No. 23-4009

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

ELITE IT PARTNERS, INC.,
and
JAMES MICHAEL MARTINOS,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Utah
No. 2:19-cv-0125
(Hon. Robert J. Shelby)

ANSWERING BRIEF OF APPELLEE THE FEDERAL TRADE COMMISSION

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ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(3), appellee states that there are no prior or related appeals.

INTRODUCTION

Appellants James Martinos and his company, Elite IT Partners (collectively, "defendants"), operated a deceptive technical support scam that took more than $13 million from consumers. Preying mostly on elderly customers looking to recover their email passwords, the defendants ran bogus "diagnostic" tests that convinced customers that their computers were infected with viruses in order to trick them into paying for costly and unnecessary repair services. Seeking to shut down the operation and return money to injured consumers, the Federal Trade Commission ("FTC") sued Martinos and the company for violating federal consumer protection laws.

Rather than challenge the FTC's case in court, the defendants elected to settle. In December 2019, by stipulation of the parties, the district court entered a final order imposing a monetary judgment equal to the amount of consumer loss—$13.5 million. But the order only required the defendants to pay what they had in available assets, less than $400,000; the remainder of the judgment was suspended. The order also enjoined defendants from certain deceptive sales tactics. Defendants expressly waived their right to appeal from or otherwise

challenge the order. Following the judgment, the FTC collected all available assets and distributed refunds to consumers.

In April 2021, the Supreme Court held that Section 13(b) of the FTC Act does not authorize monetary relief. *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021). Nearly a year later, and more than two years after they settled, defendants asked the district court to vacate the 2019 judgment, invoking Federal Rule of Civil Procedure 60(b). Defendants claimed it was no longer equitable to apply the judgment prospectively, arguing for relief under Rule 60(b)(5), and asserted that the *AMG* decision was an extraordinary circumstance justifying relief under Rule 60(b)(6). The district court rejected both arguments. On appeal, defendants abandon their Rule 60(b)(5) argument. Thus, the only issue before this Court is whether the district court abused its discretion in denying relief under Rule 60(b)(6).

The Court should affirm. It is a settled principle that new law created by the Supreme Court does not apply to closed cases, and *AMG*—the sole basis for defendants' request—does not justify relief under Rule 60(b)(6). There was no abuse of discretion in the district court's finding that *AMG* did not amount to an extraordinary

circumstance that would warrant reopening a judgment that was consistent with the prevailing law at the time. That is especially so given that the judgment resulted from the defendants' own considered, deliberate decision to forego litigating the case and instead settle. Rule 60(b)(6) cannot be used to relieve defendants from a strategic decision they later regret.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), 6105(b), and 8404(a).

The district court entered a Stipulated Order for Permanent Injunction and Monetary Judgment on December 9, 2019. Defendants moved to vacate that stipulated judgment order on March 17, 2022, and the district court denied their motion on January 23, 2023. Defendants timely appealed the district court's denial of their motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

The district court denied the defendants' motion to vacate an earlier judgment, which had been entered by stipulation of the parties following alleged violations of the FTC Act. Did the district court abuse

its discretion when it found that a new Supreme Court decision was not an extraordinary circumstance that justified relief under Rule 60(b)(6) from the final judgment memorializing the parties' settlement?

STATEMENT OF THE CASE

A. The FTC's Complaint

In February 2019, the FTC sued Elite IT Partners, Inc. ("Elite" or "the company") and its founder and CEO, James Martinos, for operating a widespread, deceptive technical support scheme that violated federal consumer protection laws. App. 21-45.[1] The FTC sought to enjoin defendants from further unlawful conduct and to obtain monetary relief for harmed consumers. App. 21-22, 44-45.

1. The FTC alleged that defendants, using online ads, targeted elderly consumers who needed computer assistance with issues like forgotten email passwords. Defendants claimed they would provide "free, No Obligation" computer assistance including password recovery. App. 24-27 ¶¶11-12, 14-17. Once on the phone, and after gaining remote

[1] "App." refers to pages in defendants' Appendix; "SUPPAPP" refers to the FTC's Supplemental Appendix; "ECF_" refers to district court docket entries; page cites (other than to defendants' Opening Brief) are to ECF-generated page numbers; and "Br." refers to defendants' Opening Brief.

control of the consumer's computer, defendants used a deceptive diagnostic tool to claim that the consumer's password had been compromised by malware. Defendants then claimed that the consumer needed Elite's urgent help to protect important personal data and finances. App. 24-33 ¶¶11-12, 14-17, 20-25, 27-31.

In fact, the "threats" supposedly detected by defendants' testing were merely computer "cookies"—small text files placed on a user's computer or web browser when visiting certain websites—that were benign and did not pose the serious threats claimed by the salespeople. App. 29-30 ¶22. Other supposed signs of viruses and malware likewise did not indicate the presence of a virus or any malfunction. App. 31-32 ¶¶26, 28, 29. But defendants would dupe consumers into paying $100 or more for a one-time "cleaning" of (non-existent) computer threats and ongoing technical support services costing $20-$40 per month. App. 24, 33 ¶¶12, 33-34.

The FTC also alleged that the defendants failed to adequately disclose material terms, such as that consumers who agreed to the monthly service were automatically signed up for a yearly term that renewed if the consumer failed to timely cancel; that those cancellations

had to be in writing a month before the yearly term ended; and that cancellations within the first year would be subject to a $150 fee. App. 24-25, 34-36 ¶¶13, 35-40. The FTC alleged that Martinos, as the founder and CEO of the company, directed, controlled, and participated in these deceptive practices. App. 23, 36-37 ¶¶9, 43.

2. The FTC alleged that defendants' scheme violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits deceptive acts and practices; the FTC's Telemarketing Sales Rule (TSR), 16 C.F.R. pt. 310, which bars misleading telemarketing; and Section 4 of the Restore Online Shoppers' Confidence Act (ROSCA), which prohibits deceptive automatic renewal practices online. 15 U.S.C. § 8403. App. 21-22, 37-44 ¶¶1, 44-70.

For relief, the FTC sought a permanent injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), as well as money to distribute to defrauded consumers as redress, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b), 57b, among other laws. App. 21-22, 44-45.

B. The TRO and Stipulated Preliminary Injunction

At the outset of the case, evidence showed that defendants were dissipating assets by paying significant legal fees to pursue meritless suits against third parties (including former customers), and also were avoiding their bank's compliance procedures. SUPPAPP-1-29–32. Fearing further hiding or dissipating of assets, or destruction of documents relevant to the litigation, the FTC moved for an *ex parte* temporary restraining order (TRO) when it filed its complaint. App. 48-78; SUPPAPP-1-25–36, ECF 9-18 at XX (PX 28 ¶¶ 10-45). The FTC also asked the court to appoint a receiver and freeze defendants' assets to preserve the possibility of meaningful relief for defrauded consumers. App. 48, 55-56, 62-70. Defendants were notified of the TRO shortly afterwards. *See* ECF_17.

The FTC supported its motion with declarations from over two dozen injured consumers; former Elite employees describing the company's deceptive practices (including their purported affiliation with Microsoft and Yahoo; undercover FTC investigators who recorded their interactions with Elite salespeople; an FTC forensic accountant who analyzed Elite's bank records and calculated consumer harm, and a

computer and data security expert who analyzed Elite's services, including the representations of its telemarketers, and concluded that they were a sham. *See generally* App. 196-198, 278-279 (and record cites therein).

In opposing the TRO, the defendants provided no evidence refuting their employees' carefully scripted misrepresentations to consumers. ECF_81 at 7. Nor did Martinos rebut the FTC's showing that he knew of those misleading statements. *Id*. The district court found "good cause to believe" that both Martinos and his company had violated the FTC Act, the TSR, and ROSCA, and determined that the FTC was "likely to prevail on the merits." App. 49. The court thus issued the TRO, froze defendants' assets, and appointed a receiver for Elite's operations. App. 50.

The FTC also sought a preliminary injunction, providing additional evidence corroborating defendants' misrepresentations to consumers, including in sales scripts, training notes, customer call recordings, transcripts of deceptive sales calls, and additional former employee declarations. SUPPAPP-1-142–43, 130. Some of these items were discovered in Martinos's desk, confirming Martinos's knowledge of

his employees' deceptive sales tactics. SUPPAPP-2-9–10, 17 ¶¶61-62. Evidence also showed Martinos's active participation in his company's practices. He also secretly removed and modified hard drives with damaging information against him in blatant violation of the TRO. SUPPAPP-1-114–17, 121–22; SUPPAPP-2-6 ¶¶ 11, 12; 17.

Given the opportunity to defend themselves at a court hearing, Martinos and his company instead chose to stipulate to a preliminary injunction, which was entered in May 2019. SUPPAPP-2-19 –121. Under the preliminary injunction, Martinos was allowed to continue Elite's business-to-business operations (which were not part of the deceptive scheme alleged in the FTC's complaint), but the TRO's receivership and asset freeze remained in place. SUPPAPP-2-25–27, 33–41. The preliminary injunction also barred the defendants from making the misrepresentations alleged in the complaint, and required defendants to provide financial statements to the FTC and to preserve their business records. SUPPAPP-2-23–25, 29–32.

C. The Stipulated Order

Following the preliminary injunction, the parties engaged in extensive settlement negotiations. Both defendants were represented by

experienced counsel throughout the proceedings. Ultimately, Martinos and his company agreed to a final Stipulated Order for Permanent Injunction and Monetary Judgment ("Stipulated Order"), which the district court entered on December 9, 2019. App. 119-165.

Under the Stipulated Order, the defendants were permanently banned from selling to consumers any technical support product or service, or any good or service with a negative option feature; mispresenting the detection of viruses on computers that affect the computers' security; telemarketing by misleading consumers or failing to disclose material information; and mispresenting material terms in their refund or cancellation policies. App. 121-123. The order did not apply to defendants' business-to-business operations.

The Stipulated Order imposed a monetary judgment against both defendants in the amount of $13,537,288.75, which represented the FTC's calculation of consumer losses from their scam. App. 124, 126. But the order limited defendants' payment obligations to their attested available assets, which constituted a mere fraction of the $13 million – approximately $355,000. *See* App. 124-125, 202-203; SUPPAPP-2-122–

24.[2] The remainder of the judgment was suspended based on Martinos's sworn representations about his and his company's assets and their ability to pay. App. 124-125. The Stipulated Order provided that if the court later found that defendants had misrepresented their financial status, defendants would be held liable for the full $13 million judgment.[3] App. 125-126.

The Stipulated Order also contained a broad waiver provision, under which defendants agreed to "waive all rights to appeal or otherwise challenge or contest the validity of this Order." App. 120. Defendants further agreed to "relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to [the Stipulated] Order" and agreed "not [to] seek the return of any assets." App. 126.

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[2] The assets (which include Elite's assets recovered by the receiver) consisted of defendants' funds in bank or brokerage accounts that had been frozen at three financial institutions, and $173,500 drawn on Martinos's home equity line of credit. *Id.*

[3] The order also included recordkeeping and reporting requirements to ensure compliance, App. 130-133, and continued the receivership, but directed that the receivership begin to wind down and terminate after approval of the receiver's final report. App. 128.

D. The FTC's Consumer Redress

The FTC has distributed nearly all the $355,138.80 collected from Elite and Martinos to defendants' scam victims as redress, with a small amount covering the cost of administering redress. *See* SUPPAPP-2-122–25; Fed. Trade Comm'n, *Elite IT Refunds* (January 2023), https://www.ftc.gov/enforcement/refunds/elite-it-refunds. Because defendants had squandered most of the funds they filched from consumers by the time assets were frozen, funds available for redress comprise only 2.6% of total consumer losses captured by the full $13 million judgment.

E. Defendants' Motion and the Decision on Review

In March 2022—two and a half years after agreeing to the Stipulated Order—the defendants moved to vacate the judgment under Federal Rule of Civil Procedure 60(b). App. 166-187. Defendants also sought the return of funds they paid the Commission. App. 171, 186. Their arguments for post-judgment relief were based on the Supreme Court's decision a year earlier in *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). App. 171-172. In *AMG*, the Supreme Court held that Section 13(b) of the FTC Act does not authorize equitable monetary relief. 141 S. Ct. at 1344, 1352.

In their motion to vacate, defendants claimed that they "would not have agreed to the same settlement terms" had they not believed that the FTC could obtain money damages through Section 13(b). App. 171-172, 182-183. Defendants contended that *AMG* thus justified relief from the judgment under two provisions of Rule 60: (b)(5), which permits relief when applying the judgment "prospectively is no longer equitable," and (b)(6), which allows relief "for any other reason." *See* App. 174-175.

The district court denied the motion. App. 284, 290. Noting "the high bar required to qualify for relief under Rule 60," the court concluded that relief was not warranted under either provision defendants invoked. App. 284. The court first held that to qualify for relief under Rule 60(b)(5), "a judgment must not only be inequitable but also 'prospective,' and Elite's judgment does not qualify as prospective." *Id*. Rather, the monetary judgment "provides redress for past harms," making Rule 60(b)(6) relief unavailable." App. 287-288.

Next, the district court rejected defendants' argument that the *AMG* decision amounted to "extraordinary circumstances" justifying relief under Rule 60(b)(6). App. 288-290. Under Tenth Circuit

precedent, the court explained, a change in the law generally does not constitute an extraordinary circumstance justifying relief under this provision. App. 288-289. While this Court has recognized an exception when the change in law occurs in a factually related case, here, *AMG* was "a completely unrelated case" to the one against the defendants. App. 290. The decision thus did not constitute an extraordinary circumstance. *Id.* Finding no other "legal or factual basis" to vacate the judgment, the district court denied relief. *Id.*

This appeal followed. On appeal, defendants abandoned their Rule 60(b)(5) argument; the only issue before this Court is whether the district court abused its discretion in denying relief under Rule 60(b)(6).[4]

SUMMARY OF ARGUMENT

New Supreme Court decisions do not retroactively apply to closed cases. In 2019, Martinos and Elite chose to settle charges that they ran a wide-scale deceptive tech support scheme, and to forego any legal

[4] Defendants abandoned their challenge under Rule 60(b)(5) by "fail[ing] . . . to explain what was wrong with the reasoning that the district court relied on" in rejecting their request for relief under that provision. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366, 1368-70 (10th Cir. 2015).

challenge to the agreed upon monetary relief. The resulting judgment became final, and the case was closed. The district court acted well within its discretion when it denied defendants' request, filed more than two years after defendants settled, to set aside that final judgment based on a new Supreme Court decision.

The catch-all provision of Rule 60(b)(6) permits a district court to reopen a final judgment for "any other reason justifying relief" from the judgment. Relief under this provision is available only in "extraordinary circumstances," which do not include a district court's correct application of the law as it stood when the judgment was entered—even if the Supreme Court later reaches a different decision. *Gonzales v. Crosby*, 545 U.S. 524, 536 (2005). The district court properly denied relief under Rule 60(b)(6), and this Court should affirm.

1. Martinos and Elite waived the right to seek the requested relief when they expressly agreed to waive "all rights to appeal or otherwise challenge or contest the validity" of the judgment. This provision was an important part of the bargain defendants struck with the FTC to settle the case. Asking the court to vacate the judgment in these

circumstances constitutes a "challenge" that the waiver provision bars, and the Court can affirm on this basis alone.

2. That the final judgment resulted from defendants' deliberate decision to settle likewise forecloses relief here. Circuit precedent holds that Rule 60(b)(6) should not be used to relieve defendants from a strategic decision they later regret. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996). Here, at the time defendants settled, they should have been aware that the law might change: a petition for certiorari squarely presenting the issue was already pending at the Supreme Court, and a Circuit split had been created by a prominent Seventh Circuit decision. The Supreme Court's later decision in *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), thus shows no "unanticipated intervening change of circumstances" that could justify Rule 60(b)(6) relief. *Cashner*, 98 F.3d at 580.

3. In any event, the district court properly exercised its discretion to deny relief under Rule 60(b)(6) because this case presents no extraordinary circumstances. Defendants' motion hinged on *AMG*, but it is "hardly extraordinary" for the Supreme Court to disagree with a lower court's interpretation of federal law. If every change in decisional

law justified reopening a final judgment at any time, all cases would be perpetually susceptible to challenges and no case would truly be final. New Supreme Court decisions thus apply only to cases open on direct review. For similar reasons, every other court to consider Rule 60(b) motions on *AMG* grounds has denied relief. And in this case, alternative provisions—alleged in the FTC's complaint—independently justify a sizeable consumer redress award, making relief even less warranted.

Defendants complain that the district court adopted an unduly rigid "categorical rule" and should have considered other factors. But governing law does not require courts to consider any particular factor in a Rule 60(b)(6) analysis. The district court properly applied Tenth Circuit precedent holding that a change in decisional law arising in a factually unrelated case does not justify Rule 60(b)(6) relief. *AMG* plainly was not related to this case under that standard. And defendants fail to show that any other factor would justify relief. The Court should affirm.

STANDARD OF REVIEW

This Court reviews the denial of Rule 60(b)(6) relief for 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). "The district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED RULE 60(b)(6) RELIEF

Defendants argue that the district court should have vacated the Stipulated Order under Rule 60(b)(6), a catchall provision that permits a court to reopen a judgment when none of the other Rule 60(b) grounds apply and when the movant demonstrates "extraordinary circumstances." *Buck v. Davis*, 580 U.S. 100, 121-124 (2017); *Kemp v. United States*, 142 S. Ct. 1856, 1861 (2022). Relief under this provision will only be granted where necessary "to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988). Put another way, relief under Rule 60(b)(6) "is extraordinary and reserved for exceptional circumstances." *Johnson v. Spencer*, 950 F.3d 680, 700-01 (10th Cir. 2020).

The high bar for relief under Rule 60(b)(6) reflects the importance to the legal system of maintaining the finality of judgments. "Public policy dictates that there be an end of litigation[.]" *James B. Beam Distilling Co. v. Georgia.*, 501 U.S. 529, 541 (1991) ("*Beam Distilling*") (cleaned up). When a decision is rendered correctly under the "then-prevailing interpretation" of a federal statute and the case then becomes final, a new Supreme Court decision generally does not "provide[] cause for reopening" the closed case. *Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005). "It is hardly extraordinary" for the Supreme Court to disagree with a lower court's interpretation of federal law. *Id.* at 536.

The district court thus did not abuse its discretion in denying Rule 60(b)(6) relief on this basis. Indeed, no court has reopened a final judgment in an FTC case on *AMG* grounds. And the Ninth Circuit recently rejected the same argument defendants make here, affirming the denial of Rule 60(b)(6) relief in the wake of *AMG*. *FTC v. Hewitt,* 68 F.4th 461, 467-470 (9th Cir. 2023).[5]

[5] In addition to *Hewitt* and the decision below, every court that has addressed the issue has refused to grant relief. *See FTC v. EMP Media*,

The requested relief is even less warranted in this case because the judgment resulted from defendants' own calculated decision to settle. As this Court has explained, Rule 60(b)(6) should not be used to set aside a "a free, counseled, deliberate choice whose consequences in hindsight" may seem "unfortunate." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996).

I. DEFENDANTS WAIVED THEIR RIGHT TO "OTHERWISE CHALLENGE OR CONTEST THE VALIDITY" OF THE JUDGMENT, INCLUDING THROUGH RULE 60(b)(6).

As a threshold matter, while the district court did not reach the issue, waiver provides an independent basis on which to affirm the decision below. *See United States v. Sandoval,* 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court may "affirm a district court decision on any grounds" found in the record "even grounds not relied upon by the district court").

No. 2:18-cv-0035, 2023 WL 3687722, at *3–4 (D. Nev. May 25, 2023); *FTC v. USA Fin. LLC*, No. 8:08-0899, 2023 WL 2196641 (M.D. Fla. Feb. 24, 2023); *FTC v. Ross*, No. 08-cv-3233, 2022 U.S. Dist. LEXIS 166360 (D. Md. Sept. 14, 2022); *FTC v. Ivy Cap., Inc.*, 340 F.R.D. 602 (D. Nev. 2022); *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-cv-3294. 2021 U.S. Dist. LEXIS 235970 (N.D. Ga. Sept. 30, 2021); *FTC v. Apex Cap. Grp.*, No. 18-cv-9573, 2021 WL 7707269, at *4 (C.D. Cal. Sept. 3, 2021); *FTC v. Ah Media Grp.*, LLC, 339 F.R.D 612 (N.D. Cal. 2021).

Martinos and Elite waived the right to seek their requested relief when they voluntarily and knowingly agreed to waive "all rights to appeal or otherwise challenge or contest the validity of [the Stipulated] Order." App. 120. The relief defendants seek through Rule 60(b)(6) amounts to a "challenge" to the Stipulated Order within the meaning of this waiver provision. *See* App. 205. And asking for the return of funds violates the separate provision in which defendants agreed "not [to] seek the return of any assets." App. 126.

In response to the FTC's waiver arguments below, defendants argued, without further explanation, that the waiver provision of the Stipulated Order does not foreclose review because "Rule 60(b) exists to reopen this . . . type of agreement." App. 247. But defendants identified no cases in which courts granted Rule 60(b)(6) relief despite a clear waiver provision like this one; nor is the FTC aware of any such cases.[6]

In the habeas context, this Court has repeatedly held that "a defendant's waiver of the statutory right to direct appeal contained in a

[6] One district court stopped short of finding that similar waiver provisions "conclusively barr[ed]" the defendants' Rule 60(b)(6) motion, but still denied relief, concluding that "the fact of their voluntary waivers is another factor that cuts against granting them relief." *FTC v. Ah Media Grp., LLC*, 339 F.R.D. 612, 620 (N.D. Cal. 2021).

plea agreement is enforceable if the defendant has agreed to its terms knowingly and voluntarily." *United States v. Cockerham*, 237 F.3d 1179, 1181-82 (10th Cir. 2001) (cleaned up). Similarly, the Court treats a criminal defendant's "waiver of collateral attack rights" as "generally enforceable where the waiver is expressly stated in the plea agreement and where both the plea and the waiver were knowingly and voluntarily made." *Id.* at 1183. These principles apply even though a defendant's physical liberty is at stake.

The same basic analysis applies here, although the underlying issue is not physical liberty but defendants' efforts to avoid providing redress to the consumers they indisputably defrauded. Elite and Martinos cannot dispute that they agreed to the terms of the Stipulated Order "knowingly and voluntarily," having engaged in lengthy settlement discussions with the FTC while represented by competent counsel.

At the very least, defendants' agreement to waive challenges to the Stipulated Order shows that this case does not implicate any exceptional circumstances that would justify vacating the judgment. *See Ah Media*, 339 F.R.D. at 620 (finding waiver "cuts against" relief);

Liljeberg, 486 U.S. at 863–64 (relief under Rule 60(b)(6) warranted only where such relief would "accomplish justice").

II. RULE 60(b)(6) RELIEF IS UNWARRANTED BECAUSE THE JUDGMENT RESULTED FROM DEFENDANTS' DELIBERATE DECISION TO SETTLE.

That the challenged judgment resulted from defendants' own decision to settle this case provides a further basis to deny discretionary Rule 60(b) relief.[7] This Court has recognized that Rule 60(b)(6) should not be used to set aside "a free, counseled, deliberate choice whose consequences in hindsight are unfortunate." *Cashner*, 98 F.3d at 580. For example, "even if the settlement upon which the parties agreed constituted a bad deal in hindsight, there is nothing sufficiently 'unusual or compelling' about making a bad bargain to warrant relief

[7] The district court did not address this argument. *See* App. 288 n.69. Nevertheless, this Court may affirm on that ground since it is supported by the record and because defendants "had a fair opportunity to address" that argument below. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) (cleaned up). Defendants addressed the effect of settlement in their motion to vacate, App. 183-184, and in their reply. App. 248, 251-252, 254-255.

under Rule 60(b)(6)." *Kile*, 915 F.3d at 688 (citing *Cashner*, 98 F.3d at 580); *Johnson*, 950 F.3d at 703 (same).[8]

Defendants claim that they would not have settled but for the injunction and asset freeze, and that the FTC should not have obtained that relief in 2019 because the law changed in 2021. Br. 9, 12. 39. But at the time defendants decided to settle, they should have been aware of the possibility that judicial interpretation of Section 13(b) might change. A full year before the judgment was entered, the Ninth Circuit had questioned the FTC's authority to obtain monetary relief under Section 13(b). *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 429-437 (9th Cir. 2018) (O'Scannlain, J., specially concurring). And three months before defendants settled, the Seventh Circuit created a circuit split regarding the FTC's authority under Section 13(b) when it overturned decades of circuit precedent to hold that Section 13(b) does not authorize monetary relief. *See FTC v. Credit Bureau Center*, *LLC*,

[8] *See also Coltec Indus. v. Hobgood*, 280 F.3d 262, 274 (3rd Cir. 2002) (denying Rule 60(b)(6) relief because regret about a settlement, after a new Supreme Court decision, does not permit parties "to escape the consequences of their own counseled and knowledgeable decisions"); *Ah Media Grp.* 339 F.R.D. at 619 (denying Rule 60(b)(6) relief where defendants chose to settle but regretted it after *AMG*).

937 F.3d 764, 767 (7th Cir. 2019). Indeed, when the parties settled in December 2019, a petition for a writ of certiorari in *AMG* was pending before the Supreme Court.[9] *See* Petition for Writ of Certiorari, *AMG Cap. Mgmt., LLC v. FTC,* No 19-508 (Sup. Ct. filed Oct. 18, 2019).

Defendants chose the certainty of a settlement over the risk of litigation, at a time when they reasonably could have anticipated the possibility of a change in the law. The Supreme Court's later decision in *AMG* shows no "unanticipated intervening change of circumstances" warranting overturning the Stipulated Order under Rule 60(b)(6). *See Cashner,* 98 F.3d at 579-580.[10] At the very least, defendants assumed the risk of subsequent favorable changes in the law when they agreed to settle the case.

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[9] And in *Credit Bureau Center*, by then the Seventh Circuit had stayed its mandate until Supreme Court proceedings in that case were over. *See FTC v. Credit Bureau Center, LLC*, No. 18-2847 (7th Cir. Sept. 20, 2019).

[10] *See also, e.g.*, *Saggiani v. Strong*, 718 F. App'x 706, 711 (10th Cir. 2018) (denying 60(b)(6) relief because all relevant facts were available to movant when he elected not to investigate or object to the settlement); *FTC v. Apex Cap. Grp.*, No. 18-cv-9573, 2021 WL 7707269, at *4 (C.D. Cal. Sept. 3, 2021) (denying 60(b)(6) relief where defendants chose to settle despite being "fully aware of the challenges to the FTC's authority to recover equitable monetary relief pursuant to Section 13(b)").

Furthermore, defendants are mistaken that *AMG* barred the FTC's ability to obtain an injunction, asset freeze, and appointment of a receiver – conditions defendants claim spurred them to settle. Br. 9, 12, 39. The FTC's complaint here sought consumer redress under both Section 13(b) and Section 19 of the FTC Act for the defendants' TSR and ROSCA violations. App. 21-22, 44-45. *AMG* held that Section 13(b) did not authorize equitable monetary relief, 141 S. Ct. at 1344, 1352, but did not restrict the FTC's ability to obtain monetary relief for consumers under Section 19 (or other FTC Act provisions providing such relief).[11] *See id.* at 1346, 1348-49, 1352. Section 19 itself permits "such relief as the court finds necessary to redress injury to consumers . . . resulting from the rule violation," and likewise authorizes "preliminary measures like an asset freeze or a receivership [that] are necessary to preserve funds for a future monetary judgment" under that provision. 15 U.S.C. § 57b(b); *FTC v. Simple Health Plans LLC*, 58 F.4th 1322, 1330 (11th Cir. 2023); *accord FTC v. H.N. Singer, Inc.*, 668

[11] Section 19(a)(1) of the FTC Act, 15 U.S.C. § 57b(a)(1), authorizes courts to issue monetary relief under Section 19(b), *id.* § 57b(b), for rule violations and violations of statutes, such as ROSCA, which provide that a statutory violation is deemed a violation of an FTC Act rule.

F.2d 1107, 1109-1110, 1112 (9th Cir. 1982). *AMG* also did not prohibit the FTC from using Section 13(b) to obtain injunctive relief. 141 S. Ct. at 1346-47, 1349. Courts have long recognized that the permanent injunction authorized by Section 13(b) includes preliminary relief necessary to ensure effective final relief. *See Singer,* 668 F.2d at 1113; *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir. 1982) (Section 13(b) injunction authority permits preliminary relief for Section 19 remedies). Thus, even after *AMG*, a court may issue preliminary relief—including an asset freeze and a receiver—to ensure effective final relief as consumer redress under Section 19.

* * *

Here, defendants had a full and fair opportunity to litigate their case, but they chose to settle instead. The judgment resulted from defendants' own decision to relinquish their potential arguments against the relief the FTC sought. *AMG* does not provide a basis for relieving defendants from the consequences of that considered decision.

III. *AMG* DOES NOT CONSTITUTE AN EXTRAORDINARY CIRCUMSTANCE UNDER RULE 60(b)(6)

In addition to these waiver and settlement considerations, relief is not warranted under the plain terms of Rule 60(b)(6). In line with every

other court to address Rule 60(b) arguments based on *AMG*, the district court properly held that *AMG* did not constitute an extraordinary circumstance sufficient to justify relief from the final judgment.

A. Supreme Court Rulings Have No Retroactive Effect on Closed Cases

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 Tax'n*, 509 U.S. 86, 97 (1993). But new decisions "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." *Beam Distilling*, 501 U.S. at 541.

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. Indeed, such a rule would eliminate the concept of finality in litigation and make every

lawsuit victor susceptible to additional litigation if the law is changed.[12] But "it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule." *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion) (overruled on other grounds).

B. The District Court Properly Held That *AMG* Does Not Justify Relief From the Judgment Under Rule 60(b)(6)

These principles underscore why "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). As discussed, relief under this provision is reserved for exceptional situations, and is addressed to the sound discretion of the district court.

1. *AMG* was not a "related case" under this Court's interpretation of Rule 60(b)(6)

Consistent with Supreme Court precedent, Tenth Circuit cases hold that a change in decisional law arising in an unrelated case does not justify post-judgment relief under Rule 60(b)(6). *See, e.g.*, *Johnston*

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[12] *See Sproull v. Union Texas Products Corp.,* No. 90-6286, 944 F.2d 911, 1991 WL 184098, at *2 (10th Cir. Sept. 18, 1991) (unpublished).

v. Cigna Corp., 14 F.3d 486, 497 (10th Cir. 1993) (explaining circuit law). The district court properly rejected defendants' attempt to dramatically expand the narrow "related case" exception to this general rule, outlined in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc). App. 288-290.

In *Pierce*, this Court granted Rule 60(b)(6) relief based on a post-judgment change in law "arising out of the same accident." 518 F.2d at 723. Absent relief, plaintiffs harmed in the same accident would have received "substantially different [legal] treatment" depending on the court adjudicating their claims, a situation the court considered "extraordinary." *Id*. *Pierce* thus recognized that Rule 60(b)(6) relief may be appropriate when a post-judgment change in law arises in a factually-related case.

Here, there was no such factual nexus between the case below and *AMG*. Defendants contend that the Court should adopt an expansive "relatedness" standard of their own invention: whether this case "shares common attributes—legal or factual—with the case that changed the law." Br. 34. In defendants' view, because "*AMG* decided the exact

issue" as this case regarding the scope of relief under Section 13(b), the two cases are related for purposes of Rule 60(b)(6). Br. 36.

Accepting defendants' argument would lead to reopening any case which relied upon then-prevailing precedent that is later overturned—gutting the principles of finality articulated by the Supreme Court. Stated another way, if defendants' case is "related" to *AMG* in the Rule 60(b)(6) sense, then *every* case to which a new decisional rule might apply is related, and *every* final judgment subject to modification or vacatur. That cannot be the law.[13] As the district court held here, defendants' situation is not remotely similar to *Pierce* or any other scenario that could justify extraordinary relief under Rule 60(b)(6).

The district court's ruling fell well within the court's broad discretion and was consistent with Supreme Court cases, principles of finality, and common sense.

[13] Indeed, this Court has affirmed the denial of a request to vacate based on a subsequent change of law where the legal basis of the claims was the same, but the claims arose in factually unrelated cases. *See Ross v. Bush*, 704 F. App'x 771, 773–74 (10th Cir. 2017).

2. The Court need not consider additional factors

Defendants complain that the district court adopted "a categorical rule" that only considered "relatedness" while ignoring other factors. Br. 6, 14, 17, 22-23, 32-33. But the district court recognized that defendants had shown no other "legal or factual basis" to vacate the judgment. App. 290. In any event, neither the Supreme Court nor the Tenth Circuit require consideration of any particular factor as part of the Rule 60(b)(6) analysis. To the contrary, the Supreme Court has recognized that the "Rule does not particularize the factors that justify relief." *See Liljeberg*, 486 U.S. at 863-64.[14] Indeed, some circuits hold that a change in decisional law after a final judgment provides no basis for relief under Rule 60(b)(6) *period*, without other considerations. *See Moses v. Joyner*, 815 F.3d. 163, 168-169 (4th Cir. 2016).

Boiled down, defendants' contention is that the Court should ignore its own precedent, and apply a multifactor test that it has never

[14] Elite argues (Br. 21-22) that courts should consider the factors listed in *Liljeberg* as "equitable circumstances" when assessing relief under Rule 60(b)(6). But those factors appear limited to motions to vacate based on violations of 28 U.S.C. § 455(a), which is inapposite here. *See Liljeberg*, 486 U.S. at 864.

adopted. But of course, this Court is bound by its own precedent. *See United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020). In any case, as discussed above, this Court's rule—that a mere change in decisional law arising in an unrelated case does not justify relief under Rule 60(b)(6)—is plainly correct and makes good sense.

Defendants claim that this Court's decisions in *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696 (10th Cir. 1989) and *Wilson v. Al McCord Inc.*, 858 F.2d 1469 (10th Cir. 1988) show that a change in decisional law alone can support Rule 60(b)(6) relief. Br. 24-27. But neither case involved a post-judgment change in law because the cases were still open when the law changed. In *Wilson,* the Court granted relief based on a change in state law during the pendency of the appeal. 858 F.2d at 1478. And in *Adams*, the change in law was issued, and defendant's motion filed, while plaintiff's federal claims were being litigated. 888 F.2d at 697-98. So as the district court correctly recognized, in *Adams* and *Wilson* "the law changed during the pendency of the litigation." App. 289; *see also Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 528 (6th Cir. 2001) (recognizing *Adams* involved a change of law while the case was open).

Further, modifying a final judgment in a closed case based only on a change in decisional law cannot be squared with *Gonzalez*, *Agostini, Reynoldsville Casket*, and the vast weight of authority.[15]

Misconstruing a footnote in *Gonzalez* (Br. 23, 28), defendants contend that *AMG* represents a "change in the interpretation of a substantive statute," and suggest that this strengthens their case for relief. Br. 36. The *Gonzalez* footnote actually states that "[a] change in the substantive statute may have consequences for cases that have already reached final judgment, particularly in the criminal context." 545 U.S. at 536 n.9 (citing *Bousley v. United States*, 523 U.S. 614, 619-21 (1998)). In that context, "substantive statute" means a statute defining what conduct is unlawful. *See Bousley*, 523 U.S. at 619-21 (addressing when new decisions can be applied retroactively in criminal cases). Here, the change in law related to (civil) remedies and did not proscribe any conduct.

Defendants also misplace reliance on *Johnson*, *supra*. Br. 23, 30-32. In *Johnson*, this Court reversed a district court order that denied

[15] *In re Gledhill*, 76 F.3d 1070, 1082 (10th Cir. 1996), Br. 29, likewise is inapposite as it did not involve a change in decisional law.

Rule 60(b) relief on the mistaken ground that such relief applies only to equitable (and not legal) claims. 950 F.3d at 701-702. That case involved legal error in applying existing circuit law regarding Rule 60(b) relief, not an attempt to reopen an underlying judgment that was based on indisputably correct law as it stood at the time.[16]

Defendants further claim that Supreme Court and more recent Tenth Circuit authority have displaced this Court's earlier holding in *Collins v. Wichita*, 254 F.2d 837, 839 (10th Cir. 1958), that "[a] change in the law . . . is not such an extraordinary circumstance which justifies [Rule 60(b)(6)] relief." Br. 25-26. Not so. *Collins* is consistent with the Supreme Court's ruling that a new statutory reinterpretation by the Supreme Court is "hardly extraordinary." *Gonzalez*, 545 U.S. at 536. And even before *Gonzalez* (but after *Pierce*, *Adams*, and *Wilson*), this Court reaffirmed that "[t]he *Collins* holding is still the rule in this

[16] Defendants mischaracterizes *Johnson* as "rejecting imposition of any 'categorical' rule in [a Rule] 60(b)(6) motion," Br. 33. But *Johnson* did not say that; rather, the decision referred to certain unexplained "categorical bars" imposed by other courts. *See* 950 F.3d at 701, 703. Defendants also erroneously claim that *Johnson* sets forth two factors that courts should consider in assessing whether relief is appropriate due to a change in law. Br. 30. The purported "relevant factors" (and cited quotes) appear nowhere in that decision.

circuit." *Colorado Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 962 F.2d 1528, 1535 (10th Cir. 1992).

3. Even if considered, other factors only confirm relief is not appropriate

Even if the Court were to consider other factors as defendants prefer, Br. 36-44, those factors, too, support denying relief.[17] Defendants' request to vacate was unquestionably based on *AMG*, *see* App. 171-72; 282; they provided no other reason independent of that decision to justify vacatur. The district court thus correctly held, as noted, that defendants had shown no other "legal or factual basis" to vacate the judgment. App. 290. And the Ninth Circuit, after applying a multifactor test that considered both relatedness and equitable factors, rejected the very same argument defendants assert here. *See Hewitt*, 68 F.4th at 467-70.

The first set of considerations analyzed in *Hewitt* was "the nature and relationship of the intervening change in the law." 68 F.4th at 468. These considerations weigh even more strongly against granting relief

[17] If this Court decides other factors should be considered, it should remand for the district court to assess those factors in the first instance. *See e.g.*, *Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999).

here. The monetary relief in the Stipulated Order was undoubtedly correct under prevailing Tenth Circuit law in December 2019 that Section 13(b) authorizes equitable monetary relief. *See FTC v. Freecom Commc'ns, Inc.,* 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) ("§13(b)'s grant of authority to provide injunctive relief carries with it . . . the power to grant consumer redress."). And apart from the fact that the FTC sought monetary relief under Section 13(b) in both *AMG* and this case, there is no relationship between *AMG* and the monetary judgment here, which was independently supported by Section 19. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993) (Section 19 remedies include relief to redress consumer injury).

The diligence factor likewise weighs decisively against relief. In *Hewitt*, the Ninth Circuit, relying on *Gonzalez,* recognized that a "change in the law" is "all the less extraordinary" where the party has shown little diligence in pursuing its claim for relief. *See* 68 F.4th at 469 (citing *Gonzalez*, 545 U.S. at 536-37). Not only did defendants never challenge the statutory validity of equitable monetary relief under Section 13(b), but they also ultimately abandoned the litigation altogether, choosing to settle instead. *Cf. Gonzalez*, 545 U.S. at 537

(emphasizing defendant's lack of diligence, even though he litigated the case). Defendants claim they diligently filed a timely motion to vacate. Br. 42-43. But the motion was filed in March 2022, nearly a year after *AMG*. It is not at all clear that a year-long delay shows the requisite diligence for relief under this rule. *See Liljeberg*, 486 U.S. at 873-74 (Rehnquist, C.J., dissenting) (suggesting that a movant's ten month delay "must weigh heavily" against a Rule 60(b)(6) motion).

Other factors further bolster the case against Rule 60(b)(6) relief. *See Hewitt*, 68 F. 4th at 469-70 (citing other "weighty reasons cutting against relief"). Defendants ran a wide-scale deceptive scheme targeting vulnerable consumers, in which Martinos played a central role. Consumers lost over $13 million as a result of defendants' deception, and the FTC has already distributed nearly all of the collected funds to those harmed. The defendants ignore that the monetary judgment amount was heavily negotiated. A key trade-off in the settlement was the suspension of most of the monetary judgment, which limited defendants' payment obligation to the amount they attested they could pay. Defendants now seek to negate not only the overall judgment amount, but the meager amount they agreed to pay— a small fraction

of the consumer harm and a condition for suspending the remainder of the judgment.

Independent grounds for monetary relief also exist here: Section 19 and ROSCA, which were unaffected by *AMG* and alleged in the FTC's complaint. Under those provisions alone, the FTC still would be entitled to significant monetary relief—approaching that awarded under Section 13(b) and far exceeding what defendants actually paid on the judgment. *See* 15 U.S.C. § 57b(b) (authorizing "such relief as the court finds necessary to redress injury to consumers" resulting from the violation). In addition, vacating the judgment would prejudice the FTC; restarting the litigation against Elite and Martinos over three years later risks stale evidence and unavailable witnesses, among other harms.

Martinos argues that it was unfair to "liquidat[e]" the business to pay the judgment. Br. 39, 41. But business-to-business operations remain possible under the Stipulated Order. In any event, the liquidation of assets was part of the bargain defendants struck in settling the case. And while Martinos contends (Br. 41-42) that it would be unfair for him to pay the "outstanding balance" of the monetary

judgment, he will only have to do that if it is determined that he lied to the FTC about his assets.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The FTC believes that oral argument would not aid the Court in resolving the straightforward issues raised in this appeal.

Dated: June 29, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing "Answering Brief for the Federal Trade Commission" complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I certify further that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in 14 point Century Schoolbook.

Dated: June 29, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2023, I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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