No. 22-2078

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

KRISTY ROSS,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
1:08-cv-03233-RDB (Hon. Richard D. Bennett)

CORRECTED BRIEF OF THE FEDERAL TRADE COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Defendant-Appellant Kristy Ross was a key player in a massive "scareware" scam that tricked more than one million U.S. consumers into buying unnecessary software to fix nonexistent problems on their computers. The Federal Trade Commission sued Ross and her partners in 2008 seeking both to shut down the scam and to get consumers their money back. The FTC requested that relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes district courts to issue a "permanent injunction." When suit was filed, every court of appeals that had considered the issue agreed that this provision gave district courts authority to order both ordinary injunctive relief and equitable monetary relief, such as restitution, to redress consumer harm. In 2012, the district court entered a permanent injunction and held Ross jointly and severally liable with her partners for $163 million in consumer redress. This Court affirmed the judgment and the Supreme Court denied review. *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014) ("*Ross I*"), *cert. denied*, 574 U.S. 819 (2014).

Years later, in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court held that Section 13(b) does not authorize monetary relief. *Id.* at 1352. Under settled legal principles, that ruling applies to cases still open on direct review, but does not apply retroactively to cases like this one that were already closed. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758

(1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Nevertheless, Ross asked the district court to vacate the monetary relief portion of the judgment under Rule 60(b)(4) and Rule 60(b)(6). The district court denied the motion, holding that its prior judgment was not "void" as required for vacatur under Rule 60(b)(4), and that a change in decisional law is not the kind of "extraordinary circumstance" that warrants reopening judgment under Rule 60(b)(6). It further held that the length of time that had elapsed since entry of the judgment—nearly ten years—weighed against an extraordinary circumstance finding.

The district court's decision was correct and should be affirmed. Contrary to Ross's argument, *AMG* does not alter the analysis of either subject-matter jurisdiction or Article III standing. Furthermore, even a new decision implicating jurisdiction will not render a judgment void under Rule 60(b)(4) if there was an arguable basis for jurisdiction when the judgment was entered. Given the then-unanimous appellate decisions holding that monetary relief was proper under Section 13(b), there was plainly an arguable basis for the judgment in 2012. The district court also did not abuse its discretion in denying relief under Rule 60(b)(6), both because a change in decisional law by itself is not an extraordinary circumstance and because considerations of finality weigh heavily against vacatur of a nearly ten-year-old judgment.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court's judgment was issued on September 24, 2012. Ross filed her motion to vacate on September 9, 2021, and the district court denied the motion on September 14, 2022. Ross timely appealed the denial of the motion to vacate on October 12, 2022. This court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

Did the district court properly deny Ross's motion to vacate the monetary relief portion of the judgment under Rule 60(b)(4) and Rule 60(b)(6)?

STATEMENT OF THE CASE

A. Trial, Judgment, and Initial Appeal

The background of this case is set forth in detail in the district court's original memorandum opinion, ECF No. 262 (JA050-078), and this Court's opinion in *Ross I*, ECF No. 270 (JA081-101). Briefly, Ross was a vice president of a company that operated an internet "scareware" scam. Ross and her confederates developed software advertisements, such as popups and warnings, that falsely told consumers that their computers were infected by malicious software, illegal pornography, or critical system errors. JA058-060, JA085-086. Their goal was to trick consumers into purchasing "repair" software, at prices ranging from $30 to $100, to fix the supposed problems. JA059. The software did not in fact repair or

clean consumers' computers; to the contrary, every major computer security vendor considered the products harmful. *Id.* More than one million consumers fell victim to this scam, which earned Ross and her co-defendants more than $160 million. JA059, JA077.

Ross used the proceeds of the scam to finance an extravagant lifestyle far beyond the means of her victims. The FTC submitted evidence that in 2008 alone, Ross traveled multiple times to luxury resorts (including several stays at the Four Seasons Resort in Nevis and one at the British Colonial Hilton in the Bahamas), enjoyed extravagant meals (some costing more than $800), and racked up tens of thousands of dollars in purchases at high-end retailers, including Harrods of London (nearly $30,000), Louis Vuitton (more than $23,000), and Dolce & Gabbana (more than $13,000). ECF No. 49-2, at 2.

In 2008, the FTC sued Ross, the company, and several other high-level executives, alleging that the scareware scam violated the FTC Act's prohibition on unfair or deceptive acts or practices. The complaint asserted a single claim against Ross under Section 5 of the FTC Act, 15 U.S.C.§ 45(a), and sought several types of relief under 15 U.S.C. § 13(b) to remedy that violation, including a preliminary injunction, a permanent injunction, and equitable consumer redress to get scam victims their money back. ECF No. 1 at 18-20 (JA046-048).

All of the defendants except Ross either settled or defaulted. In 2012, following a bench trial at which Ross refused to appear, the district court held that Ross had authority to control the scam and directly participated in it with the knowledge that it was deceptive. JA66-73. The court issued a permanent injunction and held her jointly and severally liable with her co-defendants for approximately $163 million in consumer redress. JA74-80. This Court affirmed, agreeing with the unanimous holdings of other Circuits that monetary relief was proper under Section 13(b). *Ross I*, 743 F.3d at 890-92.[1] The Supreme Court denied Ross's request for further review. 574 U.S. 819 (2014).

According to the FTC's records, Ross has never paid a single penny towards satisfying the judgment. *See* JA106. Her current whereabouts are unknown; she is believed to have fled the United States.[2]

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[1] Every court of appeals that had considered the issue at that time had held that Section 13(b) authorized equitable monetary relief. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *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, 468-470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-572 (7th Cir. 1989); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011).

[2] During discovery, Ross's deposition was taken telephonically. When asked for her current address, she pleaded the Fifth Amendment. Press reports suggest that, at least as of 2012, she was on the Caribbean island of Nevis. *See Ex-Idaho woman hiding after $163M federal judgment*, Associated Press, Dec. 9, 2012, available at

B. *AMG* and the Motion To Vacate

Many years later, in April 2021, the Supreme Court decided in *AMG* that Section 13(b) does not authorize district courts to award monetary relief. *AMG*, 141 S. Ct. at 1352. Five months later, Ross moved to vacate the monetary relief portion of the judgment, arguing that it was "void" for lack of jurisdiction under Rule 60(b)(4), or alternatively that there were "extraordinary circumstances" justifying vacatur under Rule 60(b)(6).

The district court denied the motion. ECF No. 287 (JA105-113). The court held that the judgment was not void under Rule 60(b)(4) because the remedial provisions of Section 13(b) are not jurisdictional in nature and because in any case at the time of judgment there was an arguable basis for monetary remedies. JA110-112. The court further held that under this Court's precedents, a change in decisional law is not an "extraordinary circumstance" that justifies relief under Rule 60(b)(6), and also that "the amount of time that has passed since the judgment was entered—almost ten years" was "unfavorable to a finding of extraordinary circumstance." JA112-113. This appeal followed.

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https://www.idahopress.com/news/state/ex-idaho-woman-hiding-after-163m-federal-judgment/article_09ee0b88-b68e-59d0-8d47-13cac2f66609.html.

SUMMARY OF ARGUMENT

Finality is a bedrock principle of law. Cases end and parties are entitled to certainty. Exceptions to that basic rule therefore must be applied narrowly and sparingly. A new Supreme Court decision overruling long-established precedent at the Court of Appeals level does not justify revisiting decade-old judgments. Indeed, the Supreme Court has recognized time after time that new decisions apply only to cases still open on direct review—not to closed cases (like Ross's) that were fully adjudicated and closed long ago. If every settled judgment were placed at risk of reopening with each change in the law, none would ever be truly final.

Rule 60(b), which provides various exceptions to the rule of finality, is construed narrowly lest the exceptions swallow the rule. Ross presents no serious argument that she is entitled to relief under Rule 60(b)(4) or Rule 60(b)(6) by virtue of the Supreme Court's decision in *AMG*.

1. *AMG* did not render the judgment "void" within the meaning of Rule 60(b)(4). A judgment is not void simply because it was later determined to be wrong. Voidness under Rule 60(b)(4) must rest on a showing that the district court lacked even arguable subject-matter jurisdiction (or that the movant was denied due process, which Ross does not claim). Here, the district court had subject-matter jurisdiction under three separate federal jurisdictional statutes, none of which Ross questions. *AMG* had nothing to do with the court's subject-matter jurisdiction; the

Supreme Court held that the FTC Act does not grant certain remedial authority, but that holding has no bearing on district courts' jurisdiction.

Ross is also wrong that *AMG* deprived the FTC of Article III standing to sue. The FTC is an agency of the United States government that has standing under the Constitution to redress violations of the laws Congress has charged it with enforcing, as courts have recognized repeatedly. *AMG* did not change (or even address) the FTC's standing to sue for the remedy provided by statute: a permanent injunction. It merely held that that a permanent injunction did not encompass monetary redress.

No matter what, the judgment was not "void" within the meaning of Rule 60(b)(4) because there was an arguable (indeed, a far more than simply arguable) basis for the judgment at the time it was rendered. In 2014, seven courts of appeals had held unanimously in precedential opinions that Section 13(b) authorized monetary relief. Ross's preferred approach of assessing judgments in hindsight, based on the law as it exists today, is contrary to this Court's precedents and would eviscerate the Supreme Court's careful distinction between open and closed cases, giving retroactive effect to new decisions and neutering the rule of finality.

2. The district court properly exercised its discretion to deny relief under Rule 60(b)(6) because this case presents no extraordinary circumstances. A change in decisional law rendered long after a judgment is an ordinary event, not an

extraordinary circumstance, and courts routinely decline Rule 60(b)(6) relief on that ground. Ross is wrong that her having raised an argument the Supreme Court later accepted transforms this routine case into an extraordinary one that justifies overriding principles of finality. This Court and others have rejected that reasoning, and Ross cites no persuasive authority to the contrary. Moreover, as the district court properly held, the length of time that has elapsed since judgment was entered—now more than a decade—weighs heavily against Rule 60(b)(6) relief.

STANDARD OF REVIEW

This Court reviews denial of a rule 60(b)(4) motion de novo and reviews denial of a Rule 60(b)(6) motion for abuse of discretion. *United States v. Welsh*, 879 F.3d 530, 533 (4th Cir. 2018). An appeal from denial of Rule 60(b) relief "does not bring up the underlying judgment for review." *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011).

ARGUMENT

Ross contends that in light of *AMG*, the monetary relief portion of the judgment must be vacated. But as a general matter, new Supreme Court decisions do not provide a basis for reopening judgments that were entered years earlier. "[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983). This rule reflects an important public policy dictating "that there

be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted).

Consistent with that policy, the Supreme Court has drawn a sharp line between open cases and closed cases for purposes of deciding whether a new decision can be applied retroactively. New decisions are given retroactive effect in "all cases still open on direct review." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). But they "do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). That is because "retroactivity in civil cases must be limited by the need for finality." *James B. Beam Distilling Co. v. Ga.*, 501 U.S. 529, 541 (1991) (Souter, J.). If prior decisions could be attacked at any time based on new developments in the law, no judgment would ever be truly final. In this case, Ross had a full and fair opportunity to litigate her case up through the Supreme Court. She lost, and is bound by that result. *AMG* does not provide a basis for reopening a judgment which was finally adjudicated and affirmed on appeal years earlier.

Ross's arguments to the contrary are based upon Rule 60(b), which allows district courts to reopen a judgment in "a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). The rule specifies six permissible grounds for

seeking relief from a judgment. *See* Fed. R. Civ. P. 60(b).[3] Because of the importance of finality to the legal system, these exceptions to the finality rule must be strictly construed. *See, e.g.*, *Aikens v. Ingram*, 652 F.3d 496, 500-01 (4th Cir. 2011). Here, Ross invoked two grounds: Rule 60(b)(4) and Rule 60(b)(6). The district court properly denied relief on both.

I. THE MONETARY JUDGMENT IS NOT VOID UNDER RULE 60(b)(4).

Rule 60(b)(4) allows the court to set aside a judgment that is "void." Ross argues that the monetary relief portion of the judgment should be deemed void in light of *AMG* on the theory that the decision either deprived the district court of subject-matter jurisdiction to entertain a monetary relief claim or stripped the FTC of Article III standing to seek such relief. The district court properly rejected these

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[3] Rule 60(b) provides in relevant part:

> On motion and just terms, the court may relieve a party… 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.

All motions must be filed within a "reasonable time," and motions under subsections (1), (2), or (3) must be filed "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

arguments and held that the judgment is not void within the meaning of Rule 60(b)(4).

The Supreme Court has made clear that Rule 60(b)(4) is very narrow. A judgment is not void "simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). Rather, a judgment is only "void" if it suffers from a "fundamental infirmity." *Id.* "The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.* A judgment is void under Rule 60(b)(4) "only in the rare instance where [it] is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271.

Furthermore, given the importance of finality to the judicial system, not every jurisdictional error will render a judgment void. Relief under Rule 60(b)(4) is reserved "for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." *Espinosa*, 559 U.S. at 271 (internal quotation marks omitted); *see also Wendt v. Leonard*, 431 F.3d 410, 413 (4th Cir. 2005) (Rule 60(b)(4) covers "the rare instance of a clear usurpation of power," which occurs "only when there is a total want of jurisdiction and no arguable basis on which [the court] could have rested a finding that it had jurisdiction.") (cleaned

up). In other words, if there was an arguable basis for jurisdiction when judgment was rendered, Rule 60(b)(4) does not afford a basis for relief.

Here, the judgment against Ross is not "void" within the meaning of Rule 60(b)(4) because (as the district court held), *AMG* did not affect the district court's jurisdiction at all. In any event, there was plainly an arguable basis for the monetary award in 2012, given the then-unanimous holdings of the courts of appeals that Section 13(b) authorized monetary relief.

A. *AMG* Did Not Affect the District Court's Subject-Matter Jurisdiction or the FTC's Standing.

Ross asserts two types of jurisdictional error. She argues that in light of *AMG*, the district court lacked subject-matter jurisdiction to award monetary relief and the FTC lacked Article III standing. Both contentions lack merit.

1. The District Court Had Subject-Matter Jurisdiction.

The district court clearly had subject-matter jurisdiction over the FTC's enforcement action. The complaint invoked the subject-matter jurisdiction granted by Congress in three independent provisions of Title 28: (1) Section 1331, which gives the district courts jurisdiction over actions arising under federal law; (2) Section 1337(a), which gives district courts jurisdiction over actions "arising under any Act of Congress regulating commerce," which includes the FTC Act; and (3) Section 1345, which grants the district courts jurisdiction over actions commenced by the United States or its officers or agencies who are authorized to sue by Act of

Congress. *See* JA031; 28 U.S.C. §§ 1331, 1337(a), 1345. These statutes plainly conferred jurisdiction on the district court to adjudicate the FTC's claims under Section 13(b) of the FTC Act. *See, e.g.*, *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 153-54 (3d Cir. 2019).

Ross's argument is that by narrowly construing Section 13(b) to exclude monetary relief, the Supreme Court somehow restricted the scope of the district court's subject-matter jurisdiction. That is wrong because Section 13(b) is a remedial provision, not a jurisdictional one. In *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Supreme Court established a bright-line rule for determining whether a statute is jurisdictional: unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional … courts should treat the restriction as nonjurisdictional in character." *Id.* at 515-16. Section 13(b) does not "clearly state" that it is jurisdictional; hence it is not. *See Viropharma*, 917 F.3d at 154 ("Section 13(b) includes no indicia that Congress intended to 'rank a statutory limitation . . . as jurisdictional'; as such, we must follow the Supreme Court's 'readily administrable bright line' rule and treat the statutory language as nonjurisdictional.")

This Court applied the *Arbaugh* rule to a Rule 60(b)(4) issue in analogous circumstances in *United States v. Welsh*, 879 F.3d 530 (4th Cir. 2018). That case held that a statutory requirement that a person be in the custody of the Bureau of

Prisons as a precondition for a civil commitment proceeding was nonjurisdictional because "nothing in the text of [the statute] suggests that it's a limit on the court's jurisdiction," and concluded that the judgment was not void even though the defendant argued he was not legally in BOP custody. *Id.* at 534, 536. The same reasoning applies here. Nothing in the text of Section 13(b) mentions jurisdiction, so a district court's inability to award monetary relief is not a limitation on its subject-matter jurisdiction.[4]

The point is underscored by *AMG* itself. The Supreme Court did not hold that the district court lacked subject-matter jurisdiction insofar as the FTC was seeking monetary remedies. Instead, the Court held *on the merits* that the words "permanent injunction" in Section 13(b) could not be construed to include equitable monetary relief, such as restitution or disgorgement. *AMG*, 141 S. Ct. at 1344, 1347-49. Had the Court believed that the district court lacked subject-matter jurisdiction (or even that there was an arguable issue concerning jurisdiction), it would have said so; indeed, the Court could not have reached the merits without first satisfying itself that jurisdiction was proper. *See, e.g.*, *Steel Co. v. Citizens for*

[4] The heading of Section 13(a), as it appears in the U.S. Code compilation, uses the word "jurisdiction," but no such descriptor appears in Section 13(b). Furthermore, the heading was added by the codifiers and does not appear in the text enacted by Congress. It therefore has no weight for statutory construction purposes. *See, e.g.*, *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

a Better Environment, 523 U.S. 83, 94-95 (1998) (courts must address jurisdictional issues before merits).

To be sure, as the Supreme Court has repeatedly observed, "[j]urisdiction … is a word of many, too many, meanings." *Arbaugh*, 546 U.S. at 510-11 (quoting *Steel Co.*, 523 U.S. at 90). Many older decisions erroneously conflated subject-matter jurisdiction and merits-related determinations, but *Arbaugh* makes clear that such decisions "have no precedential effect." *Id*. at 511.[5] Courts and statutes also sometimes use the word "jurisdiction" to refer to limitations on a court's ability to award particular remedies, as opposed to its ability to hear a case at all. But as the Supreme Court explained just this past year, "the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims." *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022).

Given the limited scope of Rule 60(b)(4), the lack of "jurisdiction" to grant a remedy is not sufficient to render a settled judgment void. The D.C. Circuit held as much in *United States v. Philip Morris, USA Inc.*, 840 F.3d 844 (D.C. Cir. 2016),

[5] *United States v. Walker*, 109 U.S. 258 (1883), which Ross cites (Br. 15), illustrates this confusion. That case held that a trial court lacked the statutory authority to order the prior administrator of an estate to turn over certain funds to a successor administrator. *Id.* at 265-67. Although the Court spoke in terms of "jurisdiction," in light of *Arbaugh* the ruling is better viewed as a merits-based determination.

explaining directly that Rule 60(b)(4) is not concerned with restrictions on a court's remedial authority. In *Philip Morris*, the government sued cigarette manufacturers under the Racketeer Influenced and Corrupt Organizations Act. The district court entered an injunction with multiple remedial provisions, including a requirement that the defendants run corrective television advertisements about the dangers of smoking. *Id.* at 848. One defendant was required to run two sets of ads: one in its own right, and one as a successor to another company. It sought relief under Rule 60(b)(4), arguing that the injunction was void insofar as it required two sets of ads because that would exceed the district court's "remedial jurisdiction" under RICO. *Id*. The D.C. Circuit rejected this argument. It held that even if this aspect of the injunction went beyond what the court could properly impose, "Rule 60(b)(4) does not permit relief where a court has exceeded its remedial authority." *Id.* at 851.

Ross makes the same argument and should meet the same fate. As *Philip Morris* makes clear, a remedy error does not render a judgment void under Rule 60(b)(4). Ross attempts to distinguish *Philip Morris* on the ground that "there was no dispute [there] that the district court possessed subject matter jurisdiction to provide equitable relief." Br. 18. But that is equally true here; as noted above, Ross does not dispute that the district court had subject-matter jurisdiction under three separate statutes or that it had authority to issue a permanent injunction. The

Court's holding in *AMG* that a "permanent injunction" cannot include monetary relief limited the district courts' remedial authority but did not strip them of jurisdiction.

2. The FTC Had Article III Standing.

Ross is likewise wrong that *AMG* rendered the judgment "void" under Rule 60(b)(4) because it retroactively deprived the FTC of standing to sue under Article III of the Constitution. Br. 14-15, 19.

As an agency of the United States, the FTC plainly has Article III standing to sue and seek remedies for violations of the laws Congress has charged the agency with enforcing. The violation itself is an injury to the sovereignty of the United States sufficient to confer standing for an enforcement suit. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 403 (4th Cir. 2013); *see also Stauffer v. Brooks Bros.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010) (by enacting statute, "Congress … defined an injury to the United States," and "a violation of that statute inherently causes injury to the United States"). As a leading treatise puts it, "[s]tanding to pursue the general interests of the public is easily recognized when federal officials responsible for enforcing specific statutory schemes bring suit under the aegis of the statute." 13B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3531.11 (Westlaw ed. Apr. 2022).

In this case, the injury—Ross's violation of Section 5—can be redressed by the relief provided by statute: a "permanent injunction." *AMG* merely confirms that a "permanent injunction" cannot include monetary relief. This is a merits-related question that does not impact the FTC's standing to sue.

Again, the error in Ross's argument is evident from *AMG* itself. The Supreme Court did not hold that the FTC lacked *standing* to seek monetary relief as part of a request for an injunction under Section 13(b); indeed, it did not use the word "standing" at all. Instead, it held *on the merits* that the term "permanent injunction" as used in Section 13(b) does not include equitable monetary relief to redress consumer injury. *AMG*, 141 S. Ct. at 1344, 1347-49. Had the Court believed that the FTC lacked Article III standing to assert a claim for equitable monetary relief under Section 13(b), it would have said so, and would not have reached the merits. *See Steel Co.*, 523 U.S. at 94-95.

The cases relied on by Ross are not to the contrary. They largely involve findings that private plaintiffs lacked standing to seek certain types of relief, but none of Ross's cases involves the standing of the United States or its agencies to enforce statutory provisions, and none of them remotely suggests that the FTC lacked Article III standing here.

For example, Ross relies on *Emery v. Roanoke City School Board*, 432 F.3d 294 (4th Cir. 2005). In that case, a private plaintiff sued under the Individuals With

Disabilities in Education Act seeking reimbursement of educational expenses, but the Court held that he lacked standing because he had not personally expended any funds and thus had not suffered any injury-in-fact. *Id.* at 295, 299. The court also noted in dicta that the school board's failure to provide an individualized education plan could be a cognizable injury, but that it was no longer redressable because the plaintiff was not seeking and was not eligible for an injunction (due to his age and his delay in bringing suit) and the statute did not provide a damages remedy. *Id.* at 299. That situation bears no resemblance to this case, where the government suffered an injury to its sovereignty that was redressable by the relief sought, which included a behavioral remedy as well as a monetary one.

Ross mistakenly cites *National Urban League v. Ross*, 977 F.3d 698 (9th Cir. 2022), for the proposition that "[a]n injury is necessarily not redressable if the court has no authority to authorize the relief requested." Br. 15. But that quotation comes from the dissenting opinion. *Nat'l Urban League*, 977 F.3d at 710 (Bumatay, J., dissenting). And though the statement may be correct in the abstract, it does not support Ross's argument because the dissent argued that the plaintiff had no available remedy of any sort. No similar circumstances are present here.

Ross's other cases are even farther afield. *Great-West Life Annuity & Insurance Co. v. Knudson*, 534 U.S. 204 (2002), did not involve standing or subject-matter jurisdiction. The Court held on the merits that a provision of ERISA

authorizing a plaintiff to sue for "appropriate equitable relief" did not authorize an award of monetary relief. *Id.* at 220-21. As in *AMG*, the Court did not suggest that the plaintiff lacked standing to seek such relief.

Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982), involved a statute giving the district courts jurisdiction over certain contract claims against the United States. The Court held that jurisdiction was lacking because the regulations the plaintiff cited did not create an implied contract. *Id.* at 738-41. That holding has no bearing here.

City of Los Angeles v. Lyons, 461 U.S. 95 (1983), is likewise inapposite. In that case, the Court held that a plaintiff who had been placed in a chokehold during a traffic stop lacked standing to seek an injunction against the use of chokeholds because he had not alleged a likelihood of suffering a chokehold in the future. *Id.* at 105-06. The Court noted that the plaintiff could recover damages for his past injury. *Id.* at 111. *Lyons* has no apparent relevance here; if anything, it supports the conclusion that the FTC had standing under Article III to seek monetary relief for the harm caused by past Ross's illegal conduct.

Nor does *Mumid v. Abraham Lincoln High School*, 618 F.3d 789 (8th Cir. 2010), help Ross. That case held that former students at a high school lacked standing to sue the school and the school district for prospective injunctive relief for civil rights violations because they were no longer students there. *Id.* at 797.

The court separately held that the statute under which the plaintiffs sued did not authorize monetary damages, but contrary to Ross's assertion, it addressed this issue on the merits and not as part of the standing inquiry. *Id.* at 797-98.

B. In Any Event, There Was an Arguable Basis for the District Court's Monetary Judgment in 2012.

For the foregoing reasons, the district court's award of monetary relief in the 2012 judgment was not a "jurisdictional" error within the ambit of Rule 60(b)(4). But even if it were, it would not be the kind of extraordinary jurisdictional error that would render the judgment "void" under the Rule because there was plainly an arguable basis for the district court to order monetary relief in 2012 based on the then-unanimous interpretation of Section 13(b) by appellate courts.

1. Rule 60(b)(4) Affords Relief Only When There Is No Arguable Basis for Jurisdiction.

Ross initially argues that the judgment may be vacated under Rule 60(b)(4) whether or not there was an arguable basis for jurisdiction. Br. 20-24. She bases this argument on the Supreme Court's statement in *Espinosa* that courts have "generally" reserved Rule 60(b)(4) relief for cases where there was no arguable basis for jurisdiction, which she reads as creating some wiggle room. *See* 559 U.S. at 271. But this Court has repeatedly held that that relief under Rule 60(b)(4) may be granted "only" where there is no arguable basis for the exercise of jurisdiction. *See Welsh*, 879 F.3d at 533-34 (judgment is void "only when there is a total want

of jurisdiction and no arguable basis on which [the district court] could have rested a finding that it had jurisdiction") (quoting *Wendt*, 431 F.3d at 413). Ross's argument is thus flatly contrary to the law of this Circuit.

Ross also argues that "numerous" decisions of this Court have granted vacatur under Rule 60(b)(4) even where there was an arguable basis for jurisdiction. Br. 22-24. But the cases she cites do not support the assertion. *Compton v. Alston Steamship Co.*, 608 F.2d 96 (4th Cir. 1979), discussed in more detail *infra* at 28, held that a partial vacatur was required under Rule 60(b)(6)—not Rule 60(b)(4). *See id.* at 107 (vacatur required "apart from any question of the voidness of the judgment"). *Heckert v. Dotson*, 272 F.3d 253 (4th Cir. 2001), held that a bankruptcy court judgment was void because the bankruptcy court lacked jurisdiction to enter a second judgment on a nondischargeable debt that a state court had already reduced to judgment. Although the Court did not use the term "arguable basis," it is clear from the discussion that the Court found there was no arguable basis for the bankruptcy court's action. In any event, *Heckert* was decided well before *Espinosa*, *Wendt*, and *Welsh*, which clarified the narrow standard for Rule 60(b)(4) relief. Neither *Compton* nor *Heckert* suggests that a court may grant a Rule 60(b)(4) motion where there was an arguable basis for jurisdiction.[6]

[6] Ross also cites two non-precedential decisions, neither of which support her position. Br. 23. In *Jackson v. United States*, 245 F. App'x 258 (4th Cir. 2007), the

As a backup, Ross contends that the "no arguable basis" standard should be "cabined to those situations in which a party … squandered its opportunity to challenge jurisdiction in the first instance." Br. 24. Such a rule would be flatly inconsistent with *Wendt* and *Welsh*, which make clear that relief under Rule 60(b)(4) is appropriate *only* when there is no arguable basis for the exercise of jurisdiction, whether or not a contrary argument was preserved. In support of her proposed exception, Ross cites *Hawkins v. i-TV Digitális Távközlési zrt.*, 935 F.3d 211 (4th Cir. 2019). Br. 23. But that case supports the FTC, not Ross. In *Hawkins*, the Court applied the "no arguable basis" standard, holding that the district court erred in setting aside a default judgment where the defendant had previously appeared in the lawsuit because there was an arguable basis for the exercise of diversity jurisdiction. *Id.* at 221-26. The Court distinguished the situation of a defendant who never appears in the lawsuit at all and is named in a default judgment. In that circumstance, "the defendant is usually free to challenge the existence of subject matter jurisdiction in a later proceeding." *Id.* at 221. But the

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Court held that a district court judgment was void where it was issued after the plaintiff voluntarily withdrew his complaint under Rule 41(a)(1)(i), thus ending the action. Although the Court did not use the terms "arguable basis," it was clear that there was no arguable basis for the judgment. In *Girardi v. Heep*, No. 98-2617, 1999 U.S. App LEXIS 34309 (4th Cir. Dec. 30, 1999), the Court held that a judgment was void for lack of due process where the movant was never given an opportunity to be heard. *Id.* at *11-17. Ross makes no due process argument here.

rule is different where the defendant did participate in the lawsuit. *Id.* In that circumstance, the "no arguable basis" standard applies. *Id.*

That is precisely the situation in this case. Ross appeared in the lawsuit, challenged the court's authority to award monetary relief, and lost. Although a court might reach a different result today under *AMG*, she had a full and fair opportunity to litigate the issue and is bound by the past judgment. *Hawkins* thus confirms that Ross is not entitled to relief under Rule 60(b)(4) unless there was no arguable basis for district court jurisdiction.

2. There Was an Arguable Basis for the District Court's Decision Based on Then-Unanimous Legal Authority.

The district court plainly had an arguable basis for awarding monetary relief in 2012 because at that time, every court of appeals to have considered the issue had ruled that the authority to issue a permanent injunction under Section 13(b) included the authority to order equitable monetary relief to redress consumer harm. *See* cases cited *supra* n.1. As this Court has explained, the "arguable basis" standard "make[s] no distinction between factual and legal errors." *Hawkins*, 935 F.3d at 222. In *Wendt*, for example, the court found that a split in the circuits, by itself, foreclosed Rule 60(b)(4) relief because "the mere fact that authorities disagree on this issue confirms that the district court had an 'arguable basis' for jurisdiction." 431 F.3d at 414. In this case, the basis for the district court's decision was even stronger because in 2012, when the district court issued its decision, there

was no divergence of viewpoints; rather, courts had unanimously held that Section 13(b) did authorize monetary relief. No court disagreed until 2019, when the Seventh Circuit (over a dissent from three judges) overruled its prior decisions permitting monetary relief. *See FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019).

Ross incorrectly argues that whether there was an arguable basis for the award of monetary relief must be assessed based on the law as it exists today, rather than in 2012 when judgment was entered. That argument is foreclosed by *Hawkins*, which rejected Rule 60(b)(4) relief because the putative jurisdiction error "certainly was arguable in 2007, when the judgment was entered." *Hawkins*, 935 F.3d at 226. Ross's reliance on *Rivers v. Roadway Express*, 511 U.S. 298 (1994), is misplaced. *Rivers* explains that when the Supreme Court interprets a statute, its construction is "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id.* at 312-13. But that statement does not address Rule 60(b)(4) or the arguable basis test. And, as the Court's decision in *Harper* explains, a new statutory construction is given effect only "in cases still open on direct review." *Harper*, 509 U.S. at 97; *see also Reynoldsville Casket*, 514 U.S. at 758. Ross quotes *Harper* (Br. 25-26) but omits this critical language. Ross's proposed rule would eviscerate the careful distinction *Harper* draws between open and closed cases, effectively giving retroactive effect

to new Supreme Court decisions in *all* cases, no matter how long ago they were decided or how reasonable the lower court decisions may have been at the time.

II. THE DISTRICT COURT PROPERLY DENIED ROSS'S MOTION TO VACATE THE JUDGMENT UNDER RULE 60(b)(6).

Ross argues in the alternative that the district court should have vacated the judgment under Rule 60(b)(6), which is a catchall provision that permits relief when none of the grounds specified in (b)(1) through (b)(5) apply. *See Kemp v. United States*, 142 S. Ct. 1856, 1861 (2022).[7] The district court did not abuse its discretion in denying relief on this ground. Because of the importance to the legal system in maintaining the finality of judgments, relief under Rule 60(b)(6) is available only where the movant shows "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. As *Gonzalez* explains, it is "hardly extraordinary" for the Supreme Court to differ with lower courts as to the interpretation of federal statutes, so such

[7] A threshold question is whether the district even had authority to vacate under Rule 60(b)(6) in light of *Kemp*, which was decided after the motion to vacate was fully briefed. *Kemp* held that requests for vacatur based on a judge's error of law are reviewable under Rule 60(b)(1), and hence are subject to a one-year limitations period—rather than Rule 60(b)(6). 142 S. Ct. at 1861-62. But it limited its opinion to situations where the district court erred by "misapplying controlling law to record facts," and did not decide "whether a judicial decision rendered erroneous by subsequent legal or factual changes also qualifies as a 'mistake' under Rule 60(b)(1)." *Id.* at 1862 n.2. If the monetary award was a "mistake" within the meaning of Rule 60(b)(1), then Rule 60(b)(6) relief is unavailable. But the Court need not resolve this issue because the district court did not abuse its discretion in denying relief under Rule 60(b)(6) in any event.

decisions generally do not "provide[] cause for reopening cases long since final." *Id.* at 536; *see also 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)."). Consistent with those decisions, this Court has repeatedly held that "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) (quoting *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993)). Thus the Supreme Court's reversal of the prevailing interpretation of Section 13(b) is not grounds for vacatur of a past judgment under Rule 60(b)(6).

Ross's argument is essentially that this Court should ignore its holdings in *Moses* and *Dowell*. But of course, this Court is bound by its own precedents. *See, e.g.*, *Stinnie v. Holcomb*, 37 F.4th 977, 983 (4th Cir. 2022). In any case, this Court's rule that a mere change in decisional law is not a basis for relief under Rule 60(b)(6) is plainly correct. If every change in decisional law justified reopening a judgment, then the careful distinction that *Harper* draws between cases "open on direct review" and closed cases would be eviscerated, and any judgment, however old, would be subject to challenge at any time.

Ross's reliance on this Court's 1979 decision in *Compton* is misplaced. There, a sailor sued a shipping company for unpaid wages and a substantial

statutory penalty. *Compton*, 608 F.2d at 98-99. The shipping company failed to appear, and the district court issued a default judgment that included both the unpaid wages and the penalties. *Id.* at 99-100. The shipping company then promptly filed a motion to set aside the judgment. *Id.* at 100. This Court reversed the denial of the motion to vacate, holding that the award of penalties was plainly erroneous under the terms of the statute and existing case law. *Compton* does not involve a situation remotely resembling this case, where the judgment was in accord with existing law and the law changed long after the judgment.[8]

Nor is this case anything like *Buck v. Davis*, 580 U.S. 100 (2017). That was a capital murder case where the defendant (Buck) was sentenced to death after his defense counsel called an expert psychologist witness who testified that Buck was statistically more likely to act violently because he was Black. *Id.* at 104, 107-08. Buck filed a federal habeas corpus petition alleging ineffective assistance of counsel, but despite the egregious facts the petition was denied on procedural grounds. *Id.* at 110-11. That ruling was correct under the existing law, but the Supreme Court later crafted an exception to the procedural default rule that would

[8] Moreover, in light of *Kemp*, a motion like that in *Compton* was based on the misapplication of existing law can now only be brought under Rule 60(b)(1). *See Kemp*, 142 S. Ct. at 1861-62 & n.2 (discussed *supra* n.7).

have helped Buck. *Id.* at 111-12. Buck then moved to vacate the habeas judgment under Rule 60(b)(6). *Id.* at 112.

Although *Buck* (unlike *Compton*) does involve a change in decisional law, the change in law was not the sole basis for seeking vacatur. Rather, Buck "identified ten other factors that, he said, constituted the 'extraordinary circumstances' required to justify reopening the … judgment under the Rule." *Id.* at 105; *see also id.* at 113 (listing factors) . The Supreme Court focused on two factors in holding that Buck was entitled to Rule 60(b)(6) relief. First—and wholly unlike this case—the Court found that punishing people based on race was a "disturbing departure from a basic premise of our criminal justice system," and that racial discrimination was "especially pernicious" in this context. *Id*. at 123-24. Second, the Court noted that in several other capital murder cases where the same psychologist had offered similar testimony about racial propensity to commit violence, the state confessed error and consented to resentencing. *Id.* at 124-25.

In short, *Buck* was a highly unusual case that presented circumstances wholly absent here and has little relevance beyond its particular and shocking facts. Notably, courts have declined to grant relief under Rule 60(b)(6) in other cases where defendants have relied on the same change of law at issue in *Buck* because those cases did not involve the kind of odious racial discrimination at issue in *Buck. See, e.g.*, *Raby v. Davis*, 907 F.3d 880, 885 (5th Cir. 2018) (distinguishing

Buck and finding no extraordinary circumstances where defendant "neither alleges racial discrimination nor demonstrates how his claims 'give rise to the sort of pernicious injury that affects communities at large.'"). Similarly, in this case, Ross was not a victim of racial profiling and she is not being treated differently from other similarly situated defendants. Furthermore, Ross does not face a death sentence—she is merely required to pay back money she stole from more than a million consumers and has refused to pay for years, even apparently fleeing the country to avoid justice.[9]

Ross also argues that this case should be deemed "extraordinary" because she advocated the same theory the Supreme Court ultimately adopted in *AMG*. But "[i]t is not extraordinary for the Supreme Court to deny certiorari in a court of appeals case that it ultimately overrules in the review of a later similar case." *United States ex rel. Garibaldi v. Orleans Par. Sch. Bd.*, 397 F.3d 334, 339 (5th Cir. 2005). Courts have held that a litigant's diligence in raising an argument that the Supreme Court later adopts is insufficient by itself to warrant relief under Rule 60(b)(6). For example, in *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157 (5th Cir.

[9] Justice Sotomayor's concurring opinion in *Kemp* states that extraordinary circumstances "including a change in controlling law" may provide a basis for relief under Rule 60(b)(6), citing *Buck* as an example. *Kemp*, 142 S. Ct. at 1865 (Sotomayor, J., concurring). As discussed above, however, *Buck* involved much more than a change in controlling law. In any event, Justice Sotomayor's opinion was not joined by any other members of the Court.

1990), the district court declined to award attorneys' fees on the ground that plaintiff was not a prevailing party, the appellate court affirmed, and the Supreme Court denied certiorari. Several years later, the Supreme Court changed the definition of prevailing party; under the new definition, plaintiff would have qualified for fee-shifting. The Fifth Circuit affirmed the denial of Rule 60(b)(6) relief, noting that "the issue on which [plaintiff] asks the district court for relief from final judgment was included in his prior appeal and decided against him," and that he could not "ask now for the district court to rule again on the very issues decided on appeal." *Id.* at 159. The court held that "Rule 60(b) does not give the right to reopen litigation finally concluded over two years previously on the grounds of a change in law." *Id.* at 160; *see also Raby*, 907 F.3d at 885 ("[P]ersistence alone does not warrant relief from judgment"); *Diaz v. Stephens*, 731 F.3d 370, 377 (5th Cir. 2013) (affirming denial of motion to reopen habeas case based on new law despite "extraordinary diligence" in raising argument).

Ross cites several Ninth Circuit cases setting forth a multifactor test, never adopted by this Court, for determining whether a change in decisional law can be deemed an "extraordinary circumstance" under Rule 60(b)(6) (the Ninth Circuit has cautioned that these factors do not "impose a rigid or exhaustive checklist.") *See Henson v. Fidelity Nat'l Fin., Inc.*, 943 F.3d 434, 444-53 (9th Cir. 2019); *Phelps v. Alameida*, 569 F.3d 1120, 1135-40 (9th Cir. 2009). One factor is the

movant's "exercise of diligence in pursuing relief." *Henson*, 943 F.3d at 449. But that is just one factor; Ross does not even claim that she satisfies the others. Moreover, as the district court correctly noted (JA113), this Court has not employed a similar multifactor analysis. The district court properly followed this Court's guidance in *Moses* and *Dowell*.

The Ninth Circuit's test would not help Ross much anyway. That court does not deem a movant's diligence in pursuing relief sufficient by itself to justify Rule 60(b)(6) relief. Significantly, the Ninth Circuit also considers "the delay between the judgment and the motion for Rule 60(b)(6) relief." *Henson*, 943 F.3d at 451-52. "This factor represents the simple principle that a change in the law should not indefinitely render preexisting judgments subject to potential challenge." *Phelps*, 569 F.3d at 1138. In this case, nine years elapsed between the time when judgment was entered (September 2012) and the time when Ross filed her Rule 60(b) motion (September 2021). Even measuring from the Supreme Court's denial of certiorari (October 2014), the delay is nearly seven years. Given the importance of finality, such a long delay weighs heavily against reopening a judgment, no matter how diligent a litigant may have previously been.[10] The district court was well aware

[10] The first factor of the Ninth Circuit test, which looks at the nature of the change in the law, would also weigh against Ross here. That factor looks at whether the law was unsettled at the time of the original decision, which would cut in favor of Rule 60(b)(6) relief, or whether (as in *Gonzalez*) the law was settled at

that Ross had previously argued that Section 13(b) did not authorize monetary relief; it even described that fact as being "[o]f particular importance." JA107. But the court properly held that the length of time that had passed since judgment was "unfavorable to a finding of extraordinary circumstances." JA113. That finding was well within the district court's discretion even under the Ninth Circuit framework.

CONCLUSION

The district court's order denying Ross's motion to vacate should be affirmed.

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the time but later upset or overturned by the Supreme Court, which would cut against relief. *Phelps*, 569 F.3d at 1135-36. Another factor is whether there is a "close connection" between the original and intervening decisions. *Id.* at 1139. Here there is no connection at all apart from the fact that both this case and *AMG* sought monetary relief under Section 13(b).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman type.

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