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

REPLY BRIEF FOR PETITIONER

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Rule 60(b)(1) relief for "mistake[s], inadvertence, surprise, or excusable neglect" excludes legal errors. This is a paradigmatic case for term-of-art meaning: Rule 60 was modeled on state procedure codes, 17 of which used the exact phrase "mistake, inadvertence, surprise, or excusable neglect" to exclude legal errors. Neighboring terms and Rule 60's structure confirm that legal errors are not "mistakes." Even if they were, Rule 60(b)(1) does not cover *courts'* errors.

The government's interpretation is incoherent. The government previously told this Court "mistakes" mean any errors. Br. in Opp. 12. Now, the government retreats, defining "mistakes" as encompassing legal errors, but

only "unintentional," "obvious" ones. U.S. Br. 19. No authority supports that unworkable definition.

I. Rule 60(b)(1) Excludes Legal Errors

Rule 60's text, history, and structure assign legal errors appearing on the face of the decision—like the error here—to Rule 60(b)(6), not (b)(1).

A. "Mistake" Is a Term of Art in Rule 60

All agree Rule 60(b)(1) is a classic transplant: its drafters lifted the phrase "mistake, inadvertence, surprise, or excusable neglect" from state codes, thus preserving the same meaning. Br. 13-17; U.S. Br. 21-27; 4 Advisory Comm. on Rules for Civ. Proc., *Proceedings* 515 (May 1, 1945) (*1945 Proceedings*) (describing phrase as "a term of art"). By Rule 60(b)(1)'s adoption, California and 16 other States used that phrase to authorize relief from judgments—but not for legal errors. Instead, litigants used common-law or equitable forms like the bill of review to target legal errors apparent on the face of the record. Rule 60 incorporated those traditional forms into Rules 60(b)(2)-(6), while keeping the meaning of "mistake, inadvertence, surprise, or excusable neglect" constant: no legal errors included. Br. 13-23.

1. Despite agreeing that Rule 60 imported the "mistake" phrase from state codes, the government (at 13-15) insists this is a plain-meaning case where dictionary definitions control. But when legal drafters borrow a well-worn phrase, what governs is the "cluster of ideas that were attached to each borrowed word." *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301 (2015) (citation omitted). That original, context-specific meaning—not dictionaries defining words in isolation—captures the lineage of the old soil. *See Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018);

FAA v. Cooper, 566 U.S. 284, 291-92 (2012); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

As for the States, the government (at 22-26) claims Rule 60's drafters cared about only California and that the Golden State took a minority position authorizing relief for various legal errors. That take is fiction. For nearly a century, California courts consistently held that "the summary modification of judgments to correct errors of law is not authorized by section 473," California's mistake statute. *Bowman v. Bowman*, 178 P.2d 751, 754-55 (Cal. 1947) (collecting cases); *accord, e.g.*, *Shearman v. Jorgensen*, 39 P. 863, 864 (Cal. 1895); *Chase v. Swain*, 9 Cal. 130, 134 (1858). The government ignores these cases.

The government dismisses other cases holding that California's code did not encompass judicial errors. U.S. Br. 23 (citing *Glougie v. Glougie*, 162 P. 118, 120 (Cal. 1916)). But, contrary to the government's assertion, that limitation was not because California's code covered only a party's "mistake, inadvertence, surprise, or excusable neglect." Rather, California's code excluded judicial errors because parties could separately redress those errors through appeals. *Glougie*, 162 P. at 120. The general rule was that no legal errors—by parties or others—counted.

True, California permitted reopening *default* judgments for legal errors. Br. 17. But that default-specific rule did not have "general application to legal errors." *Contra* U.S. Br. 24. With two exceptions, all of the government's citations (at 22-24) involve reopening default judgments based on legal errors.[1]

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[1] *Douglass v. Todd*, 31 P. 623, 624 (Cal. 1892) (reopening default after attorney erroneously advised defendant he had no case); *John A. Vaughan Corp. v. Title Ins. & Tr. Co.*, 12 P.2d 117, 117-18 (Cal. Dist.

The two exceptions—*Mitchell*, 105 P. 590, and *Bruskey v. Bruskey*, 41 P.2d 203 (Cal. Dist. Ct. App. 1935) (both cited at U.S. Br. 24)—do not help the government. The relevant mistake in *Mitchell* "was a mistake of fact"—defense counsel erroneously believed his clerk had obtained a continuance. 105 P. at 592. Dicta in *Mitchell* suggesting the court could "grant relief against a mistake of law" "in a proper case" relied on *Douglass*, 31 P. at 624, a default case. *Mitchell*, 105 P. at 592. A California intermediate appellate court in *Bruskey* denied relief because the movant had not specifically identified any mistake. 41 P.2d at 206. The passing dicta from an intermediate court that a "mistake either of fact or law" might qualify conflicts with the California Supreme Court's longstanding approach. *See id.; cf. Bowman*, 178 P.2d at 754-55.

The government (at 24) brandishes a separate California reopening statute that reached *only* default judgments in municipal courts as proof that section 473, the key California provision, was broader. *See* Cal. Civ. Proc. Code § 473 note (Deering 1937) (describing former section 859). But petitioner does not contend that section 473 was limited to default judgments. California courts interpreted "mistake" in section 473 to reach factual errors in regular or default judgments. California simply afforded even broader relief under section 473 in default-judgment

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Ct. App. 1932) (reopening default where defendants' attorneys erroneously believed they had properly entered appearance); 3 James Wm. Moore et al., *Moore's Federal Practice* § 60.05 n.28, at 3280 (1st ed. 1938) (citing only default cases and *Mitchell v. California & O.C.S.S. Co.*, 105 P. 590 (Cal. 1909), discussed *infra*); 34 *Corpus Juris* § 516 n.11[a], at 298 (1924) (same); 14 William M. McKinney, *California Jurisprudence* § 95 nn.8-9, at 1035 (1924) (same, sans *Mitchell*).

cases, based on a default-specific policy favoring a hearing on the merits. *Supra* p. 3.

Even had California taken a uniquely broad view of "mistakes," it defies credulity that Rule 60's drafters consigned 16 States' materially identical provisions to irrelevancy with this explanatory note: "This section is based upon Calif.Code Civ.Proc. (Deering, 1937) §473. See also N.Y.C.P.A. (1937) §108; 2 Minn.Stat. (Mason, 1927) §9283." California apparently merited special mention only because a Californian on the Committee "strong[ly] recommend[ed]" his State's provision. *See* James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 631 (1946).

The government's California-centric reading is especially implausible because the government does not dispute that at least 12 of the 17 States' "mistake" provisions excluded legal errors. Br. 15 & n.2; *e.g.*, 34 *Corpus Juris* § 516 & n.10, at 297. Likewise ignored are contemporaneous treatises and cases that grouped California and other States together and uniformly characterized these laws as limited to factual errors. Br. 15. If Rule 60's drafters wanted to buck these authorities, ascribe to California a unique, legal-error-embracing view, and enshrine that approach in Rule 60(b), copying the basic "mistake" phrase that 17 States shared would be an odd way to do it. The more natural inference is that the drafters preserved "the meaning generally attached" to the relevant term. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992). And the general meaning of "mistake, inadvertence, surprise, or excusable neglect" across state codes excluded legal errors.

Finally, the government (at 25) quibbles with whether four other States' "mistake" provisions—New York,

North Dakota, Minnesota, and Oregon—covered legal errors. To begin, unlike in the congressional-ratification context, this Court has never required a "broad and unquestioned" judicial consensus for a term of art. *Contra* U.S. Br. 26. Anyway, the "overwhelming weight of authority" recognized that States' "mistake" provisions cover "only . . . mistakes of fact." *Lucas v. N.C. Mut. Life Ins. Co.*, 191 S.E. 711, 712 (S.C. 1937). The government's purported counter-examples (at 25) again involve default-judgment cases, because these four States, like California, took the minority view that legal errors could support reopening in that context alone. *See Cowperthwait v. Critchley*, 276 N.Y.S. 133, 134 (App. Div. 1934); *Chittenden & Eastman Co. v. Sell*, 227 N.W. 188, 188 (N.D. 1929); *Flannery v. Kusha*, 179 N.W. 902, 902 (Minn. 1920); *Coos Bay, R. & E.R. & Nav. Co. v. Endicott*, 57 P. 61, 61 (Or. 1899); Br. 17.

2. Under state codes, when litigants sought relief from legal errors, they invoked traditional common-law or equitable forms like the bill of review—not the "mistake" provisions. Br. 20-22; NCLA Br. 9-11. The government does not dispute the many cases holding that bills of review covered "an error of law apparent on the face of the record" (*i.e.*, the error at issue here). Br. 19-20 (citations omitted). Nor does the government dispute that the substance of a "mistake" under Rule 60 has not changed since the Rule's inception. *See* U.S. Br. 26-28.

That history is fatal to the government's position. The original Rule 60(b), like the state codes, codified relief from "mistake[s]" while preserving common-law and equitable remedies that covered legal errors. In 1946, the drafters parceled those traditional forms across 60(b)(2)-(6) to subsume the "various kinds of relief from judg-

ments" that those forms reached. Fed. R. Civ. P. 60 advisory committee's note to 1946 amendment. The bill of review for errors apparent on the face of the record—which would have covered the error here—ended up in 60(b)(6). Br. 22-23; *see* NCLA Br. 11-13.

The government (at 30-32) responds that the Advisory Committee's meeting transcripts refute the notion that Rule 60(b)(6) captures many legal errors previously addressed through legal or equitable forms. But just as "legislative history is not the law," *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (citation omitted), committee meeting transcripts are not the Federal Rules. The adage that "statements by individual legislators rank among the least illuminating forms of legislative history" applies equally to the Rules context. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

Take the government's claim that a 1943 meeting transcript shows that "Rules 60(b)(2) and (3) alone would 'preserve[] the substance of the . . . bill of review.'" U.S. Br. 31 (quoting 4 Advisory Comm. on Rules for Civ. Proc., *Proceedings* 923 (May 20, 1943) (*1943 Proceedings*)). Actually, what the member said was that "the *rule* preserve[d] the substance of the . . . bill of review." *1943 Proceedings*, *supra*, at 923 (emphasis added). In 1943, no one had even proposed Rule 60(b)(2). Advisory Comm. on Rules for Civ. Proc., *Preliminary Draft of Proposed Amendments* 72 (May 1944).

The government (at 31-32) cites snippets from Committee members suggesting that Rules 60(b)(1)-(5) covered the old remedies. But another member "raise[d] a question" of "whether error apparent on the record"—like the error here—had been covered. *1945 Proceedings*, *supra*, at 533. The meaning of Rule 60's text does not turn

upon individual Committee members' grasp of the nuances of common-law and equitable forms.

At bottom, the transcripts are a red herring. In final form, Rule 60(b) incorporated all traditional legal and equitable remedies, including the bill of review. Fed. R. Civ. P. 60 advisory committee's note to 1946 amendment. The bill of review for apparent legal errors never fit into States' "mistake" clauses or Rule 60(b)(1)'s copycat clause. And the government does not argue that ground somehow fits into Rules 60(b)(2)-(5). That leaves Rule 60(b)(6) as the natural home for such legal errors.

B. Mistake's Neighboring Terms Exclude Legal Errors

Mistake's companions in Rule 60(b)(1)—"inadvertence, surprise, or excusable neglect"—do not reach legal errors. The *noscitur a sociis* canon reinforces that "mistake" does not either. Br. 23-25.

The government disagrees only at the margins. The government (at 16) agrees that neighboring terms in Rule 60(b)(1) should inform what "mistake" means. *But see* U.S. Br. 20 (contradictorily insisting each term stands alone). The government agrees with Mr. Kemp's definitions of "inadvertence," "surprise," and "excusable neglect." U.S. Br. 16-17; Br. 24. And the government does not dispute that "inadvertence" and "surprise" only encompass factual errors.

The government (at 20) nonetheless contends that "excusable neglect" covers legal errors, citing three circuit-court cases. The government never squares this reading of "excusable neglect" with its own definition, which requires an "unexpected or unavoidable hindrance or accident" or misplaced reliance on counsel or opposing parties. U.S. Br. 17 (quoting *Black's Law Dictionary* 715

(3d ed. 1933) (*Black's Third*)). That definition excludes legal errors. Br. 25.

None of the government's three cases even defines "excusable neglect." Two of the three invoke "mistake" and "excusable neglect" interchangeably without specifying which ground controlled, and arose in circuits that incorrectly treat legal errors as mistakes. *Lenaghan v. Pepsico, Inc.*, 961 F.2d 1250, 1254 (6th Cir. 1992); *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972). The third reopened a default judgment after treating a party's legal error as "excusable neglect" and apparently viewed defaults as particularly warranting reopening. *Provident Sec. Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 843 (9th Cir. 1963).

The government (at 16) posits another common trait linking Rule 60(b)(1)'s four grounds: "unintentional happening[s] that result[] from inattention or accident." But imposing an additional, common limitation across the whole phrase only underscores the anomalousness of defining "mistake" alone to encompass legal errors.

C. Rule 60's Structure Confirms Petitioner's Interpretation

The rest of Rule 60 confirms that legal errors are not Rule 60(b)(1) "mistake[s]."

60(a). The government does not dispute that "mistake" means the same thing in Rules 60(a) and 60(b)(1). Because Rule 60(a) uses "mistake" to exclude legal errors, so does Rule 60(b)(1). Br. 26-27, 31-32.

The government agrees that "Rule 60(a) 'may not be used as a guise for changing previous decisions.'" U.S. Br. 36 (citation omitted). The government (at 36-37) observes that Rule 60(a) only covers insubstantial errors, not errors

serious enough to demand "relie[f]" from a judgment, which fall under 60(b). And, for factual mistakes, courts under both sides' view must distinguish immaterial, clerical-type flaws subject to Rule 60(a) and more substantial problems subject to 60(b)(1).

But those aspects of Rule 60(a) always rule out correcting legal errors as "mistakes." Changing what rule of law applies inherently "chang[es] [the] previous decision[]." *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958); Br. 26-27. So the government's suggestion (at 37) that Rule 60(a) applies only to legal errors that would not "'chang[e] previous decisions' in a substantive fashion" is a non sequitur. No Rule 60(a) "mistake" could be legal in nature, or that mistake by definition would be too substantial to warrant correction (versus relief from judgment). Hence, no case appears to have ever applied Rule 60(a) to legal errors.

60(b). Rule 60(b)'s "internally coherent" structure confirms that "mistake[s]" are not legal errors. NCLA Br. 5. All other components of Rules 60(b)(1)-(3) cover fact-intensive, non-legal errors that require prompt correction, so it would be highly anomalous for "mistake" to be the odd clause out. By contrast, legal errors and subsequent developments warranting more flexibility fall in Rules 60(b)(4)-(6). Br. 27-30. The government does not dispute these characterizations, beyond the erroneous suggestion (at 20) that "excusable neglect" under 60(b)(1) can include legal errors. *Supra* pp. 8-9.

D. Regardless, Rule 60(b)(1) Does Not Reach Judicial Errors

Even if Rule 60(b)(1) encompassed legal errors, the rule does not encompass *judicial* errors of any sort. Br. 25, 34-36. This Court's cases suggest as much. In

Liljeberg v. Health Services Acquisition Corp., the Court held that the judge's responsibility for the legal error was "particular[ly] importan[t]" to why Rule 60(b)(6) was the "proper" vehicle for relief. 486 U.S. 847, 863 n.11 (1988). That confirms courts' errors do not go in Rule 60(b)(1). Br. 35-36. The government has no response.

Further, courts cannot commit "inadvertence," "surprise," or "excusable neglect," and it would be bizarre for "mistake" to be the exceptional category in this uniform list. Br. 25. The government does not dispute that "surprise" and "excusable neglect" are not things that happen to courts. *Accord 1945 Proceedings*, *supra*, at 516 ("You can hardly say that the court is surprised, can you, when he renders a judgment on you?"). The government (at 20-21) marshals one 1990s case stating that "judicial inadvertence" counts. *Larson v. Heritage Square Assocs.*, 952 F.2d 1533, 1536 (8th Cir. 1992). But that decision rested on circuit precedent erroneously holding that Rule 60(b)(1) reaches "judicial mistake," not inadvertence separately. *See CRI, Inc. v. Watson*, 608 F.2d 1137, 1143 (8th Cir. 1979).

The government's own definition also refutes that courts commit "inadvertence." Courts do not fail "to pay careful and prudent attention to the progress" of their own proceedings in a way that might affect courts' "rights." *See* U.S. Br. 16 (quoting *Black's Third*, *supra*, at 940).

The government's main rejoinder (at 28-30) is to rummage through Advisory Committee meeting minutes. On the government's read of the transcripts, the 1946 amendment expanded Rule 60(b)(1) to courts by deleting the word "his" in front of "mistake, inadvertence, surprise, or excusable neglect." But the Advisory Committee's official explanation undercuts that interpretation. The Committee note, published alongside the Rule's text, explains that

removing "his" just swept in errors by nonparties that might "call just as much for supervisory jurisdiction." Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment. Courts do not exercise "supervisory jurisdiction" over their own errors. Br. 36. Again, the government offers no response.

As for the much-vaunted minutes, the government cherry-picks favorable bits that at most indicate that three Committee members thought removing "his" would bring judicial errors within Rule 60(b)(1). This Court has never interpreted Federal Rules of Civil Procedure by divining what ideas different drafters floated. Further indicting the government's pick-your-friends approach, other comments cut the other way. When proposing to delete "his," one member noted "that it might easily be the mistake of a notary" or "a clerk of the lawyer of the party." *1943 Proceedings*, *supra*, at 932. He continued, in language tracking the eventual Advisory Committee note: A nonparty's mistake might "call[] just as much for supervisory jurisdiction as if the man himself had done it. That is all I meant." *Id.* Again, courts do not exercise supervisory jurisdiction over themselves. Br. 36.

The government also cites a 21st century treatise saying that deleting "his" from original Rule 60(b)(1) swept in judicial errors. U.S. Br. 28 (citing 12 James Wm. Moore, *Moore's Federal Practice* § 60.41[3] (3d ed. 2021)). That post hoc account rests on later circuit cases and misreads the Advisory Committee's explanatory note. Professor Moore's contemporaneous article explaining the 1946 amendment instead expressed uncertainty about whether deleting "his" reached judicial errors. Moore & Rogers, *supra*, at 641 n.52.

E. Petitioner's Interpretation Is Easily Administrable

Rule 60(b) draws a familiar line between non-legal "mistakes," which fall in 60(b)(1), and legal errors in 60(b)(4)-(6). *Contra* U.S. Br. 42-43. The government does not dispute that at least 12 States drew that same distinction in their procedural codes starting in the mid-19th century. Those States' "mistake" provisions covered only factual errors; litigants raised legal errors through traditional legal or equitable forms. Yet the government identifies no administrability problems.

Further, the fact/law distinction recurs in many contexts, such as determining the standard of review. *E.g.*, *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794) (Jay, C.J.); *cf. Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 946 (2022). While "difficult" questions may arise on the margins, U.S. Br. 42, the divide is hardly intractable. In the very case the government cites for the "vexing nature of the distinction," this Court had "little doubt" that the question was factual. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

Determining whether courts are responsible for a "mistake"—and thus, whether the mistake falls outside Rule 60(b)(1)—is likewise straightforward. States and courts implementing the original Rule 60(b) made that distinction all the time as those provisions confined relief to party errors. Again, the government unearths no evidence of problems.

That is because the inquiry is simple: Did the district court err? When a judgment or opinion contains an error, the buck stops with the court, regardless of whether the parties operated under the same incorrect view. *Contra* U.S. Br. 42. Article III "requires a court to exercise its independent judgment in interpreting and expounding

upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment). As courts recognize in the tort context, a judge's "exercise of independent judgment . . . breaks the chain of causation." *Galen v. County of Los Angeles*, 477 F.3d 652, 663 (9th Cir. 2007).

This case illustrates the simplicity of both questions. The district court erroneously believed that Mr. Kemp's time to petition for certiorari expired 90 days after the court of appeals affirmed his conviction, not after the denial of his codefendants' rehearing petitions. D. Ct. Doc. 32, at 6; Pet.App.18a. As the government recognized, Br. in Opp. 12, that was an error of law the district court made. *Contra* U.S. Br. 42-43. Even if parties omit the operative legal rule from their briefs, the court is responsible for independently ascertaining the law.

II. The Government's Interpretation Is Incorrect and Unworkable

The government (at 21) defines Rule 60(b)(1) "mistakes" as "obvious, inadvertent legal errors by courts," but apparently not non-obvious or deliberate legal errors. The government identifies no authority endorsing that flawed interpretation.

1. **Warring plain meanings.** "Mistake" can hardly have a "clear and unambiguous meaning," U.S. Br. 14, when the government equivocates about what "mistake" means. The government previously defined mistakes as "synonymous with errors . . . and misunderstandings." Br. in Opp. 12. But the government now abandons that overbroad definition, which would make Rule 60(b)(1) swallow the rest of Rule 60. Br. 30-39.

Instead, the government (at 14-15) cites different dictionaries to offer a new "plain meaning": "mistakes" are

"unintentional errors resulting from misconception or misapprehension." The government also slips in that "mistakes" must be "obvious." *E.g.*, U.S. Br. 18, 19. But the government's dictionaries do not support either limitation. None even mentions obviousness. And the dictionaries do not limit mistakes to "inadvertence," instead encompassing any "error, misjudgment"; "wrong action or statement proceeding from faulty judgment"; "fault in opinion or judgment"; or "wrong apprehension or opinion." U.S. Br. 14 (citations omitted).

Portions of definitions the government elides are broader still: any "thing incorrectly done or thought," "error of judgment," or "erroneous mental conception which influences a person to act." *Mistake*, Oxford English Dictionary (2022), https://www.oed.com/view/Entry/120072; *Ballentine's Law Dictionary* 808 (3d ed. 1969). The government's legal dictionaries muddy the waters further by defining "mistakes of law" as any "erroneous conclusion" about the law, inadvertent or obvious or not. *Black's Third*, *supra*, at 1195; *Ballentine's*, *supra*, at 808.

If "common parlance" and any "English speaker['s]" opinions were truly dispositive, U.S. Br. 15, it is hard to see any daylight between obvious and non-obvious errors, errors apparent only in retrospect, or inadvertent and deliberate ones. Yet the government does not dispute that equating "mistake" with all errors would be untenable.

2. **Warring interpretations**. The government's other arguments conflict with its putative plain-meaning interpretation limiting "mistakes" to inadvertent, obvious errors. The government (at 21-22) agrees that Rule 60 was modeled on state codes. But, according to the government (at 12, 21-24), California authorized relief for *all* legal errors.

Elsewhere, the government singles out inadvertence as a hallmark of a "mistake," while ruling out obviousness as a further limitation. For instance, the government (at 16-17) argues that "inadvertence, surprise, or excusable neglect" all refer to unintentional errors, so "mistake" must too. But when giving examples of "excusable neglect," the government includes "understandable" errors involving "somewhat ambiguous" questions. *Lenaghan*, 961 F.2d at 1254-55 (cited at U.S. Br. 20).

Conversely, the government's other arguments focus on the obviousness of the "mistake" as dispositive—regardless of whether the mistake is intentional. The government's discussion of equity practice and circuit cases (at 17-19) fits that bill.

All this inconsistency underscores a basic problem. Nothing—not the government's dictionaries, canons of interpretation, historical sources, or anything else—endorses the government's view that Rule 60(b) "mistakes" must be inadvertent *and* obvious. Even in isolation, neither purported limitation holds water.

3. **Inadvertence**. Limiting Rule 60(b)(1) "mistakes" to unintentional errors is unsupported and nonsensical. Not one of the 17 States whose identical "mistake" provisions formed the basis for Rule 60(b)(1) embraced that limitation. Limiting "mistake" to inadvertence also conflicts with the government's desire (at 19-20) to give separate meaning to every ground in Rule 60(b)(1)—"inadvertence" already covers that. The only authority in the government's brief that seems to distinguish intentional and deliberate mistakes is *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576-78 (10th Cir. 1996) (cited at U.S. Br. 17). But even that case is no help. While the Tenth Circuit makes that distinction for *party* errors, that court simply asks

whether *judicial* errors were "obvious." *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991).

This Court's decision in *Liljeberg* also undercuts an inadvertence-based limitation. There, the Court deemed a Rule 60(b) motion "proper under clause (6)," not 60(b)(1), when the judge "neglect[ed]" a mandatory basis for recusal due to a "temporary lapse of memory." 486 U.S. at 861, 863 n.11. That is a quintessential unintentional legal error under the government's definition. U.S. Br. 14. That the parties did not discover the judge's conflict until months later, U.S. Br. 34-35, is irrelevant. The legal basis for recusal always existed; the judge just missed it.

Distinguishing between intentional and unintentional legal errors would be a fraught enterprise. When a district judge fails to apply the right legal rule, how can a party tell whether the judge inadvertently overlooked controlling law or deliberately (but erroneously) deemed that law inapposite? Short of discovery into the judicial process, determining why a judge erred involves inconclusive speculation about the judge's mental state.

Take this case. The government (at 17) calls the district court's error "unintentional" because the judge failed to apply controlling law. But one could easily call the erroneous ruling deliberate. Even after Mr. Kemp's Rule 60(b) motion made it abundantly clear that a rehearing petition extended his certiorari deadline, the district court doubled down on its initial timeliness ruling. Pet.App.18a.

4. **Obviousness.** Limiting Rule 60(b)(1) "mistakes" to obvious errors creates similar problems. Again, none of the 17 state codes that formed the basis for Rule 60(b) endorsed such a limitation. And, as noted, the government's

examples of other Rule 60(b)(1) errors (like "excusable neglect") involve *debatable* errors, underscoring the oddity of defining "mistakes" alone as obvious. *Supra* p. 16.

Further, this Court's Rule 60(b)(6) cases have routinely considered even obvious legal errors under 60(b)(6), not (b)(1). Br. 29-30, 33. The government (at 34) argues that these cases "generally involved errors apparent only in light of intervening legal developments." But errors can be obvious at the time even if subsequent developments underscore their wrongness. Take *Tharpe v. Sellers*, 138 S. Ct. 545 (2018). The district court there failed to recognize that a black defendant established prejudice by pointing to a juror's n-word-laced screed. *Id.* at 546. Even without the benefit of this Court's intervening decision on juror animus in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), earlier precedent made that legal error clear enough.

History does not support the government's obviousness limitation, either. The government (at 18) claims that courts in equity granted relief from a party's legal error "only in the most unquestionable and flagrant cases." *Snell v. Ins. Co.*, 98 U.S. 85, 91 (1878) (quoting 1 Joseph Story, *Commentaries on Equity Jurisprudence*, § 138e, at 136 (10th ed. 1870)). But that rule applied to reforming defective instruments like contracts or deeds. The relevant antecedent for relief from judgment—the bill of review for error apparent—reached legal errors apparent on the face of the record (*i.e.*, without consulting evidence), whether flagrant or not. *See Whiting v. Bank of U.S.*, 13 Pet. 6, 14 (1839) (Story, J.).

The government (at 19) also cites the 1982 *Restatement (Second) of Judgments*, which advocates relief for "mistake[s] of law" that are "certain to result in reversal." Restatement (Second) of Judgments § 71 (1982). Missing

is any analysis of Rule 60 or its state antecedents. Notably, the 1942 *First Restatement*, contemporaneous with Rule 60(b)'s adoption, did not endorse mistake as a ground for relief at all. *Id.* § 71 reporter's note.

The government (at 18) misleadingly suggests that Wright and Miller endorsed a "very sensible distinction" between an "inadvertent judicial oversight" and a "fundamental error of law." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2858.1 (3d ed. updated Apr. 2021). Actually, that passage is discussing a student note that Wright and Miller deemed inconsistent with case law on "whether the motion will be allowed." *Id.*

At bottom, two circuits—the Fifth and Tenth—interpret "mistakes" to encompass legal errors but limit relief only to obvious errors. Those circuits have never grounded that position in Rule 60(b)'s text or history. *E.g.*, *Benson v. St. Joseph Reg'l Health Ctr.*, 575 F.3d 542, 547 (5th Cir. 2009). Those circuits' experience offers little hope that cabining Rule 60(b)(1) to obvious mistakes would be workable. *Contra* U.S. Br. 41. The Fifth Circuit, for example, has permitted relief where the court was "apprehensive" about the result—yet denied relief where the district court's answer was "doubt[ful]." *Compare McDowell v. Celebrezze*, 310 F.2d 43, 44 (5th Cir. 1962), *with Benson*, 575 F.3d at 548. How those two categories differ is unclear.

5. **Structural problems**. Slotting some legal errors into Rule 60(b)(1) would upend Rule 60's structure.

Rule 60(a). The government's interpretation creates significant superfluity in Rule 60(a). That Rule covers "mistake[s] arising from oversight." If, as the government (at 17, 21) contends, all "mistakes" are "inadvertent," *i.e.*, "resulting from an oversight," there was no need for Rule

60(a) to include that specific limitation. Things only get more bizarre if a 60(b)(1) "mistake" must be obvious, as well as inadvertent. It makes no sense at all for an unadorned "mistake" to be *more* limited than a "mistake arising from oversight."

Rule 60(b). Putting legal errors in Rules 60(b)(1) *and* 60(b)(4)-(6) produces redundancy and confusion, with the same error subject to competing one-year and any-reasonable-time deadlines. Br. 32-34; NCLA Br. 13-18. The government (at 33-35) does not deny this significant overlap. Instead, the government responds that more specific provisions should trump general ones and proposes a 60(b) hierarchy only a lawyer could love. If an error falls in multiple buckets, the government (at 33) says, (b)(4) trumps (b)(1) trumps (b)(6).

Courts should not have to resolve Rule 60 questions with complex decision trees. And the government's approach is question-begging. When both 60(b)(1) and (b)(5) are in play, which governs? The government does not say. Nor is it apparent why "void[ness]" (under 60(b)(4)) is more specific than inadvertent, obvious legal error (under the government's read of 60(b)(1)). *See* U.S. Br. 33.

The government's limitations also breed arbitrariness. If only obvious, inadvertent legal errors are "mistakes," all *other* legal errors would fit elsewhere in Rule 60(b), which collectively covers the waterfront of grounds for reopening. *See Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005). Because Rules 60(b)(4) and (5) cover only voidness and certain intervening legal developments, Rule 60(b)(6)—which covers "any other reason that justifies relief"—would encompass most remaining legal errors. But there is no conceivable reason why (say) obvious, inadvertent legal errors should face a one-year deadline under Rule 60(b)(1), yet obvious, *deliberate* legal errors could be

raised later under 60(b)(6). Nor is there any rationale for affording *debatable*, inadvertent legal errors a more generous timeline than obvious, inadvertent ones.

The government (at 35) asserts that petitioner's view also "require[s] courts to determine which clause controls." But the government's only real-world example (at 35) is a case where the party mislabeled the motion. *Dávila-Álvarez v. Escuela de Medicina Universidad Central del Caribe*, 257 F.3d 58, 67 (1st Cir. 2001). Courts easily reject such requests. *Id.*

Turning to hypotheticals, the government (at 35) claims that petitioner's view produces overlap, insofar as mistakes of fact can render a judgment void or prospectively inequitable. But the government overstates any overlap. Whatever its cause, "[a] void judgment is a legal nullity," *i.e.*, legally erroneous. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). And while "change[s] in factual conditions" can support Rule 60(b)(5) relief, mistakes about existing facts do not. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992). Regardless, the government's reading—which puts a swath of legal errors in both Rules 60(b)(1) and (b)(4)-(6)—produces far more overlap.

6. **Anomalies with Rule 59(e) and appeals.** Putting legal errors in Rule 60(b)(1) allows parties to skirt reconsideration and appeal deadlines without countervailing benefits. Br. 36-39.

a. The government (at 38-39) accepts that its interpretation allows parties to raise legal errors under both Rules 59(e) and 60(b)(1) with similar standards for relief, but different filing deadlines (28 days and one year, respectively). That is a bug, not a feature. Parties could

blow past Rule 59(e)'s non-extendable deadline and repackage the same motion asserting the same legal error under Rule 60(b)(1). Br. 37. And parties would not have to show "extraordinary circumstances" like they do under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 536. While the government (at 38) highlights "important" procedural differences between Rules 59(e) and 60(b)(1), none address the substantive problem: two different deadlines to raise the same errors, with no heightened bar for relief.

While some overlap between the rules is inevitable because Rules 59(e) and 60(b)(1) both cover factual mistakes, litigants rarely raise those mistakes under Rule 59(e). Br. 37. Again, the government's position explodes the overlap by shunting mine-run legal errors into Rule 60(b)(1).

Similarly, for appeals, the government's approach creates the anomaly that parties could fail to appeal (usually within a 30-day deadline) and then raise the same legal error via Rule 60(b)(1) (again, a one-year deadline). The government (at 39-40) purports to solve the problem by "presumpt[ively]" requiring parties to file Rule 60(b)(1) motions within the time to notice an appeal. But Rule 60's text contains no such deadline, simply permitting Rule 60(b)(1) motions at any "reasonable time" up to one year. Fed. R. Civ. P. 60(c). The government does not explain why other parts of the Rules clearly cross-reference deadlines, yet not Rule 60. Br. 38. And parties need certainty; they cannot rely on "flexibly applied" implicit deadlines, U.S. Br. 40.

b. The government (at 40-41) touts the "efficiency" of letting district courts correct obvious legal errors before appeal. The government (at 41) concedes that Rule 59(e) already serves that function, but claims that Rule 60(b)(1) fills "substantial gaps" by permitting relief between the Rule 59(e) and notice-of-appeal deadlines.

But that "substantial gap[]" is typically just two days—the delta between Rule 59(e)'s 28-day deadline and the usual 30 days to notice an appeal, 28 U.S.C. § 2107(a). Those deadlines have varied, *e.g.*, the Rule 59(e) deadline used to be 10 days and federal parties have 60 days to appeal. U.S. Br. 41. But the gap has always been narrow.

The government's inadvertent-and-obvious rule further hampers efficiency. How often do district courts immediately concede overlooking controlling law? That limitation excludes even the paradigmatic case on the government's side of the split, *Schildhaus v. Moe*, where Judge Friendly described "very special facts" where a decision of this Court one day after the Rule 59(e) deadline "showed the judgment to be erroneous." 335 F.2d 529, 531 (2d Cir. 1964). Since the error rested on "intervening legal developments," the government (at 34) would slot that error in Rule 60(b)(6), not (b)(1).

Meanwhile, countervailing procedural messiness under the government's interpretation is substantial. Br. 39; *contra* U.S. Br. 41. For example, parties could appeal the underlying judgment, simultaneously bring a Rule 60(b)(1) motion asserting legal error in district court, and then separately appeal the denial of that motion. *E.g.*, *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 929 (5th Cir. 1976). That is no way to run a railroad.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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