Court's jurisprudence. By categorically denying Rule-60(b)(6) relief for a post-judgment change in the law unless a common

transaction or occurrence exists, the Tenth Circuit failed to consider the equities of *this case*—a consideration mandated by this Court since at least *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

This case presents an ideal vehicle for settling this important issue, as it raises pure questions of law free of factual disputes. The Court should use this case to clarify Rule-60(b)(6) jurisprudence.

To resolve a split among the circuits and to settle an important question of courts' equitable power, this Court should grant the petition and reverse the Tenth Circuit's decision.

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE IMPORTANT AND RECURRING QUESTION WHETHER RULE-60(B)(6) RELIEF BASED ON A POST-JUDGMENT CHANGE IN DECISIONAL LAW IS CATEGORICALLY UNAVAILABLE.

Rule 60(b) allows courts to "relieve a party . . . from a final judgment" for certain specific reasons, *id.* (b)(1)–(5), and for "any other reason that justifies relief," *id.* (b)(6). According to this Court, Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988). A Rule-60(b)(6) movant must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann*, 340 U.S. at 199). But courts "may consider a wide range of factors," including "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 v. Davis*, 580 U.S. 100, 123 (2017) (quoting *Liljeberg*, 486 U.S. at 864); *see id.* (concluding that the district court

abused its discretion in denying Buck's 60(b)(6) motion "[i]n the circumstances of this case"). Ultimately, Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg*, 486 U.S. at 863–64 (quoting *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949)).

Critically, this Court has recognized a change in controlling law may provide extraordinary circumstances to justify the reopening of a judgment under Rule 60(b)(6). *See Buck*, 580 U.S. at 126, 128, 137; *Gonzalez*, 545 U.S. at 531 ("[A] motion might contend that a subsequent change in substantive law is a 'reason justifying relief,' . . . from the previous denial of a claim."); *see also id.* at 536 n.9 ("A change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context."); *cf. Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).") (emphasis added).

Nonetheless, the circuits are irrevocably divided on the question whether a post-judgment change in law may justify relief under Rule 60(b)(6). *See, e.g.*, *Crutsinger v. Davis*, 140 S. Ct. 2, 2–3 (2019) (Sotomayor, J.) (statement respecting denial of certiorari) (observing circuit split).

A. The Tenth Circuit and several other circuits hold that a change in decisional law may not serve as grounds for relief under Rule 60(b)(6).

In the Fourth Circuit, a "change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016). Accordingly, the Fourth Circuit held that this Court's "novel position" in *AMG* was "not sufficiently extraordinary to justify vacatur under the Rule 60(b) catch-all" because the opposite approach—*i.e.*, that post-judgment decisional changes may suffice for Rule 60(b)(6) relief—"would effectively eviscerate finality interests and open the floodgates to newly meritorious 60(b)(6) motions each time the law changes." *FTC v. Ross*, 74 F.4th 186, 194 (4th Cir. 2023) (citation omitted), *cert. denied*, 144 S. Ct. 693 (2024). *But see Gonzalez*, 545 U.S. at 529 (explaining that the "policy consideration" of finality, "standing alone, is unpersuasive in the interpretation of a provision [Rule 60(b)(6)] whose whole purpose is to make an exception to finality").

The Fifth Circuit likewise holds 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)." *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (citation omitted). In *Adams*, the district court held, based on this Court's decision in *Coleman v. Thompson,* 501 U.S. 722, 750 (1991), that a death-row inmate's ineffective assistance of counsel claims in a federal habeas petition had been procedurally defaulted because counsel failed to pursue them in the initial post-conviction proceeding in state court. *Adams*, 679 F.3d at 315–16. The district court's order

was affirmed. *Id.* at 316. But this Court later held that a habeas petitioner may avoid default when post-conviction counsel fails to raise claims of ineffective assistance of *trial*-counsel. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). Adams therefore filed a motion to vacate the denial of his federal habeas petition, arguing that *Martinez* constituted "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Adams*, 679 F.3d at 316. The district court stayed Adams's execution pending resolution of the 60(b)(6) motion. *Id.* at 317.

The Fifth Circuit ruled that the district court abused its discretion granting the stay because, it held, Adams had not shown a likelihood of success on his 60(b)(6) motion. *Adams*, 679 F.3d at 318–19. The Fifth Circuit reiterated the command in that circuit, 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)." *Id.* at 319 (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990); and citing *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747–48 (5th Cir. 1995)). Because the district court had correctly applied then-prevailing Supreme Court precedent (*Coleman*), the change in law effected by *Martinez* did not "constitute an 'extraordinary circumstance'" "to warrant Rule 60(b)(6) relief." *Id.* at 320 (citations omitted).

The Sixth Circuit likewise holds that "changes in decisional law alone do not establish ground for Rule 60(b)(6) relief." *Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018); *see also Abdur'Rahman v. Carpenter*, 805 F.3d 710, 716 (6th Cir. 2015) ("As a change in decisional law, *Martinez* does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief.") (citation omitted).

Similarly, in the D.C. Circuit, "'extraordinary circumstances' are not present . . . when there has been an intervening change in case law." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) (citing *Gonzalez*, 545 U.S. at 536–38; *Agostini*, 521 U.S. at 239).

According to the Eleventh Circuit, a change in decisional law "is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)." *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014).

Finally, the Tenth Circuit holds that a "change in the law or in the judicial view of an established rule of law is not . . . an extraordinary circumstance which justifies [Rule 60(b)(6)] relief." *Collins*, 254 F.2d at 839. As noted above, the Tenth Circuit has approved of reopening a judgment only in the unique circumstance when two decisions arising out of the same transaction or occurrence reach different conclusions. *Pierce*, 518 F.2d at 721–23. *Pierce* thus does not establish a general approach for courts to apply when considering changes in legal decisions, but rather, merely identifies one precise scenario in which the Tenth Circuit's categorical rule is set aside.

B. In contrast, the First, Third, Seventh, Eighth, and Ninth Circuits hold that a change in decisional law may justify relief under Rule 60(b)(6).

The First Circuit has stated that a change in state common law could, on rare occasion, serve as grounds to reopen a final judgment under Rule 60(b)(6). *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997).

The Third Circuit too, has "not foreclosed the possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief."

Cox v. Horn, 757 F.3d 113, 121 (3d Cir. 2014). In *Cox*, the Third Circuit faced the same question presented to the Fifth Circuit in *Adams v. Thaler*—whether the change in law announced in this Court's decision in *Martinez* justified Rule-60(b)(6) relief. *Id.* But, the Third Circuit said, *Martinez* may justify relief under Rule 60(b)(6), and "*Adams* does not square with our approach to Rule 60(b)(6)." *Id.* at 121–22. Indeed, later, in *Satterfield v. District Attorney Philadelphia*, the Third Circuit reversed an order denying relief under Rule 60(b)(6). 872 F.3d 152 (3d Cir. 2017). The court concluded that a Rule-60(b)(6) motion based on a change in decisional law requires an "analysis of the equitable circumstances at play," and it remanded the case for the lower court to "evaluate the nature of the change [to a statute of limitations for habeas petitioners] along with all of the equitable circumstances and clearly articulate the reasoning underlying its ultimate determination." *Id.* at 161–62.

The Seventh Circuit "agree[s] with the Third Circuit's approach in *Cox*, in which it rejected the absolute position . . . that intervening change in the law *never* can support relief under Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (referencing *Adams*); *see also Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 891 (7th Cir. 2020) (citing *Agostini*, 521 U.S. at 239); *Crutsinger*, 140 S. Ct. at 3 (Sotomayor, J.) (noting consistent approaches in the Third Circuit (*Cox*) and the Seventh Circuit (*Ramirez*), in contrast to the Fifth Circuit's approach in *Adams*).

In the Eighth Circuit, "[a] change in the law could represent so significant an alteration in circumstances as to justify both prospective and retrospective relief from the obligations of a court order." *City*

of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 785 F.3d 1207, 1210 (8th Cir. 2015) (quotations omitted). The court there twice reversed the denial of a Rule-60(b)(6) motion because the lower court repeatedly failed to consider whether a post-consent-decree change in law was an exceptional occurrence justifying 60(b)(6) relief. *Id*. at 1212; *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th Cir. 2013).

Finally, the Ninth Circuit concluded that this Court's decision in *Gonzalez* "directly refuted" the "*per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law." *Phelps v. Alameida*, 569 F.3d 1120, 1132 (9th Cir. 2009); *see also FTC v. Hewitt*, 68 F.4th 461, 468 (9th Cir. 2023) (stating that an intervening change in law "may be adequate" to grant relief under Rule 60(b)(6)).

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. This Court allows that post-judgment changes in law may suffice for relief under Rule 60(b)(6).

The Tenth Circuit's decision cannot be squared with this Court's jurisprudence. As noted above, this Court has said that courts may consider a change in controlling law to determine whether extraordinary circumstances are present in a particular case. *See Buck*, 580 U.S. at 126; *Gonzalez*, 545 U.S. at 531; *see also Kemp v. United States*, 596 U.S. 528, 540 (2022) (Sotomayor, J., concurring) (citing *Buck*, 580 U.S. at 126; *Gonzalez*, 545 U.S. at 531; and *Polites v. United States*, 364 U.S. 426, 433 (1960)); *Phelps*, 569 F.3d at 1132 ("The Supreme Court's central holding in *Gonzalez* was that a Rule 60(b)(6) motion is the *proper*

means of bringing" a challenge based on a change in decisional law.) (citing *Gonzalez*, 545 U.S. at 533) (citing, in footnote, *Agostini*, 521 U.S. at 239; *Polites*, 364 U.S. at 432). As this Court stated in *Gonzalez*, a "change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment . . . ." 545 U.S. at 536 n.9.

Indeed, aside from the specific reasons set forth in Rule 60(b)(1)–(5), Rule 60(b)(6)'s catch-all category exists precisely to reopen final orders when extraordinary circumstances exist "for '*any* . . . reason justifying relief from the operation of the judgment.'" *Gonzalez*, 545 U.S. at 529 (emphasis added) (quoting *Liljeberg*, 486 U.S. at 863 n.11).

Therefore, one reason justifying relief in a particular case may be a fundamental change in decisional law. The Tenth Circuit therefore erred by applying a categorical rule that effectively ignores post-judgment changes in law. Rather than "consider[ing] a wide range of factors," *Buck*, 580 U.S. at 123 (citation omitted), to determine whether "'extraordinary circumstances' justif[ied] the reopening" of the Stipulated Order *in this case*, *Gonzalez*, 545 U.S. at 535 (citation omitted), the Tenth Circuit simply declared that Petitioners—and all parties in similar circumstances—are precluded from relief under Rule 60(b)(6).

And the circumstances of this case demonstrate the error of this approach. First, there is no dispute that, under the Court's unanimous decision in *AMG*, the FTC was always precluded from seeking, and courts were always precluded from awarding, "equitable monetary relief" under §13(b). *See Rivers*, 511 U.S. at 312–13 ("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") (footnote omitted). Therefore, the legal foundation for the Stipulated Order's equitable monetary relief does not exist.

Further, because of this Court's holding in *AMG*, virtually all the FTC's actions in this case were taken without any lawful basis. The FTC's tactics were part of a well-worn plan based on the previous view of §13(b) that gave the FTC enormous leverage. As a former FTC general counsel explained, §13(b) (before *AMG*) armed the FTC with a "remedial arsenal," with which the FTC sought, *inter alia*, disgorgement, along with the freezing of assets or receiverships to ensure "equitable monetary relief"—orders that the courts did "not hesitate[] to grant." Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 Antitrust L.J. 141, 143–45 (1988).

Therefore, had §13(b) been properly limited to "purely injunctive, not monetary, relief," *AMG*, 593 U.S. at 75, the FTC could never have obtained an *ex parte* TRO freezing Petitioners' assets or bullied Petitioners into a settlement by threatening "equitable monetary relief" equal to Elite IT's lifetime receipts. The FTC's "arsenal" here prevented Petitioners even from accessing a portion of the frozen funds to pay legal counsel, lest those funds be unavailable for, we now know, an unlawful monetary award under §13(b).

B. There is no exception for consent judgments.

The Tenth Circuit's categorical bar also led the court—*sua sponte*—to hold that Petitioners were precluded from even challenging the district court's Stipulated Order because, according to the Order, Petitioners "waive[d] all rights to appeal or otherwise challenge or contest the validity of this Order." App.

2a–3a. But, as this Court has repeatedly confirmed, Rule 60(b) applies to consent orders just as much as it does to litigated orders.

In *Rufo v. Inmates of Suffolk County Jail*, for example, this Court held that "rigidity" in applying either Rule 60(b)(5) or (b)(6) to consent decree was legal error. 502 U.S. 367, 382–83, 390 (1992). Rule 60(b) flows from a long tradition in equity allowing modification of a judgment entered "by consent" of the parties, "in adaptation to changed conditions." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This is a well-recognized tradition. *See, e.g.*, *Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d at 1210 (reversing, for the second time, district court's failure to consider whether a change in law after entry of a consent decree justified Rule-60(b)(6) relief).

The Tenth Circuit itself understands that "[c]onsent judgments are indistinguishable from litigated judgments for purposes of Rule 60(b) analysis." *Zimmerman v. Quinn*, 744 F.2d 81, 82 n.1 (10th Cir. 1984). Indeed, Rule 60(b)(6) "implicitly contemplate[s] consideration of circumstances *beyond the terms* of the judgment." *Id.* at 82 n.1 (emphasis added). Thus, the Tenth Circuit's categorical rule against considering post-judgment changes in law prevented the court—contrary to this Court's jurisprudence—from considering whether it remained equitable to strictly enforce the Stipulated Order that was based on an invalid interpretation of §13(b).

Finally, by applying its constricted Rule-60(b)(6) approach, the Tenth Circuit ignored yet another well-established understanding about the nature of *judgments*. As this Court explained in *Rufo*, while a "consent decree no doubt embodies an agreement of the

parties and thus in some respects is contractual in nature[,]" it is an agreement "reflected in, and . . . enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." 502 U.S. at 378.

Therefore, as (again) the Tenth Circuit otherwise recognizes, "a settlement agreement or consent decree designed to enforce statutory directives is not merely a private contract. It implicates the courts, and *it is the statute*—and 'only incidentally the parties'—to which the courts owe their allegiance." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1169 (10th Cir. 2004) (emphasis added). Thus, the "primary" function of a consent decree, "like that of a litigated judgment, is to enforce the congressional will as reflected in the statute." *Id.* A consent decree does not, therefore, "freeze the provisions of the statute into place." *Id.* "If the statute changes, the parties' rights change, and enforcement of their agreement must also change." *Id.* at 1169–70.

* * *

Because the FTC's previous interpretation of §13(b) was invalidated by this Court in *AMG*, the Tenth Circuit was not free to disregard the proper interpretation of the statute simply because Petitioners "weren't involved in the events giving rise to *AMG*." App. 14a. That approach runs counter to the historical equitable lineage of Rule 60(b)(6) and this Court's jurisprudence. This Court should grant certiorari and hold that courts may consider post-judgment changes in law when ruling on motions under Rule 60(b)(6).

III. THIS CASE IS THE IDEAL VEHICLE FOR ADDRESSING THE IMPORTANT QUESTION PRESENTED.

This case presents an ideal vehicle for settling whether relief under Rule 60(b)(6) is available based on fundamental changes in law. This case raises pure questions of law and presents no disputed material facts. The Court should use this case as the vehicle to clarify Rule 60(b)(6).

The question presented raises a recurring problem, as described above. And the split is irreconcilable. Circuit courts have disputed the effect of the *same* post-judgment change in decisional law. *Compare Adams*, 679 F.3d at 319 (change in decisional law announced in *Martinez*, does not justify relief under Rule 60(b)(6)), and *Abdur'Rahman,* 805 F.3d at 714 (same), *with Cox*, 757 F.3d at 122 (noting that the "fundamental point of 60(b) is that it provides 'a grand reservoir of equitable power to do justice in a particular case'" and holding that *Martinez*'s change in law may constitute "extraordinary circumstances" justifying relief under Rule 60(b)(6)).

Indeed, the circuit courts take diametrically opposed views about this Court's relevant case law. *Compare Kramer*, 481 F.3d at 792 (The "Supreme Court has held that 'extraordinary circumstances' are not present . . . when there has been an intervening change in law.") (citing *Gonzalez*, 545 U.S. at 536–38; *Agostini*, 521 U.S. at 239); *with Phelps*, 569 F.3d at 1132 ("The Supreme Court's central holding in *Gonzalez* was that a Rule 60(b)(6) motion is the *proper* means of bringing" a challenge based on a change in decisional law.).

Finally, another pending petition for a writ of certiorari further demonstrates the need for this Court to

resolve the circuit split. *See* Pet. for a Writ of Cert. at i, *Hi-Tech Pharms., Inc. v. FTC*, No. 23-704 (Dec. 27, 2023). There, in addition to a question about sanctions available under §13(b) of the FTC Act, Petitioner Hi-Tech Pharmaceuticals presents the same question concerning the application of Rule 60(b)(6) raised by Petitioners here. The unresolved circuit split creates uncertainty and disparate outcomes across jurisdictions, undermining the consistency and predictability of legal proceedings. Clarification from this Court is crucial to ensure uniformity and fairness in the application of Rule 60(b)(6), particularly given the recent adverse ruling against Elite IT and James Martinos—a small business and its owner.

This split of authority has had more than enough time to percolate. Federal courts have been addressing these questions since at least the 1950s. *See, e.g.*, *Morse-Starrett Prod. Co. v. Steccone*, 205 F.2d 244, 249 (9th Cir. 1953). And circuit-court confusion has worsened since *Gonzalez*. Only this Court can resolve the discord arising from conflicting interpretations over the application of Rule 60(b)(6) following a change in decisional law.

* * *

CONCLUSION

This Court should grant the petition for a writ of certiorari.

DATED: May 2024.

Respectfully submitted,

OLIVER J. DUNFORD
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
916.503.9060
odunford@pacificlegal.org

ALLISON D. DANIEL
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
202.888.6881
adaniel@pacificlegal.org

Counsel for Petitioners

Appendix

Table of Contents

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-4009

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

v.

ELITE IT PARTNERS, INC., a Utah corporation, d/b/a Elite IT Home; JAMES MICHAEL MARTINOS, individually and as an officer of Elite IT Partners, Inc.,

Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:19-CV-00125-RJS)

Filed: January 23, 2024

Caleb Kruckenberg, Pacific Legal Foundation, (John F. Kerkhoff, Pacific Legal Foundation, with him on the briefs), Arlington, VA, for Defendants-Appellants.

Michael D. Bergman, Federal Trade Commission (Anisha S. Dasgupta, General Counsel, and Mariel Goetz, Acting Director of Litigation, with him on the briefs), Washington, D.C., for Plaintiff-Appellee.

Before **BACHARACH**, **BRISCOE**, and **McHUGH**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of the Federal Trade Commission's suit against Mr. James Martinos and Elite IT Partners. In the suit, the FTC alleged a fraudulent scheme to sell unnecessary services. The parties settled the suit by stipulating to a judgment that

- provided equitable monetary relief under § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) and
- waived future challenges.

Roughly a year after entry of the stipulated judgment, the Supreme Court held in *AMG Capital Management, LLC v. FTC* that § 13(b) doesn't allow equitable monetary relief. 593 U.S. 67, 75–78 (2021). The new interpretation of § 13(b) led the defendants to request vacatur of the stipulated judgment under Federal Rule of Civil Procedure 60(b)(6).[1] The district court denied the motion, reasoning that

- the change in case law had arisen in a factually unrelated case and
- the defendants hadn't presented other circumstances warranting vacatur.

The defendants appeal, and we address two issues:

---

[1] The defendants also invoked Rule 60(b)(5), but they don't address this rule in the appeal.

1. **Waiver:** The defendants agreed to waive their right to challenge or contest the stipulated judgment. Does this waiver prohibit the defendants from arguing that the stipulated judgment was invalid? We answer *yes*.

2. **Change in case law:** The defendants moved to vacate the stipulated judgment based on a change in the case law. We've allowed vacatur of the judgment for a change in case law only when the change arose in a factually related case. Here the change in case law took place in an unrelated case. Despite the absence of a relationship, can the defendants base vacatur on a change in the case law? We answer *no*.

1. The defendants waived the right to collaterally challenge the stipulated judgment.

The stipulated judgment provides that the defendants "waive[d] all rights to . . . challenge or contest the validity of this Order." Appellants' App'x at 120.[2] We must consider

- whether to consider the waiver clause and
- whether the clause applies to the defendants' appellate arguments.

We answer *yes* to both questions.

---

[2] In the stipulated judgment, the defendants also agreed "not [to] seek the return of any assets." Appellants' App'x at 126. In the motion to vacate, however, the defendants seek return of the money already collected under the judgment. The FTC argues that the defendants waived this request by agreeing not to seek return of funds. We need not address this argument because the defendants more broadly waived the right to challenge or contest the validity of the stipulated judgment.

a. We should consider the waiver clause as an alternative basis to affirm.

The district court didn't address the waiver clause. But we can affirm on any ground adequately supported by the record. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). In deciding whether to consider affirmance on a different ground, we address

- whether the issue was briefed in district court and on appeal,
- whether the issue is legal or factual, and
- whether the record is adequately developed.

Id. These factors support consideration.

First, the parties briefed the impact of the waiver clause both in district court and on appeal.[3]

Second, the questions are legal, not factual. For example, the defendants characterize the district court's reliance on a "categorical bar" as a legal error. Appellants' Reply Br. at 4.[4]

---

[3] The waiver clause prevents the defendants from contesting or challenging the validity of the stipulated judgment. *See* p. 3, above. This clause could potentially cover either

- the filing of a motion to vacate in district court or
- an appeal from the denial of vacatur.

The briefing in district court addressed the waiver that applied there: the filing of a motion to vacate. We are addressing the applicability of the waiver clause to an appeal from the denial of that motion. Until this appeal, the parties and district court had no reason to address the applicability of the waiver clause to an appeal from the district court's ruling.

[4] The defendants elsewhere argue that the issue turns on interpretation of a settlement agreement. But the language appears

Third, we consider whether the record is adequately developed. *See* p. 4, above. Here the parties rely solely on the language in the stipulated judgment rather than on any extrinsic evidence. So the record appears adequately developed.

Because each factor supports consideration, we address the applicability of the waiver clause.

b. The waiver clause covers the defendants' appellate arguments.

The defendants waived their appellate arguments because these arguments "challenge or contest the validity of" the stipulated judgment. For example, the defendants argue that *AMG* shows that the stipulated judgment was never valid:

- "The judgment at issue is unlawful." Appellants' Reply Br. at 1.
- "*AMG* recognized that the original judgment was illegal when it was issued." *Id.* at 9 (subheading).
- "And that judgment came only because the FTC sought to exercise a power it never had." Appellants' Opening Br. at 5.
- "The FTC didn't have the power to demand and then obtain disgorgement." *Id.* at 44.
- "All parties agree that the Federal Trade Commission's $13.5 million judgment against Appellants, James Martinos and his company,

---

in an unambiguous judgment (rather than a typical settlement agreement), so interpretation involves a question of law. *See United States v. DAS Corp.*, 18 F.4th 1032, 1040 (9th Cir. 2021) ("[T]he interpretation of a judgment presents a question of law.").

Elite IT Partners, Inc., should never have been issued." Appellants' Reply Br. at 1.

- "This wasn't merely a bad bargain, it was an *illegal* agreement, and one the court lacked the authority to accept." *Id.* at 8 (emphasis in original).

The defendants present four arguments to sidestep the waiver clause:

1. The defendants aren't contesting the validity of the stipulated judgment under the case law that existed earlier.
2. The parties entered the stipulated judgment based on a misunderstanding of the law.
3. The district court could modify the stipulated judgment, and the federal rules provide broad equitable power to vacate the judgment.
4. Rule 60(b)(6) allows reopening of "final agreements, no matter what they say, when certain conditions are present." Appellants' Reply Br. at 5.

These arguments are unpersuasive.

First, the defendants acknowledge that the stipulated judgment was valid under earlier case law. But the defendants argue that the Supreme Court's subsequent opinion in *AMG* rendered the stipulated judgment invalid from the outset. *See* pp. 5–6, above. In this argument, the defendants are *challenging* or *contesting* the validity of the stipulated judgment.

Second, the defendants contend that the parties based the stipulation on a misunderstanding of the law. This argument rests on unproven assumptions.

When the parties entered the stipulation, a circuit split existed on the availability of equitable monetary relief under § 13(b). The Seventh Circuit had held that § 13(b) didn't allow equitable monetary relief. *FTC v. Credit Bur. Ctr., LLC*, 937 F.3d 764, 786 (7th Cir. 2019). Seven circuits had said the opposite. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014); *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 717–20 (5th Cir. 1982); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996).

The circuit split had led to the filing of a certiorari petition before the defendants entered the stipulation. Petition for Writ of Certiorari, *AMG Cap. Mgt., LLC v. FTC*, No. 19-508 (U.S. Oct. 18, 2019). The petition itself underscored the circuit split, *id.* at 11–15, so the defendants could have foreseen a change in the case law. *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) (stating that a change in the law is foreseeable when a circuit split exists on statutory construction). Given that possibility, we have no way of knowing whether the defendants expected a change in the case law. At a minimum, however, the pending request for certiorari signaled a possible change in the interpretation of § 13(b).

Third, the defendants point out that the district court had the power to vacate the judgment because

- the court retained jurisdiction and

- the federal rules provided equitable authority to vacate an order.

But the defendants don't explain how retention of jurisdiction or equitable authority would prevent a waiver.[5]

Though a court might enjoy broad jurisdiction and equitable power, a party can waive rights that the court could otherwise protect. For example, courts can entertain appeals or collateral challenges to federal convictions. 28 U.S.C. § 2106 (appeals), § 2255 (collateral challenges). But parties can waive their rights to

- appeal final orders, *United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004) (en banc) (per curiam), or
- collaterally challenge federal convictions, *United States v. Cockerham*, 237 F.3d 1179, 1182–83 (10th Cir. 2001).

In the same way, a party can freely waive the right to invoke the court's jurisdiction or equitable authority. *See Johnson v. Spencer*, 950 F.3d 680, 703 (10th Cir. 2020) (stating that a settlement agreement can constitute a free choice undermining the right to seek vacatur under Rule 60(b)(6)).

Fourth, the defendants assert that Rule 60(b) allows vacatur regardless of any contrary agreements.

---

[5] The defendants' argument consists solely of two sentences: "More importantly, the Order recognized that it could be modified by the district court—the very last provision said 'that th[e] Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.' That language covers the situation here." Appellants' Reply Br. at 5 (quoting Appellants' App'x at 134).

For this assertion, the defendants supply no authority.

* * *

We conclude that the waiver clause applies because the defendants' appellate arguments *challenge* or *contest* the validity of the stipulated judgment.

2. The district court didn't erroneously apply a "categorical bar."

Given the importance of the underlying issue, we address the merits to explain that the defendants would not have prevailed even if they hadn't waived their appellate arguments.

The defendants argue that the district court erroneously applied a "categorical bar" to relief under Rule 60(b)(6). For this argument, the defendants try to squeeze the district court's ruling into our opinion in *Johnson v. Spencer*, 950 F.3d 680 (10th Cir. 2020).[6] But *Johnson* doesn't apply.

a. The defendants present two different arguments to analogize our case to *Johnson*.

In *Johnson*, the district court denied relief on the ground that Rule 60(b)(6) categorically disallows va-

[6] The defendants repeatedly purport to quote *Johnson* for the "explan[ation] that a district court's 'application of categorical rule' in a Rule 60(b)(6) analysis is *per se* abuse of discretion." Appellants' Opening Br. at 15, 17, 31, 32, 33; Appellants' Reply Br. at 4, 16. But *Johnson* never used the term *categorical rule*. The Court instead cited a First Circuit opinion that had used the terms *categorical rule* and *categorical bar*. *Ungar v. Palestinian Liberation Org.*, 599 F.3d 79, 81–87 (1st Cir. 2010).

catur on claims for damages. *Id.* at 701–02. We reversed, reasoning that the district court couldn't categorically disallow vacatur on damage claims. *Id.* at 702–03. Based on *Johnson*, the defendants argue that the district court erred by relying on a "categorical bar."

But the defendants are inconsistent in what they regard as the "categorical bar." They sometimes argue that the district court erroneously applied a "categorical bar" by improperly limiting vacatur when a party relies on a change in the case law in a factually unrelated case:

- "Relevant here, the [district] court held that Rule 60(b)(6) is categorically barred based on a change in the law for factually 'unrelated cases.'" Appellants' Opening Br. at 13.
- "Instead, the court adopted a categorical rule that unrelated cases can *never* win a Rule 60(b)(6) motion based on a change in the law." *Id.* at 14 (emphasis in original).

Other times, the defendants argue that the district court erred by categorically declining to consider the pertinent equitable considerations[7]:

- "The district court was wrong to categorically bar Mr. Martinos and [his company] from even the equitable considerations at play in Rule 60(b)(6)." Appellants' Reply Br. at 9.
- "In other words, the district court adopted a categorical rule that Rule 60 could apply only if a

[7] At oral argument, the court asked defense counsel to clarify the "categorical bar" argument. Counsel again presented both forms of the argument.

> case has a factual relationship with *AMG*. . . . Instead, courts must consider a range of equitable factors to determine whether a judgment should be reopened when a change in the law occurs." Appellants' Opening Br. at 6.
>
> - "Yet the district court adopted a categorical rule barring relief for almost any litigant. Instead of hewing to Rule 60's equitable lineage by considering all circumstances here, the court focused on only one: Whether [this case] was a 'related case' to *AMG*. It ignored any other factor—finality, comity, injustice, hardship, diligence—to rule that only a *single* type of case can earn Rule 60(b)(6) relief." Appellants' Opening Br. at 22–23 (emphasis in original).[8]

Under either characterization of the defendants' argument, it would fail. The first characterization of the argument fails because the district court correctly interpreted our case law: The defendants relied almost solely on a change in the case law under *AMG*, and that change couldn't justify vacatur because the cases aren't factually related. The second characterization of the argument fails because the district court didn't disregard the defendants' other equitable arguments.

---

[8] The defendants sometimes blend the arguments, characterizing the categorical bar as a refusal to consider the equities or a change in the law in unrelated cases: "Yet the district court never considered the equities. Instead, it adopted a categorical rule that 'a post-judgment change in the law only justifies 60(b)(6) relief when it arises in a related case.'" Appellants' Reply Br. at 2 (quoting Appellants' App'x at 288).

b. The change in case law does not support vacatur.

The first characterization of the argument fails because a change in case law doesn't support vacatur when the cases are unrelated.

We review the denial of a motion to vacate for an abuse of discretion. *Kile v. United States*, 915 F.3d 682, 688 (10th Cir. 2019). "The denial of a 60(b)(6) motion will be reversed only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020) (quoting *Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1248 (10th Cir. 2007)). This certainty could arise when the district court errs legally, and the defendants are urging a legal error based on the change in case law.

But the defendants' argument clashes with our precedent, for we held in 1958 that a change in case law doesn't justify vacatur under Rule 60(b)(6). *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958). Granted, our 1958 holding could

- expose parties to different legal rules in related cases or
- prevent a court from correcting a ruling before it becomes final.

We have thus acknowledged two situations in which inflexibility could create anomalies:

1. when the change in case law takes place in a factually related case or
2. when the change precedes issuance of a final order.

The first anomaly could arise when the change in case law arises between decisions in related cases. For example, assume that two suits sprout from a car accident and the state supreme court clarifies state law during a gap between the suits. A refusal to consider the state supreme court's clarification of the law could create inconsistent outcomes in two suits involving the same car accident.

We addressed this possibility in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc). There a car accident led to two suits: one was filed in state court, the other in federal court. *Id.* at 721–22. State law was to govern in both cases. The federal case ended with judgment for the defendant, but then the state supreme court changed its case law to favor the plaintiffs. *Id.* The change in case law led the plaintiffs to seek vacatur under Rule 60(b)(6). We concluded that relief was justified to ensure consistency in the treatment of cases "arising out of the same transaction or occurrence." *Id.* at 723. In doing so, we distinguished our 1958 precedent because "there the decisional change [had come] in an unrelated case." *Id.*

We've also acknowledged the anomaly of disallowing vacatur when the earlier ruling hasn't become final. District courts generally retain power to revise rulings before entering a judgment. *See Dietz v. Bouldin*, 579 U.S. 40, 46 (2016) ("[T]he Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to a final judgment in a civil case."). Revision of such rulings doesn't affect finality because the case remains ongoing. For example, before a final order, a district court can rely on a new opinion to vacate a prior order under Rule 60(b)(6). *Adams v. Merrill Lynch, Pierce,*

Fenner & Smith, 888 F.2d 696, 697–98, 702 (10th Cir. 1989).[9] And in direct appeals, we generally apply new opinions when we issue the decision. *E.g.*, *Wilson v. Al McCord Inc.*, 858 F.2d 1469, 1478 (10th Cir. 1988) (new state appellate opinion); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491 n.9 (10th Cir. 1994) (new Supreme Court opinion).

These anomalies don't exist here. The defendants weren't involved in the events giving rise to *AMG*, and the district court had entered a final judgment before the defendants moved for vacatur. In fact, more than two years passed between the district court's approval of the stipulated judgment and the defendants' request for vacatur. In the absence of these anomalies, we have explained that our precedents disallow vacatur based on a change in the case law from an unrelated case: "Absent a post-judgment change in the law in a factually related case . . . a change in the law or in the judicial view of an established rule of law does

---

[9] The FTC argues that we decided *Adams* while the case was still open. The defendants criticize this characterization on the ground that we recognized a party's right to seek relief under Rule 60(b)(6) after dismissal of a cross-appeal. We agree with the FTC because the defendants' observation bears no relevance to the difference between *Adams* and our case. There the appeal took place while the parties were disputing the scope of an upcoming arbitration. *Id.* at 697–98. The district court had not ruled on any of the claims or entered a final order.

Given the district court's unquestioned power to modify or vacate rulings before they become final, we've said in an unpublished opinion that *Adams* doesn't cast doubt on our 1958 precedent for Rule 60(b)(6) motions filed after entry of a judgment. *Sproull v. Union Tex. Prods. Corp.*, No. 90-6286, 1991 WL 184098, at *2 (10th Cir. Sept. 18, 1991) (unpublished). We agree with this explanation for the difference between *Adams* and our 1958 precedent.

not justify relief under Rule 60(b)(6)." *Johnston v. Cigna Corp.*, 14 F.3d 486, 497 (10th Cir. 1993) (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1245 (10th Cir. 1991)) (cleaned up).

The defendants apparently characterize this language as dicta, but it's not. This language appears in our consideration of the plaintiffs' reliance on a change in the case law. *Id.* There we disallowed vacatur because the change hadn't arisen "out of a *Pierce*-type factually-related incident." *Id.* The quoted language was thus integral to our holding. *See Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (rejecting a party's characterization of a prior panel's statements as dicta, reasoning that they had been essential to the decision).

The defendants also suggest that the Supreme Court has overruled our 1958 precedent. For this suggestion, the defendants cite *Agostini v. Felton*, 521 U.S. 203, 239 (1997). There the Supreme Court addressed a different rule (Rule 60(b)(5)). *Id.* at 238–39. In its discussion, the Court noted that "intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Id.* at 239. The defendants don't explain how this passage undercuts our precedents limiting the availability of vacatur under Rule 60(b)(6) based on new Supreme Court opinions. Indeed, after the Supreme Court decided *Agostini*, the Fourth Circuit held that *AMG*'s abrogation of the circuit's prior case law didn't justify vacatur under Rule 60(b)(6):

> "It is hardly extraordinary" when the Supreme Court arrives "at a different interpretation" of a particular issue than lower courts after a case is no longer pending.

. . . .

> Here, the Supreme Court's novel position in *AMG* is not sufficiently extraordinary to justify vacatur under the Rule 60(b) catch-all. A conclusion that such a circumstance justifies vacatur would effectively eviscerate finality interests and open the floodgates to newly meritorious Rule 60(b)(6) motions each time the law changes.

FTC v. Ross, 74 F.4th 186, 194 (4th Cir. 2023) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005) and citing *Agostini*, 521 U.S. at 239), *cert. pet. filed* (U.S. Oct. 18, 2023) (No. 23-405).

Our precedents remain good law unless the Supreme Court has "indisputably and pellucidly" abrogated them. *Vincent v. Garland*, 80 F.4th 1197, 1200, 1202 (10th Cir. 2023), *cert. pet. filed* (U.S. Dec. 26, 2023) (No. 23-683). *Agostini* doesn't indisputably and pellucidly abrogate our case law. Under that case law, new Supreme Court opinions can sometimes support vacatur under Rule 60(b)(6). *See* pp. 13–14, above. For example, new Supreme Court opinions might support vacatur when the district court hadn't issued a final judgment. *See* p. 14, above. But these circumstances aren't present here.

c. The district court didn't disregard the defendants' other arguments for vacatur.

The defendants contend that the district court disregarded their other arguments. We disagree. The defendants did make other arguments, but those arguments depended on the Supreme Court's new opinion in *AMG*.

The defendants point to their arguments that

- the stipulated judgment created an unfair burden,
- the FTC lacked any interest in retaining the judgment,
- *AMG*'s holding merited special consideration, and
- the facts warranted an exception to finality.

In making these arguments in district court, the defendants didn't say why they regarded the stipulated judgment as unfair. Granted, they repeatedly characterized the judgment as illegal; but the alleged illegality stemmed from the change in case law. *See* pp. 5–6, above.

The defendants also denied that the FTC had an interest in retaining the judgment because "Congress did not authorize the agency" to seek equitable monetary relief. Appellants' App'x at 182. So this argument also appeared to rest on a change in the case law.[10]

In addition, the defendants point to the importance of *AMG* and the role of Rule 60(b)(6) in creating an exception to finality. These arguments rest again on the change in case law.

The district court could thus reasonably regard these arguments as part of the defendants' reliance on a change in the case law. However the arguments

---

[10] The defendants' appeal briefs also appear to challenge the FTC's interest in the judgment based on its illegality: "The Supreme Court in *AMG* already clarified that Congress did *not* grant the FTC the power to obtain drastic equitable monetary penalties. And agencies have no interest in defending illegal actions." Appellants' Opening Br. at 41 (emphasis in original) (citation omitted).

were characterized, the court didn't overlook them. The court instead explained that these arguments hadn't constituted "a legal or factual basis" to vacate the stipulated judgment. Appellants' App'x at 290. Given this explanation, we conclude that the district court didn't ignore the defendants' equitable arguments.

3. Conclusion

For two separate reasons, we affirm the denial of the defendants' motion to vacate the stipulated judgment.

First, the defendants' appellate arguments trigger the waiver clause by challenging or contesting the validity of the stipulated judgment.

Second, the Supreme Court's issuance of *AMG* bears no factual relationship to our case. So *AMG* doesn't warrant vacatur under Rule 60(b)(6).

We thus conclude that (1) the defendants waived their appellate arguments and (2) the district court didn't abuse its discretion in denying vacatur.

No. 23-4009, *Federal Trade Commission v. Elite IT Partners, Inc. et al.*

BRISCOE, Circuit Judge, concurring.

I join in affirming the district court's denial of defendants' Rule 60(b)(6) motion to vacate the stipulated judgment. The Majority Opinion clearly explains in Section 1 of the Opinion that the waiver clause set forth in the stipulated judgment applies here to bar defendants' appellate arguments. I would rest our affirmance on waiver and would not proceed to address the merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

2:19-CV-125-RJS-CMR

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ELITE IT PARTNERS, INC., a Utah corporation doing business as ELITE IT HOME, and JAMES MICHAEL MARTINOS, individually and as an officer of ELITE IT PARTNERS, INC.,

Defendants.

STIPULATED ORDER FOR PERMANENT INJUNCTION AND MONETARY JUDGMENT AS TO DEFENDANTS ELITE IT PARTNERS, INC., AND JAMES MICHAEL MARTINOS

Filed: December 9, 2019

Chief District Judge Robert J. Shelby

Magistrate Judge Cecilia M. Romero

Plaintiff, the Federal Trade Commission (FTC or Commission), filed its Complaint for Permanent Injunction and Other Equitable Relief (Complaint) pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 53(b) and 57b. The Commission and Defendants Elite IT Partners, Inc., through the Receiver, Thomas Barton, and James Michael Martinos stipulate to the entry of this Stipulated Order for Permanent Injunction and Monetary Judgment (Order) to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. This Court has jurisdiction over this matter.

2. The Complaint charges that Defendants participated in deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, the FTC's Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310, as amended, and Section 5 of the Restore Online Shopper's Confidence Act (ROSCA), 15 U.S.C. §§ 8401–8405, in the marketing and sale of computer security or computer-related technical support services.

3. Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendants admit the facts necessary to establish jurisdiction.

4. Defendants waive any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order and agree to bear their own costs and attorney fees.

5. Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Order.

DEFINITIONS

For the purpose of this Order, the following definitions apply:

A. "**Defendants**" means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

1. "**Corporate Defendant**" means Elite IT Partners, Inc., and its successors and assigns.

2. "**Individual Defendant**" means James Michael Martinos.

B. "**Negative Option Feature**" means, in an offer or agreement to sell or provide any good or service, a provision under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the seller or provider as acceptance or continuing acceptance of the offer.

C. "**Receivership Defendant**" means "Corporate Defendant" as defined above.

D. "**Technical Support Products or Services**" and "**Technical Support Product or Service**" means any product, service, plan, program, software, or hardware marketed to clean, repair, or maintain a computer or improve its performance or security, including antivirus programs, registry cleaners, and computer or software diagnostic, maintenance, cleaning, or repair services.

E. "**Telemarketing**" means any plan, program, or campaign which is conducted to induce the purchase

of goods or services by use of one or more telephones, and which involves a telephone call, whether or not covered by the Telemarketing Sales Rule.

ORDER

I. BAN ON TECHNICAL SUPPORT PRODUCTS OR SERVICES

IT IS ORDERED that Defendants are permanently restrained and enjoined from:

A. advertising, marketing, promoting, or offering for sale any Technical Support Product or Service to consumers;

B. assisting, including providing consulting services, others engaged in or receiving any proceeds from advertising, marketing, promoting, or offering for sale any Technical Support Product or Service to consumers; or

C. owning, controlling, or serving as an officer, director, or manager of any business entity advertising, marketing, promoting, or offering for sale any Technical Support Product or Service to consumers.

Provided, however, that "consumers" shall not include corporations, limited liability companies, limited liability partnerships, limited liability limited partnerships, or subchapter S corporations.

II. BAN RELATING TO NEGATIVE OPTION FEATURES

IT IS FURTHER ORDERED that Defendants, whether acting directly or through an intermediary, are permanently restrained and enjoined from promoting or offering for sale or assisting (including providing consulting services) others in the promoting

or offering for sale of any good or service with a Negative Option Feature, except that this provision shall not apply to entities that are not consumers (as defined in Section I) with which Defendants have negotiated contracts.

III. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service are permanently restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication:

A. that Defendants have detected viruses or infections on any person's or entity's computer that affect the security of such computer and prevent access to email or other accounts;

B. that Defendants are part of, affiliated with, or certified or authorized by any entity; and

C. any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

IV. PROHIBITION CONCERNING TELEMARKETING

IT IS FURTHER ORDERED that Defendants and Defendants' officers, agents, employees, and attor-

neys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any good or service are hereby permanently restrained and enjoined from:

A. using any false or misleading statement to induce any person to pay for goods or services;

B. failing to disclose truthfully, and in a clear and conspicuous manner, before accepting payment from a customer, the following material information:

i. the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;

ii. all material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer; and

iii. if the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all materials terms and conditions of such policy; and

C. violating the TSR, 16 C.F.R. Part 310, attached as Attachment A.

V. PROHIBITIONS CONCERNING REFUNDS AND CANCELLATIONS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, and employees, and all other persons in active concert or participation with

any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of any good or service, are permanently restrained and enjoined from:

A. misrepresenting, expressly or by implication, any material term of any refund, return, or cancellation policy or practice; and

B. failing to honor a refund, return, or cancellation request that complies with any policy to make refunds or allow returns or cancellations.

VI. MONETARY JUDGMENT AND PARTIAL SUSPENSION

IT IS FURTHER ORDERED that:

A. Judgment in the amount of thirteen million five hundred thirty-seven thousand two hundred eighty-eight dollars and seventy-five cents ($13,537,288.75) is entered in favor of the Commission against the Individual Defendant and Corporate Defendant, jointly and severally, as equitable monetary relief.

B. Immediately after entry of this Order, the Individual Defendant is ordered to pay to the Commission one hundred seventy-three thousand five hundred dollars ($173,500), held by Think Mutual in the account ending in 7384. This obligation is satisfied when Think Mutual transfers the $173,500 to the Commission in accordance with Section VI.D.

C. In the event that the Individual Defendant fails to make the required payment when due under Subsection B, above, or the Commission is not allowed to retain any such payment, the entire judgment becomes

immediately due in the amount specified in Subsection A, above, less any partial payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order.

D. Think Mutual Bank is ordered to pay the Commission within seven (7) days of this Order all sums held in accounts in the name of Individual Defendant, individually or jointly with others, including amounts held in accounts ending in 7384 and 0000.

E. Wells Fargo Bank is ordered, within seven (7) days of this Order, to liquidate the brokerage account in the name of Individual Defendant ending in 6339, and thereafter to immediately pay the Commission all proceeds from such liquidation.

F. Vanguard Group, Inc. is ordered, within seven (7) days of this Order, to liquidate the IRA in the name of Individual Defendant ending in 6473, and thereafter to immediately pay the Commission all proceeds from such liquidation.

G. All payments to the Commission under the foregoing subsections shall be made by electronic fund transfer in accordance with the instructions provided by a representative of the Commission.

H. Upon payment, the remainder of the judgment is suspended, subject to the Subsections below.

I. The Commission's agreement to the suspension of part of the judgment is expressly premised upon the truthfulness, accuracy, and completeness of Defendants' sworn financial statements and related documents (collectively, "financial representations") submitted to the Commission, namely:

1. the Financial Statement of Individual Defendant James Michael Martinos signed on March 6, 2019, and amended on August 8, 2019, including the attachments;

2. the Financial Statement of Corporate Defendant Elite IT Partners, Inc., signed by James Michael Martinos on March 6, 2019, including the attachments;

3. the sworn declaration of Individual Defendant James Michael Martinos signed on August 19, 2019.

J. The suspension of the judgment will be lifted as to any Defendant if, upon motion by the Commission, the Court finds that Defendant failed to disclose any material asset, materially misstated the value of any asset, or made any other material misstatement or omission in the financial representations identified above.

K. If the suspension of the judgment is lifted, the judgment becomes immediately due as to that Defendant in the amount specified in Subsection A above (which the parties stipulate only for purposes of this Section represents the consumer injury alleged in the Complaint (Dkt. 1)), less any payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order.

VII. ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

A. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers) may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

E. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any

actions the Commission or its representatives may take pursuant to this Subsection.

VIII. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, are permanently restrained and enjoined from directly or indirectly:

A. failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the Commission, within 14 days.

B. disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with the sale of Tech Support Products and Services to consumers related to the sale of services under the name "Elite IT Home"; and

C. failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

IX. LIFTING OF ASSET FREEZE

IT IS FURTHER ORDERED that the freeze of Defendants' assets remains in effect, but will be lifted for the sole purpose of transferring funds and assets to the Commission pursuant to Sections VI and X herein, and will be dissolved only upon completion of all such transfers.

X. RECEIVERSHIP

IT IS FURTHER ORDERED that:

A. Except as modified by this Section, the Receivership imposed by the court will continue as set forth in the Stipulated Preliminary Injunction Order as to Elite IT Partners, Inc. and James Michael Martinos entered on May 6, 2019 (Dkt. 104).

B. The Receiver must take all steps necessary to immediately wind down the affairs and liquidate the assets of the Receivership Defendant. *Provided*, however, notwithstanding any limitations in Sections I.B, II, and VIII.B, the Receiver, in his discretion, may assist in transitioning customers of Corporate Defendant to current providers of antivirus software and backup services. *Provided further*, however, that notwithstanding any limitations in Section V.B, the Receiver is not responsible for providing refunds to consumers of Corporate Defendant.

C. Upon approval of the Receiver's final report and request for payment, but no later than one hundred twenty (120) days after entry of this Order, the Receivership will be terminated, and all funds remaining after payment of the Receiver's final approved payment must be remitted immediately to the Commission or its designated representative.

D. Any party or the Receiver may request that the Court extend the Receiver's term for good cause.

XI. COOPERATION

IT IS FURTHER ORDERED that Defendants must fully cooperate with representatives of the Commission in this case and in any investigation related to or associated with the transactions or the occurrences that are the subject of the Complaint. Defendants must provide truthful and complete information, evidence, and testimony. The Individual Defendant must appear and the Corporate Defendant must cause the Corporate Defendant's officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that a Commission representative may reasonably request upon 5 days written notice, or other reasonable notice, at such places and times as a Commission representative may designate, without the service of a subpoena.

XII. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after entry of this Order, the Individual Defendant for any business that such Defendant, individually or collectively with the other Defendant, is the majority owner of or controls directly or indirectly, and the Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for the conduct specified

in Sections III.A-C, IV.A-C, and V.A-B, and all agents and representatives who participate in the conduct specified in Sections III.A-C, IV.A-C, and V.A-B, and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XIII. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. One year after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury:

1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that

Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, the Individual Defendant must: (a) identify all telephone numbers and all physical, postal, email, and Internet addresses, including all residences; (b) identify all business activities, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest; and (c) describe in detail his involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of the Corporate Defendant or any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, the Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which he performs services whether as an employee or otherwise and any entity in which he

has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. Elite IT Partners, Inc., et al.

XIV. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 10 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant and the Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name, addresses, telephone numbers, job title or position, dates of service, and (if applicable) the reason for termination;

C. records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. a copy of each unique advertisement or other marketing material.

XV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including the financial representations upon which part of the judgment was suspended and any failure to transfer any assets as required by this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with each Defendant. Defendant must permit representatives of the Commission to interview any employee or other person affiliated with any Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1).

XVI. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED this 9th day of December 2019.

BY THE COURT:

/s/ Robert J. Shelby

ROBERT J. SHELBY
United States Chief District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

2:19-cv-00125-RJS

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ELITE IT PARTNERS, INC., a Utah corporation d/b/a ELITE IT HOME, and JAMES MICHAEL MARTINOS, individually and as an officer of ELITE IT PARTNERS, INC.,

Defendants.

AMENDED MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO VACATE[1]

Filed: January 23, 2023

Chief District Judge Robert J. Shelby

---

[1] This amended decision corrects an error in the court's original opinion concerning Tenth Circuit precedent when a party seeks relief from judgment after a subsequent change in law.

In early 2019, the Federal Trade Commission (FTC) brought this enforcement action against Defendants. The case was resolved through a court-approved settlement agreement later that year. Now before the court is Defendants' Motion to Vacate the Judgment Pursuant to Rule 60(b).[2] As explained herein, the Motion is DENIED.

BACKGROUND[3]

Beginning around 2013, Defendants—Elite IT Partners, Inc. d/b/a Elite IT Home, James Michael Martinos, and Elite Partners, Inc. (collectively Elite)—allegedly targeted older adults in a bait-and-switch operation.[4] Elite offered one-time "technical support" through online ads offering help for email issues, such as recovering forgotten passwords.[5] After receiving a customer's contact information, Elite staff would then allegedly contact the customer, deliver a fake diagnostics test, and make false statements designed to convince customers to purchase unnecessary technical support services.[6] Elite telemarketers were purportedly "trained, among other things, to (1) make false statements to consumers about the presence of viruses on consumers' computers through a three-part

---

[2] Dkt. 169, *Motion to Vacate*.

[3] The facts are pulled from the allegations in the Complaint but the court notes Defendants admitted no wrongdoing in the settlement agreement. *See* Dkt. 150, *Final Stipulated Order*.

[4] Dkt. 9, *Plaintiff's Motion for Ex Parte Temporary Restraining Order* (*TRO*) at 2.

[5] *Id.* at 4.

[6] *Id.* at 5–7.

diagnostic test, (2) falsely tell consumers Elite provides support for Yahoo and AOL, and (3) use scare tactics to make sales."[7] The sales were for an immediate "cleaning," which allegedly removed the virus.[8] Elite would then reportedly sell cleanings and additional technical service plans without informing customers of key terms and conditions, including automatic annual renewal and a $150 early cancellation fee.[9]

PROCEDURAL HISTORY

The Federal Trade Commission initiated this enforcement action against Elite in February 2019, filing a Complaint[10] and a Motion for a Temporary Restraining Order with Asset Freeze, Appointment of a Temporary Receiver, and Other Equitable Relief (TRO) pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (the Act).[11] On February 27, 2019, this court entered the TRO after finding "good cause to believe that Defendants [had] engaged in and are likely to engage in acts or practices that violate Section 5(a) of the FTC act, 15 U.S.C. § 45(a)."[12] The court also appointed a temporary receiver and froze Elite's assets.[13]

---

[7] *Id.* at 3.

[8] *Id.* at 3, 12.

[9] *Id.* at 16–18.

[10] Dkt. 1.

[11] Dkt. 9.

[12] Dkt. 15 at 2.

[13] *Id.* at 3.

Over opposition from Elite, the TRO was repeatedly extended for two-week periods between March 12 and April 23, 2019.[14] On May 6, 2019, the court entered a Stipulated Preliminary Injunction, which allowed Elite to continue its business-to-business technical support operations (services not subject to the FTC's Complaint) but kept the receivership and asset freeze in place.[15] Through counsel, the parties negotiated a Stipulated Order for Permanent Injunction and Monetary Judgment, which the court entered on December 9, 2019.[16]

The terms of the Stipulated Order included a monetary judgment and several compliance provisions.[17] While the monetary judgment totaled approximately $13.5 million dollars, the Order imposed a suspended judgment which worked to limit Elite's payment obligations to only those assets available and stayed certain compliance provisions.[18] Should the court find Elite made material misstatements, the suspension of judgment would be lifted.[19] The Order's compliance provisions required detailed recordkeeping of revenues, comprehensive personnel records, and allowed FTC oversight of Elite's records to ensure compliance.[20]

---

[14] Dkt. 47, 59, 72, 93.

[15] Dkt. 104.

[16] Dkt. 150.

[17] *See generally id.*

[18] *Id.* at 6–8.

[19] *Id.* at 7.

[20] *Id.* at 12–15.

Two years after entering the Stipulated Order, on March 17, 2022, Elite moved to vacate it.[21] Elite argues an intervening change in law entitles it to relief under Rule 60(b) subsections (5) and (6).[22] Now that briefing is complete, the court denies the Motion for the reasons explained below.

LEGAL STANDARDS

"Federal Rule of Civil Procedure 60(b) provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances."[23] "Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances."[24] Rule 60(b) provides several grounds for relief "from a final judgment, order, or proceeding."[25] Elite argues two such grounds are applicable here: Subsection (5) which provides relief where applying the judgment "prospectively is no longer equitable"; and Subsection (6) which protects parties for "any other reason that justifies relief."[26]

When reviewing a motion for vacatur under Rule 60(b)(5), a court may modify an order or judgment

---

[21] *See generally Motion to Vacate.*

[22] *Id.* at 4–13.

[23] *Johnson v. Spencer*, 950 F.3d 680, 694 (10th Cir. 2020) (internal quotations and citations omitted) (quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269–70 (2010)).

[24] *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990).

[25] Fed. R. Civ. P. 60(b).

[26] *See id.*; *Motion to Vacate* at 4–12.

"only to the extent that it has 'prospective application.'"[27] Rule 60(b)(5) is not a mechanism for challenging "the legal conclusions on which a prior judgment or order rests."[28] But if the judgment is prospective, "[t]he Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'"[29] "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court [must] modify an injunction or consent decree in light of such changes."[30]

Apart from this, Rule 60(b)(6) offers "a grand reservoir of equitable power to do justice in a particular case. Although the Rule should be liberally construed when substantial justice will thus be served, relief under it is extraordinary and reserved for exceptional circumstances"[31] and "only when necessary to accomplish justice."[32]

---

[27] *Twelve John Does v. Dist. of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (quoting Fed. R. Civ. P. 60(b)(5)).

[28] *Horne v. Flores*, 557 U.S. 433, 447 (2009).

[29] *Id.* (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

[30] *Id.* (internal citations and quotations omitted).

[31] *Johnson*, 950 F.3d at 700–01 (quoting *Kile v. United States*, 915 F.3d 682, 687 (10th Cir. 2019); *McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006)).

[32] *Kile*, 915 F.3d at 688 (internal citations and quotations omitted).

ANALYSIS

Elite argues it is entitled to relief under either 60(b)(5) or (6) based on an intervening change in relevant law by the Supreme Court decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021). Accordingly, the court first summarizes *AMG Capital Management* before evaluating whether it provides a basis for relief under 60(b)(5) or (6).

I. *AMG Capital Management, LLC v. Federal Trade Commission*

In *AMG Capital Management,* the FTC brought an action against short-term payday lenders for "unfair or deceptive acts or practices in or affecting commerce."[33] Relying on Section 13(b) of the Act, the FTC "asked the [district] court to issue a permanent injunction to prevent [the defendant] from committing future violations of the Act" and "to order monetary relief, . . . restitution and disgorgement."[34] The district court granted the FTC's motion, issued an injunction, and directed the defendant to pay $1.27 billion in restitution and disgorgement.[35] The court further directed the FTC to "use these funds first to provide direct redress to consumers and then to provide other equitable relief reasonably related to [the defendant's] alleged business practices."[36] Finally, the court ordered the FTC to deposit "remaining funds in the

---

[33] 141 S. Ct. at 1345 (quoting 15 U.S.C. § 45(a)(1)).

[34] *Id.*

[35] *Id.*

[36] *Id.* (internal quotations omitted).

United States Treasury as disgorgement."[37] The Ninth Circuit Court of Appeals affirmed the ruling on appeal.[38]

On certiorari, the Supreme Court reversed the lower courts' decisions.[39] The Court held Section 13(b) "authorizes the Commission to obtain, 'in proper cases,' a 'permanent injunction' in federal court against 'any person, partnership, or corporation' that it believes 'is violating, or is about to violate, any provision of law' that the Commission enforces."[40] But the "permanent injunction" provision does not authorize the FTC to seek, or a court to award, "equitable monetary relief such as restitution or disgorgement."[41] To obtain such relief, the Commission must proceed under either Section 5 or Section 19 of the Act.[42] Thus, *AMG Capital Management* clarified the type of relief the FTC may seek under Section 13(b) of the Act.

In the wake of this decision, Elite moved to vacate the Stipulated Order under Rule 60(b), arguing *AMG Capital Management* "changed not only the ultimate relief the FTC can seek, but it changed the entire *process* by which the FTC can seek such relief."[43] Elite

---

[37] *Id.*

[38] *Id.*

[39] *See id.* at 1352.

[40] *Id.* at 1344 (quoting 15 U.S.C. § 53(b)).

[41] *Id.*

[42] *Id.* at 1352 (citing 15 U.S.C. § 45 (permitting the FTC to use its own administrative proceedings to obtain equitable monetary relief) and 15 U.S.C. § 57 (authorizing redress from federal courts after section 5 has been pursued and with limitations)).

[43] *Motion to Vacate* at 11.

claims it faced "immense pressure inflicted by the injunction" and asset freeze issued at the outset of the proceedings, and for that reason agreed to settle.[44] According to Elite, because the injunction and asset freeze were only available due to the possibility of obtaining "*money damages* through Section 13(b)," relief "the FTC had no power to seek," the court should now vacate the entire settlement agreement under either 60(b)(5) or 60(b)(6).[45] Based on a review of *AMG Capital Management* and the high bar required to qualify for relief under Rule 60, the court concludes Elite is not entitled to relief under either section.

II. Elite is not Entitled to Vacatur Under Rule 60(b)(5)

First, Rule 60(b)(5) does not provide a basis to vacate the settlement. To qualify for relief under this section, a judgment must not only be inequitable but also "prospective," and Elite's judgment does not qualify as prospective.[46]

Elite argues the Stipulated Order judgment qualifies for relief under 60(b)(5) because it is prospectively no longer equitable after *AMG Capital Management.* Despite being a monetary judgment, Elite claims it remains "prospective" because of the prospective compliance provisions held under suspended judgment.[47] Elite IT concedes that "[m]ost courts have agreed that

---

[44] *Id.* at 12.

[45] *Motion to Vacate* at 11, 16 (emphasis added).

[46] *See* Fed. R. Civ. P. 60(b)(5) (providing relief from judgment when "applying it prospectively is no longer equitable").

[47] *Motion to Vacate* at 6–7.

a money judgment does not have prospective application, and that relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5)."[48] But it nevertheless argues the monetary judgment here is prospective because it "was purportedly 'equitable'" and the prospective compliance provisions "effectuate this 'equitable' purpose."[49]

The FTC counters that the judgment is decidedly not prospective because monetary judgments do not meet the definition.[50] According to the FTC, for a judgment to have prospective application under Rule 60(b)(5), it must be "executory" or involve "the supervision of changing conduct or conditions."[51] The FTC argues that is not the case here, because: (1) the monetary judgments remedy a past wrong and are not executory or requiring court supervision, (2) the prospective compliance provisions do not depend on the monetary judgment and would remain valid even if there was no suspended judgment, and (3) the monetary payments have been satisfied under the suspended judgment and would only have prospective relevance if Defendant Martinos lied in his sworn financial statements.[52]

The FTC is correct. The Tenth Circuit has held that monetary judgments are generally not considered

---

[48] *Motion to Vacate* at 6 (quoting *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998)).

[49] *Id.*

[50] Dkt. 174, *FTC's Response* at 10–12.

[51] *Id.* at 11 (quoting *U.S. v. Melot*, 712 F. App'x 719, 721 (10th Cir. 2017) (internal citation and quotation omitted)).

[52] *Id.* at 11–12.

prospective within the meaning of Rule 60(b)(5).[53] Elite's attempt to recharacterize the nature of the monetary judgment through the compliance provisions and the suspended judgment is unavailing. As one court observed, "[v]irtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect, even a money judgment . . . . That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5)."[54]

Elite challenges this conclusion by pointing to *Zimmerman v. Quinn*, a case where the Tenth Circuit Court of Appeals held a monetary judgment qualified as prospective within the meaning of Rule 60(b)(5).[55] In *Zimmerman*, an eighteen-month delay in transferring interests under a judgment imposed unanticipated tax liability once the transfer occurred.[56] The court concluded, "this is the type of changed circumstance contemplated by the equitable relief provision

---

[53] *See Melot,* 712 F. App'x at 721 ("A money judgment . . . simply remedies a past wrong; [i]t isn't executory and doesn't require the court to supervise any future changing conditions."); *see also FTC v. Apex Capital Grp.*, CV 18-9573-JFW(JPRx), 2021 WL 7707269, *3 (C.D. Cal. Sept. 3, 2021) ("Even if the judgment debtor has not yet paid the judgment . . . it is not 'prospective,' since it is not executory and involves no judicial supervision of changing conduct or conditions." (quoting 12 James Wm. Moore et al., *Moore*'s *Federal Practice – Civil* § 60.47 [1][b] (2021)).

[54] *Twelve John Does*, 841 F.2d at 1138.

[55] 744 F.2d 81 (10th Cir. 1984); *see* Dkt. 169 at 5.

[56] *Zimmerman*, 744 F.2d at 82.

in Rule 60(b)(5)."[57] Elite argues its circumstances mirror *Zimmerman* because after *AMG Capital Management* the Stipulated Order is "no longer equitable"—"the monetary relief and compliance conditions were never allowed by statute"—thus, the Order should be modified.[58]

But "the Rule 60(b)(5) language . . . doesn't allow a court to provide relief from any judgment, even assuming it's inequitable; it only allows for relief from judgments that have prospective application or effect."[59] The first inquiry then is not whether the judgment is still equitable—which is the inquiry Elite asks the court to consider in applying *Zimmerman*—but rather whether it is prospective.[60] To that question, Elite merely declares the judgment is prospective and enumerates the components of the judgment it believes are prospective, without citing any binding or persuasive authorities to support its position.[61]

This case differs from *Zimmerman* in that the changed circumstance—an intervening change in law—does not create a new prospective monetary cost. Rather, Elite's argument is that the changed circumstances prospectively make the monetary judgment inequitable. But, this does not change the monetary judgment to impose a new prospective element, as was the case in *Zimmerman*. And no authority presented

---

[57] *Id.* at 82.

[58] *Motion to Vacate* at 5 (*citing Zimmerman*, 744 F.2d at 83).

[59] *U.S. v. Melot*, 712 F. App'x at 720–21.

[60] *See* Fed. R. Civ. P. 60(b)(5) (providing relief when "applying a judgment *prospectively is no longer equitable*" (emphasis added)).

[61] *Motion to Vacate* at 6–7.

defines Elite's judgment in such a way that it qualifies as prospective under Rule 60(b)(5), even assuming the judgment is now inequitable under *AMG Capital Management*. On the contrary, the great weight of persuasive authority establishes that equitable monetary judgments awarded to the FTC are not prospective and thus Rule 60(b)(5) relief is unavailable.[62]

The court is particularly persuaded by *FTC v. Ivy Capital*, a recent decision in which a federal court in Nevada faced the same question presented here: whether a previously granted judgment awarding the FTC restitution and disgorgement could be vacated under Rule 60(b)(5) in light of the intervening *AMG Capital Management* decision.[63] The *Ivy Capital* court denied vacatur because Rule 60(b)(5) only applies to prospective injunctive relief, and the prior judgment imposed equitable monetary relief which is properly characterized as "a present remedy for a past wrong" rather than prospective relief.[64] The court is further persuaded by *FTC v. National Urological Group, Inc.*, which reached a similar conclusion.[65] The court there held, "Rule 60(b)(5) does not apply here because the [monetary] Contempt Judgment is retroactive rather

---

[62] *See FTC v. Ivy Cap., Inc.*, 340 F.R.D. 602, 607 (D. Nev. 2022) ("The equity referenced in Rule 60(b)(5) applies to prospective relief, not the equitable monetary relief that movants challenge here."); *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2021 WL 5774177, at *3 (N.D. Ga. Sept. 30, 2021); *FTC v. AH Media Group, LLC.*, 339 F.R.D. 612 (N.D. Cal. 2021).

[63] *Ivy Cap.*, 340 F.R.D. at 607.

[64] *Id.* (quoting *Cal. By & Through Becerra v EPA*, 978 F.3d 708, 713–17 (9th Cir. 2020)).

[65] 2021 WL 5774177 at *2–3.

than prospective as it awards monetary damages for past wrongdoing."[66]

The court concludes the Stipulated Order judgment is not prospective. The monetary judgment provides redress for past harms. Even assuming the judgment is inequitable due to *AMG Capital Management,* this does not change the character of the judgment to render it prospective. Thus, Elite is not entitled to vacatur under Rule 60(b)(5).

III. Elite is not Entitled to Vacatur Under Rule 60(b)(6)

As noted, Rule 60(b)(6) provides relief from judgment "only in extraordinary circumstances and only when necessary to accomplish justice."[67] Elite argues that in the Tenth Circuit, an intervening change in law by the United States Supreme Court qualifies for Rule 60(b)(6) relief.[68] In response, the FTC argues recent Tenth Circuit precedent holds that a post-judgment change in law only justifies 60(b)(6) relief when it arises in a related case.[69] The court agrees with the FTC.

---

[66] *FTC v. Nat'l Urological Grp., Inc.*, 2021 WL 5774177, at *3 (N.D. Ga. Sept. 30, 2021) ("Rule 60(b)(5) does not apply here because the $ 40 million 2017 Contempt Judgment is retroactive rather than prospective as it awards monetary damages for past wrongdoing.").

[67] *Cashner*, 98 F.3d 572, 579.

[68] *Motion to Vacate* at 8–10.

[69] *FTC's Response* at 18. The FTC also argues Elite's deliberate choice to settle renders Rule 60(b)(6) altogether inapplicable because the Rule "is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party re-

A brief history of relevant cases will add context to the parties' arguments. In 1958, the Tenth Circuit Court held that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies [Rule 60(b)(6)] relief."[70] Yet nearly twenty years later the court of appeals granted 60(b)(6) relief to a party in *Pierce v. Cook & Co.* after a post-judgment change in law.[71] The court distinguished *Pierce*, calling it an "extraordinary situation" because the post-judgment change in law arose "out of the same accident" pending before the court.[72] On the heels of *Pierce,* the Tenth Circuit granted 60(b)(6) relief in two other cases—*Adams v. Merrill Lynch, Pierce, Fenner & Smith*[73] and *Wilson v. Al McCord Inc.*[74]—due in part to a change in law. This seemingly conflicting precedent did not go unnoticed[75] and the court of appeals

---

mains under a duty to take legal steps to protect his own interests." *Id.* at 16 (quoting *Cashner*, 98 F.3d at 580); *see also Johnson*, 950 F.3d at 703 ("The sort of 'free, calculated, and deliberate choices' that may undermine a party's request for Rule 60(b)(6) are things like settlement agreements that have not worked out for the party[.]" (internal citations omitted)). Because the court concludes Elite's Rule 60(b)(6) claim fails for other reasons, it does not address this argument.

[70] *Collins v. City of Wichita, Kans.*, 254 F.2d 837, 839 (10th Cir. 1958).

[71] *See Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc).

[72] *Id.* at 723.

[73] 888 F.2d 696 (10th Cir. 1989).

[74] 858 F.2d 1469 (10th Cir. 1988).

[75] *See Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491 n.9 (10th Cir. 1994).

provided some clarity in subsequent decisions. It explained that *Pierce* "created a limited exception," providing 60(b)(6) relief for a post-judgment change in law only when it occurs in a related case.[76] *Adams* and *Wilson* were distinguishable because in both cases the law did not change post-judgment, rather, it changed during the pendency of the litigation.[77] In recent years, the Tenth Circuit has consistently denied post-judgment relief for a subsequent change in law "if that change did not arise in a related case."[78]

---

[76] *Sproull v. Union Tex. Prod. Corp.*, 944 F.2d 911 (10th Cir. 1991) ("In *Pierce,* this court, in an en banc decision, and in an unusual fact situation, created a limited exception to *Collins*: relief may be granted under Rule 60(b) when the post-judgment change in the law arises out of the same accident as that in which the plaintiff was injured."); *see also Van Skiver v. United States*, 952 F.2d 1241, 1243–45 (10th Cir. 1991) ("[W]hen the post-judgment change in the law did not arise in a related case, we have held [it] does not justify relief under Rule 60(b)(6)" (internal citations and quotations omitted)); *Johnston v. Cigna Corp.*, 14 F.3d 486, 497 (10th Cir. 1993) ("Absent a post-judgment change in the law in a related case, however, 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) (internal citations and quotations omitted)).

[77] *See Sproull*, 944 F.2d at 911 ("We thus distinguish both [*Adams* and *Wilson*] in that the moving parties had presented their legal issues to the court for relief and had not wholly surrendered prosecution of its claims.").

[78] *Bird v. Wyoming Att'y Gen.*, 779 F. App'x 546, 548 (10th Cir. 2019) (internal citation and quotation omitted) (upholding a denial of relief from judgment due to a change in law in an unrelated case and explaining "our precedent forecloses relief" in this situation and "it is beyond debate" that the district court did not abuse its discretion); *see also Ross v. Bush*, 704 F. App'x 771, 773–74 (10th Cir. 2017); *Sindar v. Garden*, 284 F. App'x 591, 596

This precedent forecloses Elite's 60(b)(6) claim here. Elite argues it is entitled to relief from judgment because *AMG Capital Management,* a completely unrelated case, changed the law.[79] In doing so, Elite relies heavily upon *Pierce, Adams,* and *Wilson.*[80] But the law clearly establishes those cases relied on narrow and specific exceptions to the rule in this Circuit that a litigant is not entitled to post-judgment relief based on a subsequent law change arising from an unrelated case.[81] When confronted with this precedent by the FTC,[82] Elite offered no substantive reply. It continued to rely on *Adams* and *Wilson* and did not address the newer cases cited.[83] Without a legal or factual basis to hold otherwise, this court must deny Elite's request for 60(b)(6) relief.

CONCLUSION

For the reasons stated, Defendants' Motion to Vacate the Judgment Pursuant to Rule 60(b)[84] is DENIED.

SO ORDERED this 23rd day of January, 2023.

(10th Cir. 2008); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. State of Utah*, 114 F.3d 1513, 1522 n.2 (10th Cir. 1997).

[79] *Motion to Vacate* at 7–12.

[80] *Id.* at 8–10.

[81] *See, e.g.*, *Sproull*, 944 F.2d at 911.

[82] *FTC's Response* at 18 ("More recently, the Tenth Circuit held that when a post judgment change in law does not arise in a related case, a change in the law does not justify relief." (citing *Ross*, 704 F. App'x at 773 and *Van Skiver*, 952 F.2d at 1245)).

[83] Dkt. 186 at 10; *see generally id.* at 8–11.

[84] Dkt. 169.

BY THE COURT:

/s/ Robert J. Shelby

ROBERT J. SHELBY
United States Chief District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-4009
(D.C. No. 2:19-CV-00125-RJS)
(D. Utah)

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

v.

ELITE IT PARTNERS, INC., a Utah corporation, d/b/a Elite IT Home, et al.,

Defendants - Appellants.

ORDER

Filed: March 21, 2024

Before **BACHARACH, BRISCOE**, and **McHUGH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

No.

In The
Supreme Court of the United States

ELITE IT PARTNERS, INC., AND JAMES MARTINOS,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 5,054 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 6, 2024.

OLIVER DUNFORD
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
916.503.9060
odunford@pacificlegal.org
Counsel for Petitioners

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. ___

----------X

ELITE IT PARTNERS, INC. AND JAMES MARTINOS,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Shari Lockenour, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioners Elite IT Partners, Inc. and James Martinos.*

That on the 7th day of May, 2024, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

Michael Bergman
Imad D. Abyad
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3184
mbergman@ftc.gov
iabyad@ftc.gov
Attorneys for Federal Trade Commission

Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Phone: (202) 514-2217
SupremeCtBriefs@USDOJ.gov
Solicitor General

by sending three copies of same, addressed to each individual respectively, through USPS Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* and three hundred dollar filing fee check through the FedEx Overnight Mail, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

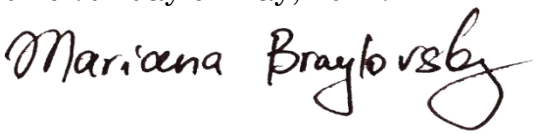
All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 2024.

Shari Lockenour

Sworn to and subscribed before me
this 7th day of May, 2024.



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026