

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DEXTER EARL KEMP, )  
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 Petitioner, )  
 )  
 v. ) No. 21-5726  
 )  
 UNITED STATES, )  
 )  
 Respondent. )  
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DEXTER EARL KEMP, )

Petitioner, )

v. ) No. 21-5726

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, April 19, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:18 a.m.

APPEARANCES:

ANDREW L. ADLER, Assistant Federal Public Defender, Fort Lauderdale, Florida; on behalf of the Petitioner.

BENJAMIN W. SNYDER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 21-5726, Kemp versus United States.

Mr. Adler.

ORAL ARGUMENT OF ANDREW L. ADLER

ON BEHALF OF THE PETITIONER

MR. ADLER: Mr. Chief Justice, and may it please the Court:

Rule 60(b)(6) governs this case because Rule 60(b)(1) does not. That is so for two independent reasons. First, Rule 60(b)(1) does not cover legal errors. Second, it does not cover judicial errors. It does not cover legal errors because the word "mistake" means mistake of fact. (b)(1) copied 17 state laws, and they overwhelmingly excluded legal errors.

That makes perfect sense in this context. The three words accompanying "mistake" are all terms of art describing factual mishaps. 60(a) uses the word "mistake" to mean mistake of fact. And 60(b)(1) through (3) have a one-year deadline precisely because they are factual defects. Meanwhile, (b)(4) through (6) do not

1 have such a deadline, and we already know that  
2 they cover legal errors.

3 If (b)(1) covered legal errors as  
4 well, that would contravene the structure of the  
5 rule. (b)(1) does not cover judicial errors  
6 either. Those errors should be corrected under  
7 Rule 59(e) or on appeal, which have strict  
8 deadlines. Where a party fails to do so, they  
9 should -- I'm sorry, where a party fails to do  
10 so, they should pay the price by having to show  
11 extraordinary circumstances under (b)(6).

12 (b)(1), however, requires no  
13 heightened showing at all. So, if (b)(1)  
14 covered judicial errors, (b) -- people could use  
15 (b)(1) to get around the deadlines, and that  
16 regime is not sound.

17 Neither is the government's definition  
18 of "mistake." Originally, the government said  
19 that "mistake" meant any and all errors. Now  
20 they say that "mistake" means only unintentional  
21 and obvious errors.

22 Slicing and dicing errors in that  
23 manner is unsupported and unworkable. No  
24 circuit has adopted that approach, and this  
25 Court should not impose an untested, subjective

1 standard on lower courts and litigants.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Adler, are you  
4 conceding that your -- that the plain meaning of  
5 the word "mistake" doesn't work for you?

6 MR. ADLER: Justice Thomas, it depends  
7 what you mean by "the plain meaning of the word  
8 'mistake.'" If you mean any --

9 JUSTICE THOMAS: Well, the judge made  
10 a mistake here.

11 MR. ADLER: Sure, Your Honor, but it  
12 can't mean that in this context, and I'd like to  
13 give three reasons why, based on the text,  
14 structure, and precedent.

15 Starting with precedent, this Court  
16 has about a handful of cases analyzing legal  
17 errors under (b)(6). If (b)(1) included all  
18 legal errors, that would conflict with the  
19 (b)(6) precedents because those two subdivisions  
20 are mutually exclusive.

21 Relatedly, as to the structure, if  
22 (b)(4) -- (b)(4) through (6) already cover legal  
23 errors, and so that would mean that any errors  
24 under those subdivisions would simultaneously be  
25 covered under (b)(1). That would create

1 substantial redundancy within the rule.

2           And, thirdly, as for -- it would  
3 create troubling implications for Rule 60(a).  
4 If "mistake" meant any and all legal errors,  
5 then that would mean legal errors arising from  
6 oversight or omission would be covered by 60(a),  
7 and that would eviscerate finality because 60(a)  
8 has no deadline at all. And judges could come  
9 in decades later and start correcting legal  
10 errors. They could do it sua sponte and without  
11 notice to the parties. So it cannot mean any  
12 and all errors.

13           That is why the government has  
14 expressly disavowed that position on page 15 of  
15 its brief in this case. The problem is the  
16 government's position is no better. They have  
17 some of the exact same problems here, but you've  
18 added on top of it major workability problems as  
19 well with this unintentional and obvious  
20 limitation.

21           We -- those -- those words are just  
22 entirely subjective, and how is a litigant  
23 supposed to know whether the judge's error was  
24 intentional or not? Is the government  
25 suggesting we put them on the stand? That would

1 be a fraught enterprise.

2           And as for "obvious," that also is  
3 inherently subjective. What's obvious to the  
4 litigant may not be obvious to the judge. And  
5 people need to know what subdivision applies on  
6 the front end because we have to know if there's  
7 a one-year deadline or if they have to make a  
8 heightened showing, like extraordinary  
9 circumstances.

10           And so our position is really the only  
11 viable position here. And -- and our position  
12 reads the rules as a coherent whole. It  
13 respects precedent, and it's entirely --  
14 entirely workable.

15           If you take (b)(1) off the table for  
16 legal errors, then there's just no question  
17 where they go. They all go in (b)(6) --

18           JUSTICE BARRETT: But you have the  
19 difficulty of distinguishing between fact and  
20 law, and then you also have the difficulty in  
21 identifying whose error was it. I mean, I think  
22 the government makes a good point, that it can  
23 be difficult to figure out if a legal error was  
24 by the litigant or by the court. You know,  
25 here, you could say, well, the lawyer failed to



1 point out that the cert deadline ran differently  
2 when his co-defendants had sought cert. Lawyer  
3 made a mistake, and then the judge didn't catch  
4 it and find that authority on his own.

5 So is it really as clear as you say?  
6 And -- and, plus, I'll just throw out for good  
7 measure too that when you point out that the  
8 other provisions in 60(b) are also referencing  
9 legal errors and so there would be a lack of  
10 clarity about whether they fell -- where they  
11 fell, the specific controls the general, right?  
12 And those are all specific kinds of errors, you  
13 know, void, et cetera.

14 So could you address that?

15 MR. ADLER: Sure. So I guess I'll  
16 start with the second part of that first.

17 The only other rules that we know,  
18 putting aside (b)(1), that cover legal errors  
19 are (b)(4) for void judgments and (b)(5). Those  
20 are pretty narrow categories, and they're also  
21 mutually exclusive with (b)(6). So, if they  
22 don't fall in (b)(4) and (b)(5), we know they go  
23 in (b)(6). If you open up (b)(1), then we're  
24 going to have a lot of confusion about where  
25 they go.

1           As for the first part of your  
2 question, the fact/law distinction is a very  
3 familiar distinction that courts around the  
4 country apply every day. We do it in standards  
5 of review. And we do this specific mistake of  
6 law/mistake of fact distinction all the time  
7 across various areas of the law. And, most  
8 importantly, it's an objective distinction. We  
9 don't have to get into somebody's mind to know  
10 whether it's, you know, obvious or intentional  
11 or not.

12           So, while I grant you that there may  
13 be some hard cases on the margins about  
14 fact/law, as a whole, it's going to be much  
15 easier and much more workable than the  
16 government's standard --

17           JUSTICE BARRETT: Well, we apply clear  
18 error standards in courts every day too.

19           MR. ADLER: For -- for findings of  
20 fact.

21           JUSTICE BARRETT: For appeal.

22           MR. ADLER: Correct. And so that's  
23 what I mean. When appellate courts --

24           JUSTICE BARRETT: Well, for forfeited  
25 -- in cases of forfeiture too, right?

1 MR. ADLER: So plain error.

2 JUSTICE BARRETT: Plain error.

3 MR. ADLER: Plain error, sure. So  
4 that analogy, I don't think, quite holds up here  
5 because that's an appellate court doing it after  
6 the fact and looking at the state of the law at  
7 the time and the record.

8 And, here, we really should be looking  
9 at this from the perspective of the litigant  
10 because it's the litigant that has to know what  
11 subdivision to file the motion under. And so  
12 it's going to -- we need an objective  
13 distinction here. Fact/law is -- is an easy  
14 one.

15 As for the facts of this case, I mean,  
16 I think, if anything, they show the problems  
17 with the government's position here because the  
18 error in this case was overlooked by the  
19 government and the district court twice,  
20 including after Mr. Kemp brought it to their  
21 attention in the 60(b) motion.

22 And yet the government is here saying  
23 that this was an obvious and unintentional  
24 error? Well, if that's true, I'm not really  
25 sure what -- what wouldn't be.

1           So -- so -- so I grant you that there  
2           may be some hard cases fact/law-wise, but  
3           they're just going to pale in comparison to the  
4           problems that we're going to see with the  
5           government's position.

6           JUSTICE KAVANAUGH: Well, the  
7           government's position is -- is not the same, as  
8           you know, as the Judge Friendly position, which  
9           is, to Justice Thomas's question, more the  
10          ordinary meaning of "mistake." "Mistake" can  
11          mean a mistake of law. Professor Moore, Judge  
12          Friendly, it's been applied in the Second  
13          Circuit and a bunch of other circuits. It seems  
14          workable enough there.

15          They put in the deadline for filing  
16          it. Why not just -- why is that not a simple  
17          route? It's not the government's position as I  
18          understand it. But why is that not a simple --

19          MR. ADLER: So, you know, I don't want  
20          to say anything disparaging about Judge  
21          Friendly, but I think that opinion was wrong.  
22          And it didn't conduct a textual analysis. It  
23          didn't conduct a structural analysis of the  
24          rule. It was part of a line of 1960s opinions  
25          by the courts of appeals that basically said,

1 well, we need a mechanism for district courts to  
2 correct their own errors.

3 But what they overlooked was that  
4 59(e) provides that exact mechanism.

5 JUSTICE KAVANAUGH: Right. There's  
6 definitely overlap then. I grant you that. But  
7 it's been the way it's been interpreted, and  
8 there's going to be redundancies here, a lot of  
9 our usual canons are not going to be able to  
10 solve all the problems that are going to be  
11 created no matter which interpretation we adopt,  
12 but it's been workable in the Second Circuit and  
13 several other circuits for a long time.

14 CHIEF JUSTICE ROBERTS: And -- and  
15 it's not surprising that Judge Friendly may not  
16 be very familiar with mistakes of law.

17 (Laughter.)

18 MR. ADLER: Very well, Your Honor.  
19 Well --

20 JUSTICE BREYER: I can think of at  
21 least three decisions we've written, one in a  
22 patent case that I think a footnote which was  
23 pretty interesting, and Justice Kagan wrote a  
24 decision, I wrote it.

25 Why do we have to keep writing these

1 decisions if it's so clear? Maybe we just make  
2 it worse, but, I mean, the -- the -- the  
3 decision between fact and law, it seems to me  
4 they're always coming up, and it's actually not  
5 so easy. Sometimes it is.

6 And then the argument the other way  
7 would be we're going to have that problem, and,  
8 you know, I'm sitting there as a trial judge and  
9 I actually got confused between shifting and  
10 springing uses. And at the end of the case, I  
11 think, oh, my God, I should have said shifting  
12 use. It was not a shifting use, it was a  
13 springing use. Oh, my goodness, and -- and I  
14 can't say it's major, but I'd like to correct it  
15 right now. All right? Matter of law.

16 So -- so what they're saying, look,  
17 the judges do make mistakes. Give them a quick  
18 chance to do it, even if it's one of law. Call  
19 it to their attention. Six of one, half a dozen  
20 of the other because we have problems both ways.

21 MR. ADLER: Justice Breyer, judges  
22 have that authority under Rule 59(e). That's  
23 what Rule 59(e) is for.

24 JUSTICE BREYER: But they might not  
25 know it until actually three months later,

1 because they do not read every night the  
2 shifting/springing new section of the American  
3 Law of Property. And -- and then they realize  
4 it.

5 JUSTICE BARRETT: Well, and let me  
6 just add one thing to Justice Breyer's  
7 hypothetical. Let's say that the  
8 shifting/springing thing comes to light after  
9 the Rule 59 deadline has passed.

10 What's the extraordinary circumstance  
11 that justifies fixing it? I mean, maybe it's  
12 just a regular old error and we'd like to fix it  
13 without having to show a heightened standard.

14 MR. ADLER: Well, I really think the  
15 onus is going to be on the parties there to --  
16 to file the motion under 59(e) or to file an  
17 appeal. That's how legal errors get corrected  
18 in our system.

19 And our position respects those  
20 primary mechanisms for doing that and their  
21 deadlines. If you miss those deadlines, if you  
22 miss the 59(e) deadline, if you miss the appeal  
23 deadline, then you've got to show extraordinary  
24 circumstances. Otherwise, those deadlines  
25 really don't mean anything. And --

1 JUSTICE KAVANAUGH: What about the six  
2 -- I -- I don't want to interrupt. You have  
3 more?

4 MR. ADLER: Yeah. Please, Your Honor.

5 JUSTICE KAVANAUGH: What about the  
6 60(b)(1) that the courts have imposed a deadline  
7 saying reasonable time means within 30 days or  
8 60 days or what have you?

9 MR. ADLER: Sure, Your Honor. So,  
10 number one, that doesn't --

11 JUSTICE KAVANAUGH: That solves that  
12 problem.

13 MR. ADLER: Well, it doesn't solve the  
14 59(e) problem because --

15 JUSTICE KAVANAUGH: No, there's, I  
16 agree, total overlap.

17 MR. ADLER: So you come in on day --  
18 you come in on day --

19 JUSTICE KAVANAUGH: But is there a  
20 problem from that? I mean, this is a rules  
21 committee question more than a judicial  
22 question, but I'll just ask you, is there -- you  
23 know, is there a real-world problem from the  
24 Second Circuit's approach with the overlap plus  
25 the time limit on filing the 60(b)(1)?



1 MR. ADLER: So I -- I just think it  
2 doesn't make sense with the rules as a whole  
3 because, first of all, now that the 59(e)  
4 deadline is 28 days and most appeals, the  
5 deadline is 30 days --

6 JUSTICE KAVANAUGH: Right.

7 MR. ADLER: -- it's not really  
8 accomplishing anything.

9 JUSTICE KAVANAUGH: It's a weird  
10 two-day --

11 MR. ADLER: Yeah. It's not doing  
12 anything. So the -- the other thing is that,  
13 you know, it just doesn't make sense to have a  
14 non-extendable 28-day deadline for 59(e). If  
15 you can just come in on day 29 using another  
16 rule to do the exact same thing, that's just not  
17 a coherent system. That's not reading the rules  
18 in harmony.

19 JUSTICE SOTOMAYOR: Counsel, the rules  
20 are in harmony because it's not that you have a  
21 year to bring a 60(b)(1) motion. You have to  
22 bring it within a reasonable time, up to one  
23 year. And so, if you could have brought it  
24 under 59(e), a court is going to ask or on a  
25 direct appeal, a court is going to ask bringing

1 it after that time passed, is there a reason for  
2 that.

3 If there's not a reason for that,  
4 here, the reason would be my attorney, the  
5 government, the court, we're all incompetent and  
6 I'm the only one who did it and I'm pro se and  
7 didn't have time. I believe most judges would  
8 say, you're right, I made a mistake and grant it  
9 to you.

10 But I want to go to the more important  
11 question. The circuits are all over the place.  
12 Only the Fifth and Tenth go the government's way  
13 with an obvious legal error. As Justice  
14 Kavanaugh pointed out, the Second, Sixth,  
15 Seventh, and Eleventh call it any legal error.  
16 I'm really not sure what the difference means or  
17 why.

18 What I am concerned about is those  
19 circuits that permit 60(b)(6) motions when  
20 there's been a change in law or an intervening  
21 change in the law that renders the initial  
22 judgment based on overruled or changed laws.

23 We've even done it in Buck under  
24 60(b)(6). How do we write this opinion to avoid  
25 barring that, meaning if -- do we have to write

1 it the Second, Sixth, Seventh, and Eleventh way  
2 or the Fifth and Tenth way? But how do we avoid  
3 opining on that inadvertently? Because it can't  
4 be all legal errors the way the government  
5 suggests that are obvious or not obvious.

6 MR. ADLER: I --

7 JUSTICE SOTOMAYOR: So what -- how do  
8 we write this if we were to rule --

9 MR. ADLER: I think --

10 JUSTICE SOTOMAYOR: I know we're  
11 asking you to rule against yourself, but I think  
12 it's important to --

13 MR. ADLER: Well, that's what I was  
14 going to say. I was going to say that I think  
15 that's a question for the government because the  
16 whole reason they've come up, I think, with this  
17 unintentional and obvious definition is to get  
18 around as many of this Court's (b)(6) precedents  
19 as they can which concern subsequent changes in  
20 the law.

21 There's at least four of --

22 JUSTICE SOTOMAYOR: But that's  
23 logical, isn't it? You can't anticipate  
24 subsequent changes in law. And that's what  
25 60(b)(6) is about.

1           So I'm asking you -- yes, I'm asking  
2           you to take a position contrary to your  
3           interests but to save something that makes  
4           sense. So how do we write it?

5           MR. ADLER: I -- I think the only way  
6           to write it is based on the government's  
7           definition of unintentional and obvious is the  
8           -- is what mistake means. And I don't see how  
9           the Court can write that opinion without --  
10          without throwing the lower courts and litigants  
11          into complete chaos. While the Fifth and Tenth  
12          Circuits have written this -- have this obvious  
13          limitation, no circuit has this  
14          unintentional/intentional limitation, and that's  
15          the really big problem here.

16          And in addition to the  
17          administrability problems, it's contrary to this  
18          Court's decision in *Liljeberg*, which was a  
19          classic unintentional oversight, yet this Court  
20          analyzed it under (b)(6). And it would also  
21          render language in 60(a) superfluous. If  
22          "mistake" by definition included unintentional  
23          oversights, then the oversight or omission  
24          language in 60(a) would be unnecessary.

25          So I think that's the only way to

1 write the opinion to preserve those other 60(b)  
2 cases --

3 JUSTICE KAVANAUGH: Well --

4 MR. ADLER: -- but I don't think it's  
5 a viable option for the Court here.

6 JUSTICE KAVANAUGH: -- can -- I -- I  
7 share Justice Sotomayor's concern about the  
8 60(b)(6) being preserved for subsequent changes,  
9 but, in the Second Circuit, presumably, but  
10 correct me if I'm wrong, and in those other  
11 circuits that follow the Second Circuit's rule,  
12 presumably, 60(b)(1) is available for mistakes  
13 of law, but 60(b)(6) is still available for  
14 intervening changes in the law that come after  
15 that deadline, but correct me if I'm wrong about  
16 that.

17 MR. ADLER: I -- I believe that is  
18 correct, Your Honor, but those 60(b)(6) cases,  
19 they're going to have to show extraordinary  
20 circumstances.

21 JUSTICE KAVANAUGH: Well, a change in  
22 the law often -- well, tell -- tell me what you  
23 think "extraordinary circumstance" means in  
24 relation to changes in the law. You know,  
25 you're a district court judge and a circuit

1 decision comes out two months later. What --  
2 what -- what do you say to that?

3 MR. ADLER: So, in -- in this Court's  
4 decision in Gonzalez, I think the Court was  
5 pretty clear that a subsequent change in the law  
6 by itself is not going to be an extraordinary  
7 circumstance because that's just going to  
8 disrupt finality too much.

9 So you've got to show something else  
10 along with that. And so I think this Court's  
11 decision in Buck versus Davis is a good example  
12 of that. It was a subsequent change in law and  
13 procedural default coupled with, you know, very  
14 unusual and troubling circumstances about the  
15 use of race in a capital sentencing. And so I  
16 think, you know, that's how we deal with  
17 subsequent changes to the law.

18 Now this situation, we have a legal  
19 error that existed at the time of the judgment,  
20 and the question there under extraordinary  
21 circumstances is going to be, why didn't you  
22 appeal this? Why didn't you correct this on  
23 appeal?

24 And that's the question that this  
25 Court asked in Ackermann and in Liljeberg. And

1 in Ackermann, the Court said, well, you can't  
2 show extraordinary circumstances because you  
3 made a cost/benefit decision not to appeal this.  
4 And in Liljeberg, the Court said, oh, well,  
5 we're going to grant -- we think (b)(6) relief  
6 is appropriate there because there was no way  
7 for you to know about the legal error in time to  
8 appeal.

9           And that's exactly the situation here.  
10 Mr. Kemp, through no fault of his own, could not  
11 have ascertained the basis of the legal error in  
12 the district court's judgment in time to appeal  
13 it. And the reason why is that he was  
14 transferred from federal prison to Miami-Dade  
15 County jail in pretrial detention, and he was  
16 not allowed to bring his legal materials and he  
17 was not allowed to conduct any legal research  
18 there.

19           He had no access to this Court's  
20 rules, and so he could not have just opened to  
21 Rule 13.3 and discovered the legal error in the  
22 district court's ruling. And this is precisely  
23 why we have (b)(6), to serve as a catch-all in  
24 cases to remedy gross injustice. That's why we  
25 have it. It's not going to come up very often,

1 but we need to preserve it.

2 And if you expand (b)(1), what you're  
3 going to do is contract (b)(6) because they're  
4 mutually exclusive provisions. And I think the  
5 Court needs to be very careful before it does  
6 something like that.

7 CHIEF JUSTICE ROBERTS: You can  
8 proceed with your argument.

9 MR. ADLER: Thank you, Your Honor.  
10 I'm trying to think about where to go from here.

11 So I guess one thing we haven't talked  
12 about is the judicial error. So we have a  
13 second theory in this case, which is that even  
14 if legal errors are -- are not covered by  
15 (b)(1), judicial errors are not either.

16 And the government places the entire  
17 weight of its argument on the removal of a  
18 pronoun in 1946. And, basically, what the  
19 government is saying is that when the committee  
20 removed a pronoun, it transformed 60(b)(1) into  
21 essentially a substitute for an appeal.

22 And I just don't think that is a  
23 plausible take on the history here.

24 CHIEF JUSTICE ROBERTS: Why do you  
25 think they did it?



1           MR. ADLER: To capture mistakes by  
2 third parties like process servers, notaries,  
3 postal workers, and -- and that's why they did  
4 it. And we know that from several sources, not  
5 just this Court's precedent in Liljeberg but  
6 also the official explanation in the advisory  
7 committee note, which explains that they did it  
8 to capture mistakes that warranted the  
9 supervisory jurisdiction of the courts.

10           And courts don't exercise supervisory  
11 jurisdiction over their own mistakes but,  
12 rather, the mistakes of others. And the  
13 government --

14           JUSTICE BARRETT: But the statute --  
15 not the statute, sorry -- the rule doesn't --  
16 nothing on the face of the rule excludes courts.  
17 And what about the point I made before, which  
18 was a repetition of the government's point, that  
19 it can be difficult to figure out whose error it  
20 was? It could be categorized as the counsel's  
21 error. It could be categorized as the court's  
22 error.

23           MR. ADLER: So, Your Honor, I don't  
24 think that's a difficult distinction when we're  
25 talking about legal errors because the district

1 court has an independent obligation to ascertain  
2 and apply the law in every case regardless of  
3 what the parties say. And so, when there's a  
4 legal error, the only question is, well, did the  
5 district court commit an error? It doesn't  
6 matter what the parties say.

7 As for the text, we rely on the  
8 noscitur a sociis canon for this, the  
9 accompanying words all involve things that do --  
10 that judges don't do or they don't commit.  
11 Surprise, excusable neglect, those aren't  
12 judicial actions here.

13 And -- and then, of course, we have  
14 our structural argument about respecting the  
15 deadlines for 59(e) and appeal. And so, you  
16 know, if (b)(1) did the exact same thing and  
17 covered legal errors, then that regime just  
18 doesn't work. It doesn't make sense.

19 And there's not going to be any repose  
20 in the system when someone fails to appeal. If  
21 someone doesn't appeal, then, you know,  
22 typically, we should require extraordinary  
23 circumstances in order to reopen a final  
24 judgment. People need to be able to rely on  
25 that judgment.

1                   But, on the government's view, there's  
2 not going to be any repose for an entire year,  
3 so -- because all you have to do is come in on a  
4 reasonable time and show a legal error and you  
5 can reopen the judgment. I just don't think  
6 that is consistent with our conception of  
7 finality and repose that we typically think of  
8 in litigation.

9                   CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11                   Justice Thomas, anything further?

12                   JUSTICE THOMAS: Nothing, Chief  
13 Justice.

14                   CHIEF JUSTICE ROBERTS: Justice  
15 Breyer? No?

16                   Justice Barrett?

17                   Thank you very much.

18                   Mr. Snyder?

19                   ORAL ARGUMENT OF BENJAMIN W. SNYDER

20                   ON BEHALF OF THE RESPONDENT

21                   MR. SNYDER: Mr. Chief Justice, and  
22 may it please the Court:

23                   Rule 60(b)(1) gives courts discretion  
24 to grant relief based on mistakes. In ordinary  
25 usage, that word sometimes refers

1       indiscriminately to all errors. Other times,  
2       the word is used in a narrower sense that covers  
3       only inadvertent errors. But, under either of  
4       those definitions, the district court's error  
5       here clearly qualifies as a mistake that the  
6       court could have addressed through a timely Rule  
7       60(b)(1) motion.

8                 In arguing otherwise, my friend  
9       proposes two limitations on Rule 60(b)(1). He  
10       says that it excludes all legal mistakes and all  
11       mistakes by judges. There is no possible way to  
12       reconcile either of those limitations with the  
13       ordinary meaning of "mistake." And my friend  
14       does not even try. Instead, he stakes his case  
15       on the idea that the drafters of Rule 60(b)  
16       understood "mistake" as a term of art that  
17       carried his proposed limitations.

18                But that argument is dead wrong. All  
19       agree that Rule 60(b) was based on Section 473  
20       of the California Code of Civil Procedure, and  
21       it was well settled that Section 473 covered  
22       mistakes of law as well as mistakes of fact, as  
23       Professor Moore explained in his treatise just a  
24       year after helping to draft the first version of  
25       the Federal Rules.

1           My friend dismisses that understanding  
2           as limited to default judgment cases. But  
3           nothing in Section 473 distinguished between  
4           default cases and other cases, and the  
5           California Supreme Court squarely recognized  
6           that Section 473 covered mistakes of law made  
7           outside the default judgment context.

8           As to the distinction between mistakes  
9           by parties and mistakes by courts, it's true  
10          that the original version of Rule 60(b) covered  
11          only mistakes by the movant himself. But, in  
12          1946, the rule was amended to remove any textual  
13          limitation on whose mistakes could provide a  
14          basis for relief.

15          My friend speculates that the advisory  
16          committee still silently intended to exclude  
17          judicial mistakes. But that speculation has no  
18          grounding in the text of the rule. If the  
19          committee had wanted to exclude judicial  
20          mistakes as a basis for relief from judicial  
21          orders, it would surely have said so expressly.

22                 I welcome the Court's questions.

23                 JUSTICE THOMAS: Mr. Snyder, you argue  
24                 in your brief, I think, that not every error is  
25                 a mistake. I don't know what the difference is.

1 I don't know why an error is not a mistake.

2 MR. SNYDER: So, Justice Thomas, there  
3 are two categories of -- of dictionary  
4 definitions of the word "mistake." Some  
5 categories do include all -- or all errors.  
6 And, if forced, we would choose that  
7 interpretation over Petitioner's interpretation.

8 But there's another understanding of  
9 "error" that dictionaries define as -- in a way  
10 that focuses on inadvertent or unintentional  
11 errors. And we think that context suggests that  
12 "mistake" is used in that latter sense here.

13 Most specifically, the -- the words  
14 surrounding "mistake" in 60(b)(1) all carry a  
15 connotation of inadvertence. And so we think it  
16 makes sense to read "mistake" in that  
17 inadvertence-focused way as well.

18 Now my friend has said that that would  
19 provide a subjective standard that would be  
20 incredibly difficult to administer. I think the  
21 key thing to remember in thinking through how  
22 you would administer that test is that it's the  
23 district courts themselves that are applying  
24 Rule 60(b) in the first instance.

25 And no one is better positioned than

1 the district court to say whether the error in  
2 the decision that he or she just entered was  
3 just an oversight, just something that they  
4 completely missed, like the error here, or  
5 instead was something that they thought through  
6 and just resolved in a way differently than the  
7 one the movant would have preferred.

8 JUSTICE KAVANAUGH: Why would we do  
9 that? It just seems like asking for a whole lot  
10 of litigation about the difference between an  
11 obvious mistake -- suppose you interpret the  
12 statute one way and then you read some more in  
13 -- in response to the 60(b) motion and you say,  
14 you know, I think I got it wrong. Does that  
15 qualify as a mistake or not?

16 MR. SNYDER: So, if -- if on the -- if  
17 in your first judgment you thought through it,  
18 you thought through the issue and just resolved  
19 it a particular way, you -- you later have  
20 second thoughts, that is something you could  
21 address in 59(e), but we don't think that that  
22 comes within 60(b)(1).

23 JUSTICE KAVANAUGH: But, if you just  
24 missed the relevant subsection of the statute  
25 the first time you read it or it wasn't cited to

1 you and you -- you didn't see it yourself, that  
2 would qualify?

3 MR. SNYDER: That's right, Your Honor.  
4 We think that makes sense in light of the role  
5 that 60(b)(1) plays in this broader scheme.  
6 There are other ways that you can raise errors  
7 where you just disagree with the decision-maker.  
8 And so the -- the key --

9 JUSTICE KAVANAUGH: Why -- why is this  
10 inquiry worth it, I -- I guess, as opposed to  
11 the Second Circuit and other circuit approach?  
12 I just don't understand this collateral inquiry  
13 into, well, it wasn't an inadvertent -- it was  
14 -- you know, why not just say mistakes are  
15 mistakes, as Justice Thomas indicated, and --  
16 what -- what problems are created?

17 You changed your position from the B  
18 -- well, shifted a little bit your position from  
19 the BIO to the -- the brief here. Why? And --

20 MR. SNYDER: So -- so I don't think we  
21 understood ourselves to be changing our position  
22 at all. If you look at the -- at page 12 of our  
23 opp, which is where my friend focuses, our  
24 argument was just that the error here is a  
25 mistake under any conceivable understanding of



1 that word.

2 And we think that is correct. We  
3 didn't say in the opp that every possible error  
4 would be covered.

5 JUSTICE KAVANAUGH: Okay. But what --  
6 on the broader question, why is it worth doing  
7 this rather than just the Second Circuit  
8 approach? What --

9 MR. SNYDER: So --

10 JUSTICE KAVANAUGH: -- what problems  
11 would be created?

12 MR. SNYDER: -- so I -- I don't want  
13 to suggest that we think there's some huge  
14 problem with the -- what you're calling the  
15 Second Circuit approach, the approach of  
16 treating all legal errors as mistakes.

17 The primary reason that we have argued  
18 for an interpretation that focuses only on  
19 inadvertent mistakes is that we think that makes  
20 the most sense in light of the surrounding words  
21 in (b)(1).

22 There's also to some extent the  
23 concern that Justice Sotomayor was identifying  
24 about instances in which a decision is correct  
25 as a -- as a matter of law when it's entered,

1 and then some subsequent decision comes along  
2 from a higher court and results in a -- a change  
3 in the law that we don't think is appropriate in  
4 that circumstance to say that the original  
5 decision was a mistake, the district court did  
6 exactly what it was supposed to.

7 Justice Sotomayor, you were asking  
8 about how to address that. Our distinction  
9 between inadvertent mistakes and -- and all  
10 other mistakes would address that.

11 The other way to do it, if you were  
12 going to go with the broader understanding of  
13 "mistake" that Justice Kavanaugh has asked  
14 about, would be to -- to say that the focus of  
15 that inquiry is on whether it was a mistake at  
16 the time the decision was made.

17 And so this Court has said time and  
18 again that when there is binding precedent of a  
19 higher court, the lower courts are required to  
20 apply that precedent unless and until it's  
21 overturned.

22 So a district court that enters a  
23 decision that is correct on the day it's entered  
24 has not made a mistake in the sense that we  
25 think is relevant here. That would be better

1 addressed under (b)(6).

2 JUSTICE BREYER: Why not -- but, look,  
3 there -- there are four circuits, it's the same  
4 question. From what we can tell, my law clerks  
5 looked this up, the Second, Sixth, Seventh, and  
6 Eleventh say that basically, 60(b)(1)  
7 authorizes, based on relief, based on a legal  
8 mistake, as long as the time to appeal hasn't  
9 run.

10 And then my memo says that, looking at  
11 this, that the Fifth, Ninth, Tenth, and D.C.  
12 Circuits have said that some of the legal errors  
13 fall under 60(b)(1), fundamental misconceptions  
14 or obvious error of law, and you seem to be  
15 leaning in the second direction, and so you say  
16 it doesn't matter, you win regardless. But --  
17 but it seems as if there is a difference of  
18 opinion among the circuits, and part of our job  
19 is to try to create a harmony, and that's why I  
20 have the same question here.

21 You're very -- you want to do this in  
22 a -- why? I mean, just say, yeah, you have  
23 extra time. If you think you convince this  
24 judge, you know, you appeal. Hey, you know, at  
25 least you have three judges who haven't

1 considered this yet. Do you want to do that, or  
2 do you want to make this judge try to change his  
3 mind? Well, good luck.

4 But, if you want to, go ahead.

5 MR. SNYDER: So -- so we think that  
6 part of the concern about the broader reading of  
7 60 -- six -- 60(b)(1), and I don't want to  
8 overstate this concern, but part of the concern  
9 is that 60(b)(1) should not be treated as just a  
10 second round of relitigation so that the  
11 district court rules against you, you file a  
12 59(e) motion. The district court rules against  
13 you again, you file a Rule 60(b)(1) motion.

14 We don't think that's the way the --

15 JUSTICE BREYER: Well, will there be  
16 any lawyers who will do that in the absence of  
17 inadvertence, et cetera? But, if they want to  
18 do it, I mean, a judge has twice decided against  
19 them, and now he's going to try to get him to  
20 change or her to change his mind?

21 MR. SNYDER: So we don't think that  
22 the drafters would have structured this in a way  
23 that incentivized that. That sort of filing is  
24 just going to slow the process down.

25 If the judge has really resolved the

1 question in a way that you just disagree with,  
2 then the -- the correct course is onward and  
3 upward, seek -- seek review from a new group of  
4 -- of three judges, but don't force everyone to  
5 sort of go back through the same exercise.

6 JUSTICE KAVANAUGH: Isn't the time  
7 limit designed to deal with that, that some  
8 courts have put in on filing 60(b)(1) motions  
9 interpreting what a reasonable time is? I  
10 thought that accomplished your concern or  
11 satisfied your concern there.

12 MR. SNYDER: So it does -- it does in  
13 significant part address that concern. A party  
14 could still file a 60(b)(1) motion in the  
15 circumstances I've -- I've described while also  
16 filing a notice of appeal, and those things  
17 could proceed on separate tracks.

18 So we think that reading 60(b)(1) in  
19 that broader way might create some unnecessary  
20 procedural messiness. We understand 60(b)(1) as  
21 existing --

22 JUSTICE KAVANAUGH: Has that happened  
23 often in the Second and in other circuits?

24 MR. SNYDER: I -- I can't point to any  
25 significant disruption here. I mean, we -- we

1 noted at the certiorari stage that there has  
2 never been a petition as far as we can tell  
3 about this issue before.

4 We do not think that the modest  
5 disagreement between the courts of appeals on  
6 whether it's all errors or only obvious errors  
7 that's -- that are correctable under this  
8 particular provision is really a significant  
9 issue. So I -- I don't want to claim that there  
10 has been a problem.

11 But it's here now. And as you're  
12 thinking about how best to resolve it, we think  
13 that 60(b)(1) serves the function of allowing  
14 district courts to address the kind of mistakes  
15 that they would want to address, a mistake like  
16 this one, where the -- the district court just  
17 never sort of grappled with the fact that there  
18 is this exception in Rule 13.3 that deals with  
19 situations where a petition for rehearing has  
20 been filed by one of the co-defendants.

21 JUSTICE KAGAN: But could you describe  
22 a little bit more -- I mean, if we're supposed  
23 to be giving guidance to courts, what is the  
24 category of mistakes, you know, assuming we go  
25 the narrower route that you suggested? How do

1 we describe the compartment that's appropriate  
2 to think of in -- in this rule?

3 MR. SNYDER: So we would describe that  
4 test as whether the issue is one that the  
5 district court just overlooked in entering its  
6 original judgment or if instead it's an issue  
7 that the district court considered and just  
8 resolved in a way that the movant disagrees  
9 with. And -- and that test will then be  
10 evaluated under an abuse of discretion standard  
11 because relief under 60(b) is discretionary.

12 If a litigant has doubt about whether  
13 the district court really grappled with the  
14 issue and thinks maybe the district court just  
15 missed this or maybe the district court just  
16 disagreed with me, file a notice of appeal.

17 If you want to file a 60(b)(1) motion  
18 and the district court can sort of resolve it by  
19 just looking at it and saying no, I -- I really  
20 meant it, you can.

21 But we think that that sort of  
22 preserves litigants' rights while still allowing  
23 for district courts to deal with oversights in  
24 an expeditious fashion.

25 This is the point -- this is the part

1 of Judge Friendly's opinion that we especially  
2 like. In that case, there was what he viewed as  
3 a mistake that occurred because of a subsequent  
4 decision 11 days after the original judgment has  
5 been entered.

6 And so, on the majority interpretation  
7 in which Rule 60(b)(1) extends to mistakes of  
8 law by judges, the district court could say it  
9 is now clear on day 11 that this judgment I  
10 entered 11 days ago is going to be reversed on  
11 appeal.

12 And rather than requiring the parties  
13 to file notice of -- notices of appeal and brief  
14 the issue and have the court of appeals get up  
15 to speed on what this case is about and send it  
16 back and we've got all this delay, I can just  
17 enter the decision today under 60(b)(1).

18 And we think the rule serves a  
19 valuable function in that context. We're not  
20 here to say that it serves some huge function or  
21 that it replaces appeal, but we think it's  
22 valuable in that function.

23 Justice Kavanaugh, you were asking  
24 about sort of the -- the two-day interval. We  
25 agree that the rule has less utility after the



1 2009 amendment to 59(e) that extended the  
2 deadline from 10 days to 28 days.

3 Of course, at the time that the --  
4 that 60(b)(1) was adopted in 1946, there was a  
5 larger window. And even today, the rule  
6 continues to be relevant in cases in which the  
7 government is a party or in cases in which it  
8 would be appropriate to grant an extension of  
9 the notice of appeal deadline or in cases where  
10 there is some showing why the petitioner really  
11 was unable to file within the time for filing a  
12 notice of appeal.

13 So it does preserve some flexibility,  
14 but we acknowledge that it serves less of a role  
15 today than it did when it was first adopted in  
16 1946.

17 I -- I -- I'd like to turn briefly if  
18 I could -- this didn't really come up in the --  
19 the opening part of the argument -- but to the  
20 state law decisions that -- that Petitioner  
21 relies on as the only possible way of  
22 reconciling his rule or his interpretation with  
23 the text of Rule 60(b)(1).

24 So he has a lot of structural  
25 arguments, but I don't think those arguments --

1 I'm happy to address them, but I don't think  
2 they even get him anywhere unless he has some  
3 account of how "mistake" can possibly exclude  
4 mistakes of law and mistakes by judges. Justice  
5 Thomas, I think he acknowledged that his  
6 interpretation is not a plain meaning  
7 interpretation.

8           And so what he said is that when Rule  
9 60(b) was adopted in 1938, 1937, the drafters of  
10 Rule 60(b) would have understood "mistake" as a  
11 term of art that applied only to mistakes of  
12 fact, not mistakes of law.

13           That is just completely wrong. The --  
14 the advisory committee note to the original  
15 version of the Federal Rules explained that Rule  
16 60(b) was based on California Code of Civil  
17 Procedure Section 473, and the California courts  
18 had repeatedly recognized that Section 473  
19 applied to both mistakes of law and mistakes of  
20 fact. So they did not read it in the term of  
21 art way that Petitioner proposes.

22           There were two other states that were  
23 also mentioned in the advisory committee note,  
24 New York and Minnesota. At page 6 of his reply,  
25 my friend acknowledges that those states also

1 treated "mistake" as applying to both mistakes  
2 of law and mistakes of fact.

3 So this idea that it had a narrow  
4 idiosyncratic meaning that departed from the --  
5 its ordinary meaning and applied only to  
6 mistakes of fact just isn't consistent with any  
7 of the -- the three states that the advisory  
8 committee specifically pointed to.

9 And -- and my friend has made two  
10 other distinctions that I'll just sort of  
11 briefly address. One is he says that those  
12 cases applied Section 473 to mistakes of law  
13 only in the context of default judgments.

14 That's not true, as he eventually  
15 acknowledges in the reply brief. The Mitchell  
16 decision from the California Supreme Court in  
17 1909 applied Section 473 to a mistake of law in  
18 a case involving post-trial motions. So that  
19 limitation doesn't get him anywhere.

20 And even if you thought that there was  
21 some uncertainty about the California cases or  
22 don't want to go read them, Professor Moore in  
23 1938 explained how people would have understood  
24 that California practice in his treatise, and at  
25 page 3,280, he said that it -- that the

1 California provision clearly covered mistakes of  
2 law and mistakes of fact.

3 The other distinction that my friend  
4 has drawn is between mistakes by judges and  
5 mistakes by litigants. We think that by  
6 deleting the word "his," the only textual  
7 limitation in Rule 60(b)(1), the advisory  
8 committee made clear that the rule would apply  
9 to mistakes by anyone. There's no textual basis  
10 in the rule after that amendment for  
11 understanding it to be limited to only mistakes  
12 by other parties or by third parties. And it's  
13 hard to see how mistakes by third parties, for  
14 example, would require relief from judgment  
15 unless they're adopted by the court.

16 Unless the Court has further  
17 questions, I'm happy to rest on our brief.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Thomas?

20 Justice Breyer?

21 Justice Alito?

22 Justice Barrett?

23 Thank you, counsel.

24 Mr. Adler, rebuttal?

25

1 REBUTTAL ARGUMENT OF ANDREW L. ADLER  
2 ON BEHALF OF THE PETITIONER

3 MR. ADLER: Thank you, Mr. Chief  
4 Justice.

5 I guess I'll start with the state law  
6 cases. So my friend -- my friend talks a lot  
7 about the advisory committee notes' reference to  
8 the California statute. But we don't start with  
9 advisory committee notes; we start with the text  
10 of the rule. And the text of the rule uses the  
11 exact same language as 17 states, and there's no  
12 dispute that at least 12 of the 17 categorically  
13 excluded legal errors. They said "mistake"  
14 meant mistake of law. That was the predominant  
15 view. That was captured by the leading  
16 treatises of the era.

17 My friend -- my friend talks a lot  
18 about -- so, as for the California cases, you  
19 know, he refers to only one case that did not  
20 involve a default judgment. But that was dicta.  
21 That case actually involved a mistake of fact,  
22 the Mitchell case, not a mistake of law.

23 And the main point on the California  
24 cases is they had the general rule that we are  
25 saying, that "mistake" means mistake of fact,

1 not law. The only exception was limited to  
2 default judgments based on a liberal policy in  
3 California favoring resolution on the merits.

4 So it's a limited exception in a  
5 minority of the states, where we have the  
6 predominant view in all of the other states  
7 categorically saying "mistake" means mistake of  
8 fact. That is the meaning that got picked up in  
9 the text of the rule. That's the old soil that  
10 got carried forward.

11 As for the Professor Moore treatise in  
12 1938, my friend referred to page 3280  
13 characterizing the California cases. The  
14 footnote there, Footnote 28, refers only to the  
15 dicta in this Mitchael case, and all the others  
16 are default cases. That's it. So, again, a  
17 very limited exception there.

18 If you actually scroll back seven  
19 pages earlier in the same treatise to page 3273,  
20 Professor Moore says that the bill of review for  
21 -- for errors of law was not covered by the  
22 wording of 60(b) because it was limited to  
23 mistakes of fact. So we think that suggests  
24 that 60(b) did not incorporate the default cases  
25 from California, and at the very least, it's a

1 wash. At least they negate each other at the  
2 very least.

3 Justice Kavanaugh, you were asking  
4 about what's wrong with the Second Circuit's  
5 approach of sort of imposing this appeal  
6 deadline. The problem is it's inconsistent with  
7 the text of the rule. Rule 60(c) does not  
8 incorporate Rule 4(a)'s deadlines. It talks  
9 about a reasonable time. That's a totality of  
10 the circumstances test.

11 You don't just import a categorical  
12 rule based on the totality of the circumstances.  
13 And that's, I think, what the government is now  
14 suggesting. In their brief, they were talking  
15 about a presumptive -- a presumption and a  
16 flexible presumption. I don't know what that  
17 means. I don't know where that comes from, but  
18 litigants aren't going to know what it means.

19 And litigants need to know what the  
20 deadlines are on the front end. Do they have to  
21 file within 30 days, 60 days, what? It doesn't  
22 make sense to have a one-year outer deadline and  
23 then a flexible presumptive 30-day deadline on  
24 the inside. That's just inconsistent with Rule  
25 60(c)(1).

1           And the final point is, because it's a  
2     presumption as the government frames it, it  
3     still contemplates people blowing by the appeal  
4     deadline. That cannot be right. That does not  
5     respect the deadlines of the other rules.

6           And the final point is I think it's  
7     important to take a step back and remember what  
8     the purpose of (b)(1) is. (b)(1) is not a  
9     substitute for an appeal. That's how the  
10    government is treating here.

11           (b)(1) is about mistakes of fact made  
12    by a party or someone in the litigation process.  
13    You make a mistake about what the trial date is.  
14    You make a mistake about whether you had been  
15    served with process. You make a mistake about  
16    whether the lawyer agreed to represent you. And  
17    then a judgment gets entered against you. The  
18    only recourse you have there is to reopen the  
19    judgment based on this mistake of fact. You  
20    can't appeal it.

21           It's a fundamentally different  
22    situation where the judgment itself contains a  
23    legal error. The -- we have appeals for that  
24    purpose. And the government is essentially  
25    treating 59(e) appeals as optional. You can



1 blow right by the deadlines. I don't think that  
2 is correct.

3 So, under our position, the -- the  
4 only viable option here is that (b)(1) does not  
5 cover legal errors. It doesn't cover judicial  
6 errors. Those are covered in other ways.

7 So whichever way you slice it, (b)(1)  
8 doesn't cover this case. This case is governed  
9 by (b)(6). Mr. Kemp must show extraordinary  
10 circumstances on remand to reopen an erroneous  
11 final judgment, and that's a very high bar for a  
12 reason, because it protects finality.

13 Mr. Kemp asks only that he be afforded  
14 the opportunity to make that showing on remand.

15 The judgment below should be reversed.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18 (Whereupon, at 12:01 p.m., the case  
19 was submitted.)

20

21

22

23

24

25

## Official

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## Official

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