No. 21-5726

In the
Supreme Court of the United States

DEXTER EARL KEMP,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 60(b)(1), which authorizes relief from final judgment based on "mistake," as well as inadvertence, surprise, or excusable neglect, also authorizes relief based on the district court's error of law.

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state and defending those constitutional principles in the courts. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties consented to the filing of this brief after receiving timely notice.

administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly interested in preserving judicial remedies for relief from judicial error, prosecutorial or executive overreach, or unconstitutional judgments that abridge Americans' civil liberties. Because courts, like any other human institution, are fallible, error in such judgments may be discovered years after entry. Furthermore, unconstitutional practices by the government or administrative agencies can and unfortunately do go unquestioned for years and may require subsequent correction under the rules that govern court proceedings.

When, as here, error is admitted by all parties, the Supreme Court in adopting the Federal Rules of Civil Procedure determined that Rule 60 should be available to correct judicial errors of law, by courts exercising independent judgment and without bias. The Executive typically plays an outsized role in setting forth the terms upon which judgments are entered in governmental cases.

> The construction given to the laws, by any department of the executive government, is necessarily ex parte, without the benefit of an opposing argument …; and … the judicial department has … the solemn duty to interpret the laws, in the last resort; and … in cases where its own judgment shall

> differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.

United States v. Dickson, 40 U.S. 141, 161–62 (1841) (per Story, J.). Here, where this Court expressly designed the federal rules to permit correction of judicial errors of law, the judiciary must step in to protect the judicial decision from annulment.

SUMMARY OF THE ARGUMENT

The Supreme Court adopted Rule 60(b) to "accomplish justice" and to avoid "undermining the public's confidence in the judicial process." *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). Allowing incorrect—or even worse, unconstitutional—judgments to stand "injures not just the defendant, but the law as an institution, … the community at large, and … the democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (cleaned up) (finding Rule 60(b) relief appropriate where race was a factor in the original judgment and state's interest in finality deserves little weight when proceedings violate the Constitution).

Before the Supreme Court decided to adopt the Federal Rules of Civil Procedure, federal courts had two ways of altering erroneous judgments. First, if the term in which the district court entered the erroneous judgment was not yet over, parties could petition

district courts to use their inherent power to modify judgments. *See U.S. v. Mayer*, 235 U.S. 55, 67 (1914). This centuries old power became known as the "term rule." *Cf. Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020) (using the phrase "term rule"). Second, if the term had expired, a latinate potpourri of remedial devices was developed to permit correction of judgments as needed to effectuate justice. *See* James Wm. Moore & Elizabeth B.A. Rodgers, *Federal Relief From Civil Judgments*, 55 Yale L.J. 623, 626 (1946). While these remedial devices served the noble cause of correcting judgments, courts applied them inconsistently, sometimes turning justice into a matter of luck. *See Klapprott*, 335 U.S. at 614 ("few courts ever have agreed as to what circumstances would justify relief under these old remedies.").

To establish more uniform justice, this Court adopted the first iteration of Rule 60(b) in 1937. This new rule did away with the "term rule" and let litigants move to reopen their cases if they brought their motion "within a reasonable time" not "exceeding six months." Fed. R. Civ. P. 60(b) (1938). While this change was certainly an improvement from the prior *ad hoc* and happenstance practice, the new Rule 60(b) did not go far enough. Therefore, in 1946, the drafters rewrote Rule 60(b), codifying the common law practices and "dramatic[ally]" expanding the ability of courts to remedy prior incorrect judgments. *See* Comment, *The Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. Chi. L. Rev. 664, 668 (1950). The amended Rule 60(b) still stands today, and courts

should interpret it consistent with its original public meaning and purpose. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074–75 (2018).

The Rule and each of its subsections addressed a particular infirmity and provided a remedy therefor. Reading the Rule to provide for overlapping or alternate remedies as proposed by the Government here defeats the design of the Rule, contradicts the harmonious reading canon of interpretation, *see* Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts, 180–82 (2012) ("there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously"), and fails to serve the Rule's purpose of doing substantial justice.

This *amicus* brief first examines the history of federal district courts' power to revise flawed judgments, including common law doctrines and equitable practices before the adoption of the Federal Rules of Civil Procedure, the original Rule 60(b), and the amended Rule 60(b). Next, this brief examines contemporaneous interpretation of the most recent amendment to Rule 60(b) by this Court. This statutory history and judicial interpretation elucidate the drafters' goals of crafting an internally coherent rule that expands the situations in which a litigant can petition a court to reopen an erroneous judgment.

ARGUMENT

I. A SHORT HISTORY OF POST-JUDGMENT RELIEF

A. The Common Law Regime

Prior to 1938, district courts had plenary authority to alter their judgments before the "term" of the court ended. *Mayer*, 235 U.S. at 67. However, if the term ended and the flawed judgment was still in effect, parties could take remedial action through one of four ill-defined and overlapping categories. First, parties could reopen the judgment through writs of *audita querela, coram nobis*, *coram vobis* and bills of review or in the nature of bill of review. *See* Moore & Rodgers, *supra*, at 626–27, 659–670 (discussing how these "ancillary remedies" were primarily used for legal errors on the face of the record and newly discovered facts). Second, if there was extrinsic fraud, mistake, or accident on behalf of the moving party, that party could assert a direct action in equity to reopen the case. *Id.* at 653. These direct actions often overlapped with the "ancient writs." *See Klapprott*, 335 U.S. at 614. Third, if the problem was the scope of an injunction, district courts found they had inherent power to modify such injunctions. *See, e.g.*, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Finally, courts retained the power to disregard or vacate void judgments, as they never had the power to enter them in the first place. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

Indeed, the common law provided a remedy where courts that otherwise have personal and subject-matter jurisdiction, may have their judgments voided for lack of power to issue them at all. *See United States use of Wilson v. Walker*, 109 U.S. 258, 266 (1883) (superseded by Rule as stated in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) ("Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization its decree is void."). As the Supreme Court observed in *Ex Parte Lange*, 85 U.S. 163, 176–77 (1873):

> It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should

> render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

This system of correcting erroneous judgments contained serious flaws, principally the arbitrary timing and confusion over the availability and meaning of the writs and bills. It was inequitable to parties whose cases were heard toward the end of the term. *See* Comment, *supra*, at 666. Parties who lost their cases early in the term had much more time to convince the district court to alter the judgment than parties who lost later in the term. In fact, a litigant who lost on the last day of the term would have no recourse at all under the "term rule" and would have to resort to the various *ad hoc* remedial devices described above. *Id.* at 665–68. The process thus fell short of doing substantial justice.

The inequity of the "term rule" resulted in courts creating remedial devices over hundreds of years. *See* Note, *Federal Rule 60(b): Relief From Civil Judgments*, 61 Yale L.J. 76, 76–77 (1952). While these devices blunted the impact of the "term rule," they had their own infirmities, primarily inconsistency and confusion. By the mid-20th century, neither courts nor litigants could be sure which writs applied under which circumstances. *See Klapprott*, 335 U.S. at 614.

As the Advisory Committee on Rules for Civil Procedure wryly noted, the remedial devices were "shrouded in ancient lore and mystery." Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment. Contemporary academics were just as flummoxed, with famed civil procedure scholar James Moore stating, "no one could say with certainty … just what matters could be reached or raised by a bill of review, writ of error *coram nobis*, or the like." Moore & Rodgers, *supra*, at 638. In short, these remedial devices offered potential relief, but still often made obtaining substantial justice uncertain.

B. The Origin of Rule 60(b)

It was clear by 1937 that the traditional methods of reopening judgments were not working. To remedy the problem, the Supreme Court included Rule 60(b)[2] in the first Rules of Civil Procedure. *See*

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[2] In full, this incarnation of Rule 60(b) read: "MISTAKE; INADVERTENCE; SURPRISE; OR EXCUSABLE NEGLECT. On motion the court upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after a judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code U.S.C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified."

10a (Rule 60 (1938)). Under this new rule, its drafters did away with the previous "term rule" used in the federal district courts. Instead, parties could move to reopen a judgment "within a reasonable time" not to exceed "six months" from the date of the judgment. Fed. R. Civ. P. 60(b) (1938). Nonetheless, some district courts found it within their power under Rule 6(b) to waive this six-month limit and allow for motions to reopen cases for an undefined period. *See Schram v. O'Connor*, 2 F.R.D. 192 (E.D. Mich. 1941) (noting that Fed. R. Civ. P. 6(b) (1938) allowed courts to extend deadlines, including deadlines under Rule 60(b)).

While the original Rule 60(b) did away with the "term rule," most courts held it did not abolish the common law writs of *audita querela*, *coram nobis*, *coram vobis*, bill of review, and bill in the nature of bill of review. *See Wallace v. U.S.*, 142 F.2d 240, 244 (2d Cir. 1944) (holding that the "savings clause" in Rule 60(b) preserved the common law writs); *see also United States v. Certain Lands in the Town of Highlands*, 82 F. Supp. 432, 434 (S.D.N.Y. 1946) (holding that Rule 60(b) did not eliminate bills of review). While the original Rule 60(b) was intended to simplify, expand, and standardize post-judgment review, yet, with the traditional writs still in effect, and courts exercising power under Rule 6(b) to extend timelines, litigants were still not guaranteed any measure of certitude or consistency.

The enduring availability of the traditional writs was important because courts uniformly held

that mere errors of law by courts were not within the ambit of "[the party's] mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b) (1938); *Jusino v. Morales & Tio*, 139 F.2d 946, 947 (1st Cir. 1944) (stating that the original Rule 60(b) had "no bearing" on a claim for a mistake of law); *In re Barnett*, 124 F.2d 1005, 1012 (2d Cir. 1942) (not applying Rule 60(b) to a claim of legal error); *Fleming v. Miller*, 47 F. Supp. 1004, 1010 (D. Minn. 1942) (same). This meant that without the savings clause at the end of Rule 60(b), district courts would have been unable to fix legally erroneous judgments after six months expired. The Government does not dispute this, but instead argues that the Rule intended to give district courts the ability to revisit legally erroneous judgments under subsection (b)(1) of the amended Rule 60(b) merely by taking the word "his" out of the first sentence. Br. in Opp. at 14. As *amicus* shows below, this interpretation creates structural contradictions within the Rule and contravenes the objectives of this Court in adopting the rule.

C. The 1946 Amendment

Given the flaws of the original Rule 60(b), the federal rule drafters endeavored to update it in 1946. The 1946 amendment to Rule 60(b)—which took effect in 1948—made three significant changes. First, the amendment extended the timeline for a district court to adjust judgments because of "mistake, inadvertence, surprise, or excusable neglect" from six months to one year. Fed. R. Civ. P. 60(b)(1), (c)(1). Second, the amendment codified, incorporated, and

expanded the disparate remedial measures that district courts were using to reopen a judgment, Fed. R. Civ. P. 60(b)(1)-(6), and abolished the old writs in subsection (e). Third, the amendment added a catchall provision which authorizes courts to reopen judgments for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

Notably, the drafters made these changes to *expand* a litigant's ability to obtain relief from erroneous judgments. As a contemporary author explained, the new Rule 60(b) was a "fundamental change" from the previous regime. Comment, *supra*, at 670. The change was most dramatic as it pertained to the time limits to reopen a judgment. Subsection (b)(1) doubled the amount of time that a party had to reopen a case for "mistake, inadvertence, surprise, or excusable neglect" and subsections (b)(4)-(6) contain no explicit time limit other than they must be raised in "a reasonable time."[3]

Because Rules 60(b)(1)-(3) involve fact-intensive, non-legal errors like new evidence and fraud that require prompt correction, some time limit is appropriate. By contrast, Rules 60(b)(4)-(6) focus on

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[3] The "reasonable time" requirement was likely intended to be different for the different subsections. For example, if a judgment turned out to be void, there could be no time restriction upon the motion, as the underlying judgment was a nullity to begin with. *See New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143–44 (5th Cir. 1996).

legal errors, unconstitutionality, or legal developments that would render the judgment void. Those errors do not involve litigation conduct or trial evidence and thus warrant a lengthier, more flexible timeline for correction—or no time limit at all in the case of an unconstitutional or otherwise void judgment. "Although Rule 60(c)(1) purports to require all motions under Rule 60(b) to be made 'within a reasonable time,' this limitation does not apply to a motion under clause (4) attacking a judgment as void. There is no time limit on a motion of that kind." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2866 (3d ed. 2002 & Supp. 2019); "[A] judgment allegedly void on constitutional grounds is subject to attack at any time." 47 Am. Jur. 2d *Judgments* § 653.

D. The Structure of the Rule

The structure of the amended Rule 60(b) is crucial to this case. Subsections (b)(1)-(6) of the new rule codified and expanded existing common law remedies. *See* Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment (noting that Rule 60(b) maintains the forms of "relief from judgments which were permitted in the federal courts prior to the adoption of these rules …"). There is nothing in the rule or the comments thereto that even suggests that the amendments were intended to cut back on any of those remedies. Yet, under the Government's interpretation of subsection (b)(1), parties would only have one year to claim the district court made a legal error. Br. in Opp. at 24. This is

contrary to the committee's note discussing that before the amendment, parties could reopen a judgment for a legal error with a "bill of review" longer than one year after the judgment was entered. *See Scotten v. Littlefield*, 235 U.S. 407, 411 (1914) (denying the bill of review on other grounds). This contradiction casts doubt on the Government's claim.

The difference in the time to raise claims under subsections (b)(1)-(3) and (b)(4)-(6) also hurts the Government's argument that subsection (b)(1) was intended to cover legal errors. If legal errors were to fall under section (b)(1), the error could be subject to two different time requirements—a result the drafters surely could not have intended. For example, no one disputes that entering a judgment without subject-matter jurisdiction would be a legal error. Therefore, under the Government's interpretation of subsection (b)(1), a litigant can only raise this claim within a year. However, if a judgment is "void" under subsection (b)(4) because there was, for example, "a clear usurpation of power," *see United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (declining to "define the precise circumstances in which a jurisdictional error will render a judgment void" under Rule 60(b)(4)), or because the court lacked power to issue a particular remedy, *SEC v. Bolla*, 550 F. Supp. 2d 54 (D.D.C. 1983), or where, as in *Klapprott*, statutory grounds other than jurisdiction or due process void a judgment, *e.g., Carter v. Fenner*, 136 F. 3d 1000 (5th Cir. 1998) (voiding under 60(b)(4) a minor's settlement judgment where the necessary probate court approval had not been secured), parties

may bring the motion "within a reasonable time" Fed. R. Civ. P. 60(c)(1), or at any time if the court lacked power to enter all or part of an order. Therefore, the Government's interpretation of subsection (b)(1) creates a paradox. If an erroneous legal judgment falls under subsection (b)(1), then it would be both challengeable and not challengeable at the same time. *See* Scalia & Garner, *supra*, at 180 ("The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves (in the absence of duress).").

II. POST-ADOPTION INTERPRETATION

Immediate interpretation of a statute has long been strong evidence of its original public meaning. *See*, *e.g.*, *Boyd v. United States*, 116 U.S. 616, 622 (1886). We rely upon this principle of *contemporanea expositio* because we assume that interpreters closer to the time of enactment had a better grasp on the language than we do many decades later. *Id.* This principle should be especially strong when it is a neutral court discerning the contemporaneous meaning of a statute or rule and not a self-interested administrative agency or other interested party.

Only one year after the amendment to Rule 60 became effective, this Court interpreted its meaning in *Klapprott*, 335 U.S. 601. In *Klapprott*, a German immigrant sought to reopen a judgment stripping him of his American citizenship. The Government alleged that Mr. Klapprott had lied on his naturalization form

and was still loyal to Adolf Hitler. *Id.* at 603. During the "denaturalization" proceeding, Mr. Klapprott "was absent [from the courtroom], no counsel or other representative of his was present, no evidence was offered, and the only basis for action was a complaint containing allegations, questionable from a procedural and substantive standpoint . . . ." *Id.* at 610. Mr. Klapprott did receive notice of the proceeding. *Id.* at 604. However, at the time he was seriously ill, broke, and was arrested a few days later for allegedly violating the Selective Service Act, which denied him the chance to contest the accusation that he had lied on his naturalization form. *Id.* at 604–607.

Four years after he was denaturalized, Mr. Klapprott filed a motion under Rule 60(b) to reopen the judgment against him and halt his impending deportation. *Id.* at 607. Notably, this was well past the one-year deadline to raise a claim for "mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1). Instead, he moved to reopen the judgment under Rule 60(b)(4) for voidness and under the 60(b)(6) catchall provision. The Court ruled in the alternative for Mr. Klapprott on *both* issues.[4]

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[4] To clarify the "lineup" of justices in *Klapprott*, Justice Black announced the "judgment of the court," joined by Justice Douglas. Justices Rutledge and Murphy "concurre[d] in the result;" their concurrence stated, "upon the assumption that rules of civil procedure may apply in denaturalization proceedings" they were "substantially in accord with the views expressed by MR. JUSTICE BLACK." Justice Burton concurred

The lead opinion from Justice Black contained two holdings. First, and most important to the case at hand, the judgment "denaturalizing" Mr. Klapprott was void under Rule 60(b)(4). The Court held that the district court did not follow the proper statutory procedure to enter a denaturalization order. *Klapprott*, 335 U.S. at 609–610. Specifically, the Court held that 8 U.S.C. § 738 required district courts to conduct a "hearing [and hear] evidence" before entering a default judgment "denaturalizing" a citizen. *Id.* Because the district court did not follow the correct statutory procedure, its judgment "denaturalizing" Mr. Klapprott was void because without satisfying the proper procedures the court lacked the power to enter the default judgment. *Id.*

Holding that a legal error, such as a failure to follow statutory procedures, can render a judgment void under subsection (b)(4) eviscerates the Government's argument in this case. Under its reading of subsection (b)(1), this type of legal error would be covered by both (b)(4) and (b)(1). However,

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entirely with the majority opinion but did "not express an opinion on any matters not before this Court." While five justices did not formally join Justice Black's opinion, the Supreme Court has consistently cited Justice Black's opinion as a majority opinion entitled to precedential value. *See*, *e.g.*, *Gonzales v. Crosby*, 545 U.S. 524, 534, 542 (2005); *see also Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993). Not only has the Supreme Court treated *Klapprott* as binding precedent, but so has the Government in this case. *See* Br. in Opp. at 17–18.

that reading would violate the Supreme Court's longstanding interpretive principle that statutes should be read harmoniously and to avoid "internal inconsistencies." *See United States v. Turkette*, 452 U.S. 576, 580 (1981). Furthermore, this Court has consistently read the provisions of Rule 60(b) in harmony. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988); *see also Klapprott*, 335 U.S. at 613. Not only would reading "mistake" to cover legal errors make subsection (b)(4) redundant, but it would also create a paradox. A legal error serious enough to result in a void judgment would fall under the one-year time limit of subsection (b)(1), but also under the more expansive "reasonable time" limit of subsection (b)(4). Given that the 1946 amendment to Rule 60(b) was designed to simplify the law surrounding the reopening of judgments, it seems odd that this Court would have enacted a type of "Schrodinger's provision," where a motion could be timely and untimely at once.

The Government may counter with the argument that legal errors which result in voidness under subsection (b)(4) are somehow different in kind, and subsection (b)(1) only covers other legal errors. However, this reading does not hold up to scrutiny. First, nothing in the text of the Rule gives guidance for courts to determine which legal errors result in voidness and which do not. And, while the historical usage of term "void" gives some clue as to which judgments would be void—rather than just incorrect—this still does not provide an easily applicable bright-line rule. *See Walker*, 109 U.S. at

266 (explaining the voidness as when a court "makes a decree which is not within the powers granted to it by the law of its organization its decree is void."). This would be far less consequential if district courts evaluate legal errors under subsection (b)(6), since neither subsection (b)(4) nor (b)(6) has a hard deadline after which one cannot move for relief. *See* Fed. R. Civ. P. 60(c)(1). In deciding between an interpretation of Rule 60(b) that creates contradictory deadlines and an interpretation that creates coherent ones, this Court should conclude the rule drafters meant the latter.

The Supreme Court's alternative holding in *Klapprott* does nothing to help the Government's untenable position. After determining that subsection (b)(4) allowed the district court to reopen the judgment, the Supreme Court went on to state that the Government's improper conduct throughout the previous years would have authorized relief under subsection (b)(6) as well. *Klapprott*, 335 U.S. at 614–15. No one could deny that the facts surrounding Mr. Klapprott's failure to contest his denaturalization were exceptional. When the U.S. Attorney filed suit against him, Mr. Klapprott was gravely ill and unable to work. *Id.* at 604. This illness not only sapped him of his strength, but also his financial resources. *Id.* Before he could muster an answer to the complaint against him, Mr. Klapprott was arrested for allegedly violating the Selective Service Act and was held in prison pretrial with $25,000 bail which he could not afford. *Id.* at 604–05. The Government held Mr.

Klapprott for six and a half years[5]—four and a half of which the Supreme Court deemed "wrongful." *Id.* at 607–08. Moreover, his attempts to contact the ACLU for representation were thwarted when FBI agents confiscated his letter asking for legal help. *Id.* at 604. Due to the Government's misconduct, Mr. Klapprott was unable to fight the denaturalization proceeding against him. In holding that these circumstances justified relief under subsection (b)(6), the Court stated that Mr. Klapprott's plight involved more than mere "excusable neglect," and therefore, he was not bound by the one-year time limit in subsection (b)(1). *Id.* at 613.

The Government addresses *Klapprott* in its brief, but its analysis only proves why it is *wrong* about Rule 60(b). *See* Br. in Opp. at 17–18. In arguing that the Supreme Court has never authoritatively interpreted Rule 60(b)(1), the Government contends that "[i]n … *Klapprott v. United States*, … the only ground for relief under Rule 60(b)(1) at issue was the 'excusable neglect' criterion" and not the "mistake" criterion. *Ibid.* We agree! The Court never mentioned the "mistake" portion of subsection (b)(1) because legal errors are not within its purview. Mistakes of law—like the district court's failure to apply the correct statutory procedures—fall under subsection (b)(4) if they are serious enough to void the judgment,

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[5] At the time Mr. Klapprott filed his Rule 60(b) motion, he had been in jail for approximately four years.

such as to be unconstitutional, s*ee, e.g.,* 11 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2862, p. 331 (2d ed.1995 and Supp. 2009), or subsection (b)(6) if they are not. If the Court—expounding the meaning of the law only a year after it took effect—thought that the district court's misapplying statutory requirements was a "mistake" within subsection (b)(1), it surely would have at least *mentioned* that Mr. Klapprott could have brought his claim under subsection (b)(1). So, *Klapprott* itself proves the Government's position is mistaken.

To summarize, directly after this Court adopted amended Rule 60(b), the Supreme Court interpreted it in a way that disproves the Government's argument. A legal error made by the district court rendered it powerless to enter the judgment against Mr. Klapprott. Yet, instead of stating that Mr. Klapprott filed his motion under the wrong subsection of Rule 60(b), the Supreme Court held that such a legal error was ground for vacating the judgment under Rule 60(b)(4). 335 U.S. at 610.

The history and contemporaneous interpretation of Rule 60(b) show two primary goals of the Rule. First, this Court wanted to simplify the post-judgment relief process. The "ancient" writs and remedies had mystified courts for decades. This Court adopted a more coherent rule which was intended to fit together smoothly and allow consistency across jurisdictions. Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment. Second, this

Court wished to "grant[] courts a broader power to set aside [flawed] judgments"—hence the reason it enacted subsection (b)(6), which serves as a catchall provision. *Klapprott*, 335 U.S. at 609.

The Government's interpretation of the word "mistake" in subsection (b)(1) cuts against both goals. First, it would create a structural anomaly within the Rule, subjecting some legal errors to two different time limitations and giving courts no way to decide between them. Second, it would cut back on the traditional remedy of a "bill of review," which the committee notes explicitly preserve. Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment ("The Committee has … endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules …"). This Court should not allow the Executive Branch to rewrite the rules of civil procedure to better fit its goals.

CONCLUSION

Courts, like any other human institution, are fallible. To their great credit, they have always known that. Over centuries, the common law developed specific writs and bills to allow for correction of judgments. When the drafters first codified these in 1937, the courts still drew on their fund of remedial writs and bills to correct judgments—showing both wisdom and humility about their own errors—

because the first Rule was inadequate to the task. Judges knew the hard-won common law remedies crafted by generations of judges were necessary to accomplish the difficult task of dispensing justice and should be preserved in an expanded rule, not disposed of in the interest of finality. It was only after these remedial bills and writs had been securely and expansively preserved in the new Rule 60(b) subsections, along with a new savings provision to allow room for all contingencies necessary to the fair administration of justice, that the old remedies were abolished. The Government's reading of the Rule contradicts the history, structure and purpose of Rule 60(b).

The Eleventh Circuit should be reversed.

Respectfully submitted,

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