
EXTRAORDINARY CIRCUMSTANCES AND EXTRAORDINARY WRITS:
EQUITABLE TOLLING DURING THE COVID-19 PANDEMIC AND BEYOND

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ABSTRACT

When all other opportunities for relief have been exhausted, people convicted of crimes have one year to file a petition for habeas corpus in federal court before their chance to do so expires. But for the past 365 days, the COVID-19 crisis has fundamentally disrupted both the functioning of the criminal legal system and people's daily lives inside and outside of prisons. COVID-19 has created delays, disruptions, and circumstances during which some incarcerated people have missed what may be their only opportunity to seek habeas review. Fortunately, those people may yet be heard in federal court, if their limitations period is equitably tolled.

This paper addresses how courts have made equitable tolling available for habeas petitioners during the COVID-19 pandemic. It explores how courts evaluate whether "extraordinary circumstances" are present such that a petitioner is entitled to equitable tolling. It examines how district courts analyze the extraordinary circumstances requirement, arguing that district courts must adopt an approach that allows for the holistic consideration of all the circumstances accompanying a petitioner's late filing when deciding whether to dismiss that petition as barred by AEDPA's statute of limitations. It then summarizes the two competing approaches employed most frequently among district courts—one flexible, one strict—and argues that district courts, guided by extensive Supreme Court and circuit court precedent, must embrace flexibility. It concludes by explaining how district courts can adopt a flexible approach.

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INTRODUCTION

For more than a year, the COVID-19 pandemic has been a source of extraordinary disruption for people all over the world. Schools and businesses have shut down.¹ Government agencies and courts have paused or delayed critical functions.² People experiencing “disaster stress” are feeling overwhelmed, anxious, and fatigued.³ All that is true, too, for people incarcerated in the United States.

Carceral facilities across the country have been “hotspots” for COVID-19.⁴ While their families, friends, and communities experience the novel challenges associated with COVID-19 outside of prisons, incarcerated people are burdened by compounding challenges and delays, as the pandemic disrupts life inside and outside of carceral facilities. In an effort to reduce the spread of the virus, state and federal facilities have imposed lockdowns, suspended in-person visiting, halted work programs, and adopted new protocols inside jails, detention centers, and prisons.⁵ These disruptive conditions have posed and continue to pose unprecedented challenges, not only for incarcerated people seeking to maintain their wellbeing and relationships with loved ones, but also for those seeking postconviction relief.

Many people seeking to challenge their criminal convictions on postconviction review must do so while incarcerated at state or federal prison facilities. This Article focuses on one opportunity for postconviction review, federal habeas corpus proceedings. Habeas corpus is often considered a person’s last opportunity to challenge their sentence or conviction, and habeas proceedings are governed by strict and complex rules and procedures.⁶ Federal habeas petitioners—incarcerated

¹ See, e.g., George Psacharopoulos et al., *The COVID-19 cost of school closures*, BROOKINGS INST. (Apr. 29, 2020), <https://www.brookings.edu/blog/education-plus-development/2020/04/29/the-covid-19-cost-of-school-closures/> (noting that 1.6 billion children and young people were affected by school closures due to the pandemic); Alexander W. Bartik et al., *The impact of COVID-19 on small business outcomes and expectations*, 117 PROCEEDINGS NAT’L ACAD. SCI. 17656, 17656–66 (July 28, 2020) (explaining that “the pandemic had already caused massive dislocation among small businesses just several weeks after its onset” resulting in 43% of the small businesses studied temporarily closing their doors).

² See, e.g., INTERNAL REVENUE SERVICE, *IRS Operations During COVID-19: Mission-critical functions continue* (last updated July 16, 2021), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue> (“COVID-19 continues to cause delays in some of our services.”); FEDEX, *What to know about shipment delays* (last visited July 19, 2021), <https://www.fedex.com/en-us/service-alerts.html> (“The COVID-19 pandemic has created record-breaking shipment volumes. As more people shop online to avoid crowds in stores, those numbers have grown even more. This has created shipping volumes that are taxing logistics networks nationwide, which may cause delays.”).

³ UNIV. CAL. DAVIS HEALTH, “COVID fatigue” is hitting hard. Fighting it is hard, too, says UC Davis Health psychologist (July 7, 2020), <https://health.ucdavis.edu/health-news/newsroom/covid-fatigue-is-hitting-hard-fighting-it-is-hard-too-says-uc-davis-health-psychologist/2020/07>.

⁴ Edmund L. Andrews, *Stanford researchers find COVID-19 spreads faster in American jails than on cruise ships*, STAN. NEWS (Sept. 24, 2020), <https://news.stanford.edu/2020/09/24/covid-19-spread-american-prisons/>.

⁵ Lindsey Van Ness, *COVID-19 Extends Sentences for Some Incarcerated People*, PEW CHARITABLE TRUSTS (Jan. 20, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/20/covid-19-extends-sentences-for-some-incarcerated-people>; see also PARTNERS IN HEALTH, *Why Decarceration Is Vital For Public Health Amid COVID-19* (Jan. 26, 2021), <https://www.pih.org/article/why-decarceration-vital-public-health-amid-covid-19>.

⁶ Habeas corpus proceedings are notoriously complex. Chief Judge Diane Wood has written that “habeas corpus has tied courts and legal scholars into knots for many years.” Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1809 (2020). The late Chief Judge Donald Lay wondered “whether pursuit of federal habeas corpus has turned into a Sisyphean task for both courts and litigants,” concluding that “inefficient procedural rules” have the potential to “subsume principles governing fundamental fairness.” Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1064 (1993). Despite this complexity, it is estimated that 90 percent of non-capital habeas litigants proceed without counsel. See Nancy J. King, Fred L. Cheesman II & Bran J. Ostrom,

people seeking to collaterally attack their convictions on constitutional or federal law grounds—generally have only one year during which to bring their claims before a federal court.⁷ After that year, the statutory limitations period expires, and petitioners are foreclosed from seeking further judicial review. But what happens when a petitioner’s limitations period coincides with a global health crisis, accompanied by unprecedented delays, lockdowns, and challenges? As petitioners have missed their deadlines during the COVID-19 pandemic, courts have begun addressing this question, and this Article assesses courts’ responses.

When “extraordinary circumstances” interfere with a petitioner’s ability to file a federal habeas petition by their statutory deadline, courts may still review a petitioner’s claims under the doctrine of equitable tolling. Equitable tolling allows courts to retroactively suspend a petitioner’s filing deadline if extraordinary circumstances exist that stand in the way of timely filing, so long as petitioners exercise due diligence in pursuing their claims. As the COVID-19 pandemic has wrought havoc in U.S. carceral facilities and in the criminal legal system more broadly, many petitioners have asked courts to equitably toll their limitations periods to accommodate delayed filings—but courts have not universally granted these requests.

In this Article, I examine how courts enforce the statute of limitations for habeas petitions during the COVID-19 pandemic. In particular, I focus on the availability of equitable tolling for petitioners facing extraordinary circumstances that preclude timely filing. I begin by describing the legal landscape of pre-pandemic equitable tolling, including controlling Supreme Court and courts of appeals precedent. I then explain the two primary approaches that district courts typically employ when evaluating late habeas petitions: a strict *circumstance-by-circumstance* approach, in which courts separately evaluate each argument for equitable tolling that a petitioner has raised, and a flexible, *totality-of-the-circumstances* approach, where courts conduct a holistic assessment before determining whether equitable tolling is warranted. I conclude by advocating that courts adopt the latter approach, because Supreme Court and circuit court precedent mandate a flexible, totality-of-the-circumstances style of analysis and because a totality approach allows courts to recognize and validate the experiences of incarcerated litigants.

I. ACCESSING HABEAS REVIEW BY OVERCOMING AEDPA’S STATUTE OF LIMITATIONS

Federal courts may review the legality of a person’s detention and vacate unconstitutional sentences using “the Great Writ” of habeas corpus.⁸ Although some scholars have lauded habeas corpus as “the most effective weapon yet devised for the protection of [] liberty,”⁹ Congress greatly restricted the availability of habeas review in the Antiterrorism and Effective Death Penalty Act of

Executive Summary: Habeas Litigation in U.S. District Courts, at 8 (Aug. 21, 2007), <https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf>.

⁷ 28 U.S.C. §§ 2244(d), 2255(f); see *infra* note 12 and accompanying text.

⁸ Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585, 589 (1976); FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 2.2 (2020) [hereinafter “PRACTICE & PROCEDURE”]; BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* 1 (2013). A full discussion of the evolution of habeas corpus in the United States is outside the scope of this Article, but for that discussion, see McFeeley, *supra*, at 589; Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 563-65 (1994); see also *Brown v. Allen*, 344 U.S. 443 (1953).

⁹ McFeeley, *supra* note 8, at 589.

1996 (AEDPA).¹⁰ Now, to obtain postconviction review and relief through habeas corpus, incarcerated people must comply with the complex procedural requirements that characterize habeas proceedings.¹¹

Under AEDPA, Congress established new time constraints governing when incarcerated people may seek federal habeas review, mandating that petitioners have only *one year* to file a habeas petition.¹² The practical result of this strict limitations period is that judicial review is impossible for many petitioners to obtain, and in fact, district courts deny about a quarter of all non-capital habeas petitions as barred by AEDPA's statute of limitations.¹³ Petitions that would otherwise be dismissed, however, may be heard if the limitations period is equitably tolled.

A. Equitable Tolling Under AEDPA

Under AEDPA's one-year limitations period, district courts may be obligated to deny habeas petitions because incarcerated people were not able to file them quickly enough, even if petitioners' requests for relief are meritorious. Fortunately for these petitioners, the Supreme Court has recognized that equitable tolling may apply in the habeas context, allowing courts to excuse petitioners' delay and review their petitions on the merits even after their AEDPA deadline has passed.

In 2010, the Court decided *Holland v. Florida*, holding that the statute of limitations provision in AEDPA was subject to equitable tolling.¹⁴ The Court explained that in enacting AEDPA, Congress "did not seek to end every possible delay at all costs," and accordingly, the Court cautioned against an overbroad interpretation of the statute that would "close courthouse doors that a strong equitable claim would ordinarily keep open."¹⁵ After concluding that equitable tolling was available for untimely federal habeas petitions,¹⁶ the Court explained that a habeas petitioner is

¹⁰ The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified in relevant part at 28 U.S.C. §§ 2244(d), 2255(f); see PRACTICE & PROCEDURE, *supra* note 8, at § 3.2 (providing an overview of AEDPA and how it modified procedures and standards governing habeas litigation).

¹¹ See Ian D. Eppler, Davila v. Davis, Brady, and the Future of Procedural Default Doctrine in Federal Habeas Corpus, 75 NAT'L. L. GUILD REV. 152, 153 (2018) (explaining that incarcerated people "have lost an important tool to vindicate their rights" due to exceedingly harsh restrictions limiting the availability of habeas review).

¹² 28 U.S.C. §§ 2244(d), 2255(f). Under AEDPA, the statute of limitations for filing a habeas petition is "triggered" in four sets of circumstances, though the one-year limitations provision applies to each triggering provision. *Id.*; see PRACTICE & PROCEDURE, *supra* note 8, at § 5.2. Although state convictions and federal convictions are treated somewhat differently under AEDPA, for the purpose of this Article, motions seeking postconviction review by those convicted and incarcerated by the state and federal governments alike are considered "habeas" petitions. See *infra* note 16.

¹³ King et al., *supra* note 6, at 6.

¹⁴ *Holland v. Florida*, 560 U.S. 631, 635 (2010); see 28 U.S.C. § 2244(d)(1). Prior to the Supreme Court's decision in *Holland*, many scholars had addressed habeas petitioners' need for equitable tolling. See generally Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545 (2009); Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365 (2005); Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1 (2004).

¹⁵ *Holland*, 560 U.S. at 649 (citations omitted).

¹⁶ Since *Holland*, courts have extended equitable tolling to federally incarcerated petitioners filing under 28 U.S.C. § 2255. See Ramos-Martinez v. United States, 638 F.3d 315, 322 (1st Cir. 2011) (collecting cases). Although technically distinct, this Article refers to motions under § 2254 and § 2255 both as habeas petitions, as the statutes of limitations for petitions under both sections are one-year long and the triggering provisions function similarly. See 28 U.S.C. §§ 2244(d), 2255(f).

entitled to equitable tolling only if he shows “that he has been pursuing his rights diligently” and “that some extraordinary circumstance stood in his way and prevented timely filing.”¹⁷

The “extraordinary circumstances” and “diligence” requirements are distinct elements,¹⁸ and in *Holland*, the Court reversed the district court’s determination that Mr. Holland—who presented evidence of egregious negligence on the part of his attorney¹⁹—had failed to exercise “reasonable diligence.”²⁰ Accordingly, instead of definitively answering the question of whether “extraordinary circumstances” were present in Mr. Holland’s case,²¹ the Court remanded his case and others like it so that lower courts could make those conclusive determinations.²² Although the Court has not provided an exhaustive list of circumstances that are considered extraordinary, it has subsequently clarified that the extraordinary circumstances element is “met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond [the litigant’s] control”²³ and has reiterated that extraordinary circumstances must have “stood in the way” of a timely habeas petition.²⁴

Interpreting this language, lower courts have elaborated on *Holland*’s two-part test when evaluating claims for equitable tolling and have provided additional guidance for courts assessing the

¹⁷ *Holland*, 560 U.S. at 649 (internal quotation marks omitted).

¹⁸ *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 256-57 (2016).

¹⁹ The majority opinion in *Holland* lays out the extensive set of facts underlying Mr. Holland’s claims of attorney negligence, which legal ethics professors described as violating “fundamental canons of professional responsibility.” *Holland*, 560 U.S. at 652. Mr. Holland was convicted in 1997 in the state of Florida and sentenced to death. *Id.* at 635. He waited in prison as his attorney fumbled through postconviction proceedings on his behalf, trying repeatedly and futilely to communicate with his attorney during that time. *Id.* at 639-41. His attorney failed to respond to his inquiries about his appeal and later failed to file a timely federal habeas petition, despite Mr. Holland’s repeated requests that he do so. *Id.*

²⁰ *Id.* at 653. This paper focuses on the second requirement from *Holland*—extraordinary circumstances—and does not provide a comprehensive discussion of the diligence requirement. For that discussion, see Jonathan Atkins, Danielle B. Rosenthal & Joshua D. Weiss, Essay, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 470-78 (2016).

²¹ Although the Court did not conclusively determine whether Mr. Holland’s circumstances were sufficiently extraordinary, the Court strongly suggested that the facts of Mr. Holland’s case would have satisfied the extraordinary circumstances requirement. *Holland*, 562 U.S. at 652. The Court also reiterated that petitioners alleging attorney misconduct must present more than just a “garden variety claim of excusable neglect” in order to establish that “extraordinary circumstances” justify equitable tolling. *Id.* at 651-52; see *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (“Attorney miscalculation [of the expiration of a statute of limitations] is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel.”).

²² *Holland*, 562 U.S. at 654; see, e.g., *Perkins v. Ammons*, 562 U.S. 1027, 1027 (2010); *Whitfield v. McNeil*, 561 U.S. 1002, 1002 (2010); *Melson v. Allen*, 561 U.S. 1001, 1001 (2010).

²³ *Menominee Indian Tribe of Wisconsin*, 577 U.S. at 256-57 (emphasis in original); see *Mayberry v. Dittman*, 904 F.3d 525, 530 (7th Cir. 2014) (explaining that the “extraordinary circumstances prong of the tolling inquiry. . . is intended to apply to circumstances outside of the litigant’s control”); *Blue v. Medeiros*, 913 F.3d 1, 9 (1st Cir. 2019) (“The diligence prong covers those affairs within the petitioner’s control, while the extraordinary-circumstances prong covers matters outside his control.”) (internal citations omitted). Compare *Roper v. Sec., Fla. Dep’t of Corr.*, 686 F. App’x 759, 763-64 (11th Cir. 2017) (denying equitable tolling when petitioner could have filed a timely habeas petition but chose instead, after consulting with his attorney, to file a state postconviction motion after the federal habeas statute of limitations had expired) and *Johnson v. Warden*, 738 F. App’x 1003, 1006 (11th Cir. 2018) (“Johnson did not clearly show that the state court misplaced his notice of appeal and caused him to lose statutory tolling, as there was evidence indicating that the mistake was his own fault.”) with *Smith v. Vannoy*, -- F. App’x --, No. 19-30261, 2021 WL 1016425, at *4 (5th Cir. Mar. 16, 2021) (denying petitioner equitable tolling because he was placed in “administrative segregation” after allegedly violating prison regulations, and his “lockdown was thus not a matter outside his control but a consequence of his own behavior”).

²⁴ See *Menominee Indian Tribe of Wisconsin*, 577 U.S. at 251 (denying equitable tolling where the petitioner failed to establish the “extraordinary circumstances that stood in the way of timely filing”).

presence or absence of extraordinary circumstances.²⁵ Courts of appeals have explained that this language requires petitioners to demonstrate “a causal connection, or nexus, between the extraordinary circumstances [a petitioner] faced and the petitioner’s failure to file a timely federal petition.”²⁶ In other words, there must be a “causal relationship between the extraordinary circumstance and the untimely filing.”²⁷ Courts enforce this nexus requirement rigorously,²⁸ denying equitable tolling when petitioners fail to establish *how* extraordinary conditions prevent timely filing²⁹ or when a petitioner alleges sufficiently extraordinary circumstances but fails to “point to anything specific” that transpired within the limitations period “that interfered with [petitioner’s] inability to understand or pursue his habeas claim.”³⁰ Even in light of the nexus requirement, courts have recognized the availability of equitable tolling in a variety of different circumstances.

²⁵ *Holland*, 562 U.S. at 649; see *Daniels v. Florida*, 769 F. App’x 809, 811 (11th Cir. 2019) (“Equitable tolling is an extraordinary remedy that applies only in rare and exceptional circumstances, which must be both beyond the petitioner’s control, and unavoidable, even with diligence. The petitioner must further show a causal connection between the alleged extraordinary circumstances and his untimely filing.”) (internal citations omitted); *Smith v. Davis*, 953 F.3d 582, 600 (9th Cir. 2020) (“[I]t is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy.”); *Chachanko v. United States*, 935 F.3d 627, 629 (8th Cir. 2019); *Lombardo v. United States*, 860 F.3d 547, 552 (7th Cir. 2017); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir. 2011); *Smith v. Vannoy*, -- F. App’x --, No. 19-30261, 2021 WL 1016425 (5th Cir. Mar. 16, 2021) (holding that a petitioner “must demonstrate a causal relationship between the extraordinary circumstance and his delay, a showing ‘that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances’”) (citing *United States v. Perkins*, 481 F. App’x 114, 118 (5th Cir. 2012)); *Whiteside v. United States*, 775 F.3d 180, 185 (4th Cir. 2014) (“The standard announced in *Holland* . . . focuses . . . on whether a factor beyond the defendant’s control prevented him from filing within the limitations period at all.”); *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012) (“The extraordinary circumstances prong requires that the petitioner ‘in some extraordinary way be[] prevented from asserting his or her rights.’”) (citing *Brown v. Shannon*, 322 F.3d 768, 773 (3d Cir. 2003)); *Dillon v. Conway*, 642 F.3d 358, 362-63 (2d Cir. 2011) (restating *Holland*’s test while emphasizing the “‘flexibility’ inherent in ‘equitable procedure’” and “rejecting the notion that rigid and nonvariable rules must guide courts of equity” (citation omitted)); *Holmes v. Spencer*, 822 F.3d 609, 612 (1st Cir. 2016).

²⁶ *Ross v. Varano*, 712 F.3d 784, 803 (3d Cir. 2013) (finding both extraordinary circumstances and a sufficient nexus to warrant equitable tolling).

²⁷ *Hunter-Harrison v. Atchley*, No. 2:20-cv-00592-WBS-CKD, 2020 WL 7239590, at *3 (E.D. Cal. Dec. 9, 2020); see *Jenkins v. Greene*, 630 F.3d 298, 302-03 (2d Cir. 2010) (“A petitioner seeking equitable tolling must ‘demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.’”) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)); *Kammerdeiner v. Superintendent Albion SCI*, 841 F. App’x 416, 419 (3d Cir. 2021) (denying equitable tolling because petitioner failed to “offer any explanation for how his mental health problems hindered his ability to file a timely habeas petition. Instead, he simply cites in general to his mental health records and claims in a conclusory fashion”); *Del Rantz v. Hartley*, 577 F. App’x 805, 811 (10th Cir. 2014) (denying equitable tolling where petitioner “has not shown that his mental disorders were the cause of the untimeliness”); *Bills v. Clark*, 628 F.3d 1092, 1097-98 (9th Cir. 2010) (“[R]eiterat[ing] the causation requirement recognized in our equitable tolling cases. . .”).

²⁸ As the Second Circuit has explained, “Although we are mindful that equitable procedure demands flexibility . . . that flexibility cannot stretch beyond the requirement that an extraordinary circumstance prevent timely filing.” *Jenkins*, 630 F.3d at 305.

²⁹ *Young v. Johnson*, 842 F. App’x 89, 89 (9th Cir. 2021).

³⁰ *Mayberry v. Dittman*, 904 F.3d 525, 531 (7th Cir. 2014).

B. When Are “Extraordinary Circumstances” Present?

In addition to claims of egregious attorney negligence like those at issue in *Holland*,³¹ courts have granted equitable tolling in other extraordinary circumstances, especially where government actors are responsible for or contribute to a petitioner’s delay. For example, courts have made equitable tolling available where government officials fail to make pertinent legal information about AEDPA or a petitioner’s own case available to the petitioner³² and where a court or state official misleads a litigant about the deadline for filing timely claims.³³ Courts have also granted equitable tolling where the state has failed to provide incarcerated litigants with the resources—including their case files, access to law libraries, and adequate time to work on a petition—necessary to file their petitions by their AEDPA deadlines.³⁴ Furthermore, extreme conditions created by community-wide disasters—for example, the flooding and evacuation of jails, courthouses, and residences in New Orleans during Hurricane Katrina—may constitute extraordinary circumstances, as well.³⁵

Courts may also permit equitable tolling when litigants’ physical or mental conditions prevent them from filing on time. The Second Circuit has explained that a petitioner’s hospitalization “can manifest extraordinary circumstances” as long as those circumstances *cause* the petitioner to lose his opportunity to file in a timely manner.³⁶ Similarly, the Seventh Circuit has suggested that extraordinary circumstances exist where a petitioner suffers from medical conditions that create obstacles to filing “beyond a litigant’s control.”³⁷ Other courts of appeals have held

³¹ *Holland v. Florida*, 560 U.S. 631, 651-52 (2010) (remanding the case to the lower court to evaluate whether attorney neglect rose to such an “extraordinary” level as to warrant equitable tolling); *see* *Maples v. Thomas*, 565 U.S. 266, 271 (2012) (concluding that attorney abandonment constituted “extraordinary circumstances” to excuse procedural default).

³² *See, e.g., Hardy v. Quarterman*, 577 F.2d 596, 598-99 (5th Cir. 2009) (per curiam) (granting equitable tolling where petitioner “suffered a substantial state-created delay” after a Texas court failed to notify petitioner that his postconviction claim had been denied until nearly a year had passed); *Pabon v. Mahanoy*, 654 F.3d 385, 399-401 (3d Cir. 2011); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000); *Andrade v. Johnson*, No.: 3:20-cv-01147, 2021 WL 848171, at *7 (S.D. Cal. Mar. 4, 2021) (finding extraordinary circumstances present and equitable tolling justified where “Petitioner did not have access to his legal materials for 169 days of his one-year statute of limitations period and 152 days after the deadline to file had passed”); *see* Eve Brensike Primus, *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time*, 12 ADVANCE 141, 148 (2018) (collecting cases). *But see* *Escobar v. May*, No. 18-1933-RGA, 2021 WL 797876, at *3 (D. Del. Mar. 2, 2021) (finding no extraordinary circumstances where petitioner alleged that he had limited access to the law library because “routine aspects of prison life which may create difficulties in filing habeas applications (such as limited access to the law library) do not constitute extraordinary circumstances for equitable tolling purposes”).

³³ *See, e.g., Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014) (describing the “nearly insurmountable” hurdles that petitioner faced, including that “[f]or nearly 90% of his allotted one year, Socha was without access to any of the documents pertaining to his legal proceedings through no fault of his own,” and once he finally received his case file “new obstacles stood in his way: limited library access and the rapid expiration of time”); *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012) (concluding that a state court’s “dismissal of Munchinski’s pending petition, with its implicit suggestion that Munchinski refile once his federal appeal was resolved, was sufficiently misleading as to constitute an extraordinary circumstance because ‘it later operate[d] to prevent [Munchinski] from pursuing his rights’”) (quoting *Urcinoli v. Cathel*, 546 F.3d 269, 275 (3d Cir. 2008)); *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007); *Drew v. Dep’t of Corr.*, 297 F.3d 1278, 1288 (11th Cir. 2002); *United States ex rel. Willhite v. Walls*, 241 F. Supp. 2d 882, 888 (N.D. Ill. 2003); Primus, *supra* note 32, at 148 (collecting cases).

³⁴ Primus, *supra* note 32, at 148.

³⁵ *Hooker v. Cooper*, No. 10-1624, 2011 WL 1321405 (E.D. La. Jan. 31, 2011); *see generally* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 145-47 (2006) (explaining how the conditions in the wake of Hurricane Katrina constituted extraordinary circumstances).

³⁶ *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011); *see* *Mazola v. United States*, 294 F. App’x 480 (11th Cir. 2008) (allowing equitable tolling for a habeas petitioner who had been hospitalized for 42 days).

³⁷ *Perry v. Brown*, 950 F.3d 410, 411 (7th Cir. 2020). At issue in *Perry* was Mr. Perry’s medical condition that impaired his ability to write and understand words. *Id.* The Seventh Circuit explained that access to “legal information is controllable;

specifically that a petitioner's mental incompetence may create extraordinary circumstances when his condition prevents timely filing.³⁸

As courts have already recognized that illness, incapacity, and state-created impediments can create extraordinary circumstances sufficient to justify equitable tolling, district courts can continue to recognize such circumstances when evaluating late filings in light of the COVID-19 pandemic.

C. *Extraordinary Circumstances During the COVID-19 Pandemic*

People in carceral facilities across the United States have been disproportionately infected with and killed by COVID-19.³⁹ According to a study by the Prison Policy Initiative, states across the country have failed to protect incarcerated people from infection, and state responses to COVID-19 in prisons “ranged from disorganized or ineffective, at best, to callously nonexistent at worst.”⁴⁰

The policies and practices adopted by carceral institutions in response to the pandemic have impeded incarcerated people's ability to compose and file petitions for habeas corpus. For example, state and federal facilities have at times instituted complete lockdowns of prison facilities,⁴¹ adopted

an inmate can go to the prison library and look up the deadline But mental shortcomings may limit a prisoner's power to engage in self-help.” *Id.* at 412. The court remanded the case to the district court to distinguish whether petitioner's condition “left him unable to understand or use language well enough to protect his interests,” or whether “Perry's difficulties stem from his failure to do enough legal research The former could support tolling, while the latter would not.” *Id.* at 413.

³⁸ *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011) (“[W]e now hold that a petitioner's mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA's one-year statute of limitations. . . . a causal link between the mental condition and untimely filing is required.”); *Bills v. Clark*, 628 F.3d 1092, 1097-1101 (9th Cir. 2010) (“[A] habeas petitioner's mental incompetency [is] a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control” and can justify equitable tolling where “the petitioner's mental impairment made it impossible to timely file”) (internal citations omitted); *see also* *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009) (remanding for further factual development a case where the district court had improperly denied equitable tolling for an intellectually disabled petitioner asserting that he was unable to understand or act on his legal rights during the limitations period). *But see* *Kammerdeiner v. Superintendent Albion SCI*, 841 F. App'x 416, 419 (3d Cir. 2021) (“Mental illness does not constitute a per se reason to toll the limitations period.”).

³⁹ *See* EQUAL JUST. INITIATIVE, *Covid-19's Impact on People in Prison* (last updated Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> (reporting that “[i]ncarcerated people are infected by the coronavirus at a rate more than five times higher than the nation's overall rate,” and “[t]he reported death rate of inmates (39 deaths per 100,000) is also higher than the national rate (29 deaths per 100,000)"); Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?smid=url-share> (“America's prisons, jails and detention centers have been among the most dangerous places when it comes to infections from the coronavirus.”); MARSHALL PROJECT, *A State-by-State Look at Coronavirus in Prisons* (last updated Apr. 23, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (collecting data about the rate of infection and death among incarcerated populations).

⁴⁰ Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, PRISON POL'Y INITIATIVE (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html.

⁴¹ *See, e.g.*, Jill Castellano & Mary Plummer, *New COVID-19 Cases Cause Donovan Prison To Lock Down Again*, KPBS (Apr. 24, 2021), <https://www.kpbs.org/news/2021/apr/24/new-covid-19-cases-cause-donovan-prison-lock-down-/> (“A spokesperson for the state corrections department confirmed Wednesday that multiple staff members at Donovan have contracted the virus, leading the facility to temporarily cancel in-person visits and reinforce restrictions on the thousands of people living there.”).

special visiting protocols,⁴² and suspended visiting altogether.⁴³ During lockdown, incarcerated people may spend 22-23 hours each day inside their cell, with only one hour a day allotted for using the library, showers, computers, and telephones.⁴⁴ These restrictions make it substantially harder for incarcerated people to access lawyers and legal resources.

In addition to limiting access to legal resources, prison responses to the COVID-19 pandemic have also increased the punitive and violent nature of American incarceration.⁴⁵ Inside of carceral facilities, “even those who don’t contract COVID-19 are still victims to the stress and trauma of life during a pandemic,”⁴⁶ compounding the trauma already experienced by those confined to cages.⁴⁷ Incarcerated people have reported that because they are imprisoned, they are not able to take the same kind of COVID-19 prevention measures that non-incarcerated people can—they have inadequate or no access to sanitizer, soap, and personal protective equipment, medical care is inadequate or hard to obtain, and living conditions make it impossible to social distance.⁴⁸ The inability to take action to prevent contracting the virus further contributes to the fear and anxiety that incarcerated people experience.⁴⁹ In sum, people who have been imprisoned during the

⁴² See, e.g., Memorandum to N.C. English, Federal Bureau of Prisons Northeast Regional Director, from David E. Ortiz, Warden for the Federal Correctional Institution at Fort Dix, “COVID-19 Phase Nine Social Visiting Modification” (Sept. 14, 2020), https://www.bop.gov/locations/institutions/ftd/ftd_modified_visiting_procedures.pdf (explaining that legal visits are to take place in the general “Visiting Room” rather than private conference areas).

⁴³ *FCI Fort Dix*, FED. BUR. OF PRISONS (last visited Apr. 25, 2021), <https://www.bop.gov/locations/institutions/ftd/> (“All visiting at this facility has been suspended until further notice.”).

⁴⁴ One habeas petitioner explained that, “as a result of the public health crisis, he has been confined to his room for 22.5 hours a day, he is unable to use the prison’s law library, cannot use the email or phone, and has no access to his transcripts.” *United States v. Smith*, No. ELH-18-17, 2020 WL 4016242, at *1 (D. Md. July 16, 2020). See also *BOP Modified Operations*, FED. BUR. OF PRISONS (last updated Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp (“[I]nmates are limited in their movements to prevent congregating and maximize social distancing. . . . Inmate movement in small numbers is authorized” for laundry, showers, telephone use, and commissary visits).

⁴⁵ *Decarceration During COVID-19: A Messaging Toolkit for Campaigns for Mass Release*, CMTY. JUST. EXCHANGE & PUB. HEALTH AWAKENED, at 2 (Apr. 2020) [hereinafter “*Decarceration During COVID-19*”] (“The country’s jails, prisons, and immigration detention centers were already and are inherently sites of violence, illness, and death. Continuing to incarcerate people amidst this global pandemic only exacerbates and magnifies this long-standing truth.”).

⁴⁶ Lexi Wessling, *Quick Take: Maintaining mental wellness of staff and inmates during custodial pandemonium*, CORRECTIONS1 (Apr. 16, 2020), <https://www.corrections1.com/coronavirus-covid-19/articles/quick-take-maintaining-mental-wellness-of-staff-and-inmates-during-custodial-pandemonium-0niHn2Za1zFP8gmq/>.

⁴⁷ See, e.g., Michelle VanNatta & Mariame Kaba, “*We’re In It For the Long Haul*”: *Alternatives to Incarceration For Youth In Conflict With the Law*, PROJECT NIA, at *3 (last visited Apr. 29, 2021), <https://project-nia.org/uploads/documents/Research-Reports/were-in-it-for-the-long-haul.pdf> (“[I]ncarceration is expensive, traumatic, disruptive, and ineffective.”).

⁴⁸ As Camila Strassle and Benjamin E. Berkman explain:

Prisons and jails encounter a host of unique challenges that hinder infection control and fuel high rates of infection. These include restricted movement; overcrowding; confined spaces; high population turnover; rationed access to soap and laundry; restrictions on alcohol-based hand sanitizer and undiluted disinfectants; poor sanitation; limited isolation rooms and personal protective equipment; and low public priority for correctional healthcare, which can result in delayed case detection; poor contact investigations; interrupted supplies of medicine; inadequate treatment; and insufficient laboratory capacity diagnostic tools.

Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083, 1090-91 (2020).

⁴⁹ See *id.* at 1084-85 (“Heightened fears surrounding COVID-19 have led to mass prison releases and protests, reflecting a growing sentiment among those incarcerated—‘we’re all on death row now.’”).

pandemic have encountered myriad challenges as they endeavor to keep themselves safe while pursuing postconviction remedies.

In light of COVID-19, federal courts across the country have granted motions for “compassionate release,” recognizing that the conditions of confinement during the pandemic create extraordinary circumstances warranting an incarcerated person’s immediate release from prison.⁵⁰ Federal law permits sentencing courts to vacate and modify sentences when petitioners present “extraordinary and compelling reasons” for doing so,⁵¹ and multiple courts of appeals have affirmed that district courts can consider “any extraordinary and compelling reason for release” that a petitioner presents.⁵² One court granting compassionate release explained that “the COVID-19 pandemic presents an extraordinary and unprecedented threat to incarcerated individuals.”⁵³ Another court noted that “nothing could be more extraordinary and compelling than this pandemic.”⁵⁴ As compassionate release litigation makes clear, federal courts are willing to acknowledge the extraordinary circumstances created by the pandemic—and they may continue to do so when evaluating habeas petitioners’ requests for equitable tolling.

In both the compassionate release and equitable tolling contexts, however, courts have concluded that petitioners cannot rely solely on the pandemic as an automatic reason for relief.⁵⁵ Courts demand an additional showing that circumstances are extraordinary and stand in the way of timely filing before concluding that a petitioner is entitled to relief.⁵⁶ But, for untimely habeas petitioners requesting equitable tolling, a court’s mode of analysis may determine which facts and arguments are considered when assessing whether the circumstances causing a petitioner’s delay were sufficiently extraordinary. Having explored the kinds of facts that courts have previously identified as extraordinary, as well as the conditions inside of carceral facilities during COVID-19, this Article will now address *how* district courts should approach the extraordinary circumstances aspect of the equitable tolling inquiry during the pandemic. Courts must adopt a holistic, flexible

⁵⁰ At this time, there has not been a concerted effort to collect, quantify, and analyze all of the compassionate release motions sought and granted since the pandemic. For only a few examples, *see*, for example, *United States v. Arreola-Bretado*, 445 F. Supp. 3d 1154, 1158-59 (S.D. Cal. 2020); *United States v. Davis*, No. 06-20020-002, 2020 WL 4049980, at *1 (C.D. Ill. July 20, 2020); *United States v. Wahid*, No. 1:14-cr-00214, 2020 WL 4734409, at *2 (N.D. Ohio Aug. 14, 2020); *United States v. Littrell*, 461 F. Supp. 3d 899, 906 (E.D. Mo. 2020); *United States v. Jacobs*, 470 F. Supp. 3d 969, 978 (S.D. Iowa 2020); *United States v. Weems*, 477 F. Supp. 3d 1301, 1309 (S.D. Fla. 2020); *United States v. Rachal*, 470 F. Supp. 3d 63, 65-66 (D. Mass. 2020).

⁵¹ First Step Act of 2018, § 603(b), Pub. L. 115- 391, 132 Stat. 5194, 5239 (Dec. 21, 2018), codified in relevant part at 18 U.S.C. § 3582(c)(1)(A)(i). For more on the federal compassionate release statutory scheme, *see* Meghan Downey, *Compassionate Release During COVID-19*, REG. REV. (Feb. 22, 2021), <https://www.theregreview.org/2021/02/22/downey-compassionate-release-during-covid-19/>.

⁵² *United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020); *see, e.g., United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

⁵³ *United States v. Williams-Bethea*, 464 F. Supp. 3d 562, 568-69 (S.D.N.Y. 2020).

⁵⁴ *United States v. Adeyemi*, 470 F. Supp. 3d 489, 492 (E.D. Pa. 2020) (quoting *United States v. Rodriguez*, 451 F. Supp. 3d 392, 394 (E.D. Pa. 2020)).

⁵⁵ For example, one district court explained that “[t]he COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis.” *Taylor v. United States*, No. 4:20CV1489, 2021 WL 1164813, *3 (E.D. Mo. Mar. 26, 2021). Similarly, in the context of compassionate release, the Third Circuit has noted that the “mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release.” *United States v. Raia*, 954 F.3d 594 (3d Cir. 2020).

⁵⁶ *See, e.g., Taylor v. United States*, No. 4:20CV1489, 2021 WL 1164813, *3 (E.D. Mo. Mar. 26, 2021) (“The COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis.”).

approach when approaching this inquiry, especially in light of substantial Supreme Court and appellate court precedent.

II. A FLEXIBLE APPROACH TO RECOGNIZING EXTRAORDINARY CIRCUMSTANCES

To ensure that incarcerated people have meaningful access to postconviction review, district courts assessing late habeas petitions must employ a flexible, totality-of-the-circumstances approach when evaluating the availability of equitable tolling. Given the Supreme Court's guidance on equitable tolling in the context of habeas corpus, the appropriate framework for assessing whether extraordinary circumstances justify equitable tolling embraces flexibility, rejects strict adherence to arbitrary and archaic legal rules, and humanizes by directing attention to the lived experiences of the people seeking relief. Applying a flexible, holistic approach when petitioners are late to file, and specifically when petitioners are late due to conditions created by the COVID-19 pandemic, is more than a jurisprudential possibility—it is compelled by the Supreme Court's emphasis on providing flexibility for late habeas petitioners. When presented with late habeas petitions during the pandemic, courts must recognize the extraordinary circumstances brought about by COVID-19 and how the pandemic has exacerbated the punitive conditions of incarceration that impede petitioners' ability to timely file. Furthermore, even when pandemic-related circumstances are not implicated, courts must assess claims for equitable tolling holistically and without reliance on “rigid and nonvariable rules.”⁵⁷

Supreme Court and court of appeals precedent on the equitable tolling inquiry provides a strong foundation for the totality-of-the-circumstances approach. As the Supreme Court announced in *Holland v. Florida*, untimely habeas petitioners are entitled to the flexible assessment of their claims for equitable tolling.⁵⁸ In setting out the proper standard for assessing equitable tolling, the Court explained:

[T]he exercise of a court's equity powers . . . must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity. The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.⁵⁹

Whether to make equitable tolling available, therefore, is a flexible, “fact-intensive” inquiry, free from the constraints of “archaic rigidity.”⁶⁰ Courts must make “case-by-case” determinations about a petitioner's entitlement to “equitable intervention” when “new situations” so demand it.⁶¹

⁵⁷ *Dillon v. Conway*, 642 F.3d 358, 362-63 (2d Cir. 2011).

⁵⁸ 560 U.S. 631, 649 (2010).

⁵⁹ *Id.* at 649-50 (internal quotations and citations omitted).

⁶⁰ *Id.* at 650-54 (internal quotations omitted).

⁶¹ *Id.* at 650.

In light of the Supreme Court's decision in *Holland*, and particularly in the context of COVID-19, courts analyzing the availability of equitable tolling must adopt a flexible, totality-of-the-circumstances approach and must reject a narrow, circumstance-by-circumstance approach. Courts adopting a totality-of-the-circumstances approach and embracing *Holland's* rejection of "archaic rigidity" will consider whether all of the circumstances surrounding a petitioner's delay rise to the level of "extraordinary," rather than requiring any particular circumstance satisfy that standard independently.⁶² Courts adopting a circumstance-by-circumstance approach, on the other hand, will isolate and evaluate each fact causing a petitioner's delay, determining whether any one fact alone is sufficiently extraordinary.⁶³ Because a culmination of factors may stand in a petitioner's way, courts must consider all of the facts and arguments in favor of equitable tolling in the aggregate, rather than discussing and dismissing those reasons individually and independently of one another.

Consistent with the Supreme Court's guidance in *Holland*, a number of circuit courts have adopted a totality-style approach for assessing the presence of extraordinary circumstances and the availability of equitable tolling more broadly. These decisions provide district courts with an effective model for conducting a flexible extraordinary circumstances inquiry.

The Third Circuit, for example, has explicitly adopted a totality-of-the-circumstances approach, concluding that equitable tolling is warranted when "[t]he totality of the[] circumstances makes it clear . . . that extraordinary circumstances stood in the way" of a petitioner's timely filing.⁶⁴ In *Ross v. Varano*, the Third Circuit "consider[ed] the record as a whole" when determining whether to grant equitable tolling to Mr. Ross, an untimely habeas petitioner.⁶⁵ Among the factors considered were his attorney's conduct, Mr. Ross's "limited intellectual ability and education," his "history of poor mental health," and the fact that Mr. Ross was "an incarcerated prisoner with limited resources at his disposal who was moved among facilities within the prison system."⁶⁶ Taken together, the Third Circuit concluded that these facts constituted extraordinary circumstances and warranted equitable tolling.⁶⁷

The Sixth Circuit, too, has embraced the totality-of-the-circumstances approach and evaluated whether the conditions a petitioner faces, in the aggregate, rise to the extraordinary level required for equitable tolling.⁶⁸ In *Jones v. United States*, for example, Mr. Jones sought equitable tolling when he filed three months after his AEDPA deadline.⁶⁹ In addition to pointing out his pro se status and limited library access, Mr. Jones demonstrated that he was prevented from accessing legal information due to a series of transfers between prison facilities and that he was "partially

⁶² *Id.* at 649-50; *see infra* Section II.A.

⁶³ For a thorough explanation and examples of the circumstance-by-circumstance approach, *see infra* Section III.B.

⁶⁴ *Ross v. Varano*, 712 F.3d 784, 802-03 (3d Cir. 2013).

⁶⁵ *Id.* at 803.

⁶⁶ *Id.*

⁶⁷ *Id.* at 804.

⁶⁸ *Cf. Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750-54 (6th Cir. 2011). In Mr. Hall's case, the Sixth Circuit concluded that two of the three arguments Mr. Hall raised had been waived, and the court was therefore not required to take those circumstances into account when assessing the availability of equitable tolling. *Id.* at 752-54. With regard to the remaining argument—Mr. Hall's lack of access to his trial transcript—the court concluded that, "Standing alone . . . the unavailability of or delay in receiving transcripts is not enough to entitle a habeas petitioner to equitable tolling." *Id.* at 750-51. Although the court refused to consider the waived arguments, it did not limit its analysis to solely the unavailability of the transcript. *Id.* at 751. ("Hall's pro se status and limited law-library access do not change our analysis.")

⁶⁹ *Jones v. United States*, 689 F.3d 621, 627 (6th Cir. 2012).

illiterate” and “must rely on other prisoners for knowledge of changes in the legal landscape.”⁷⁰ He also explained that he had a variety of medical conditions that interfered with his ability to obtain legal information.⁷¹ Ultimately, the Sixth Circuit concluded that “[a]lthough any one of the above factors may not constitute ‘extraordinary circumstances’ alone, the combination of all of these factors justifies applying equitable tolling to Jones’s claim.”⁷²

The Seventh Circuit has also embraced a totality-of-the-circumstances approach and has explicitly rejected a narrow circumstance-by-circumstance approach. “It does not matter that one could look at each of the circumstances encountered by [a petitioner] in isolation and decide that none by itself required equitable tolling,” the Seventh Circuit explained in *Socha v. Boughton*.⁷³ There, the Seventh Circuit concluded that the district court below had erred by “conceiv[ing] of the equitable tolling inquiry as the search for a single trump card, rather than an evaluation of the entire hand that the petitioner was dealt.”⁷⁴ Furthermore, the court explained that the circumstance-by-circumstance approach is improper because, “[i]n *Holland*, the Supreme Court disapproved the use of such a single-minded approach. It wrote instead that a person’s case is to be considered using a ‘flexible’ standard that encompasses all of the circumstances that he faced and the cumulative effect of those circumstances.”⁷⁵ The Seventh Circuit concluded that the district court had abused its discretion in denying Mr. Socha equitable tolling because the circumstances surrounding his late filing—including his lack of access to his case file for a majority of the limitations period and his limited library access due to his placement in segregation—were, in combination, extraordinary.⁷⁶

In another Seventh Circuit case, *Carpenter v. Douma*, Mr. Carpenter supported his request for equitable tolling by noting his pro se status, lack of legal training, physical and mental health issues, transfer from one correctional facility to another, and conflicts with appointed counsel during his state appeal.⁷⁷ Mr. Carpenter conceded that these circumstances were not sufficiently extraordinary when considered individually, and the Seventh Circuit ultimately held that Mr. Carpenter was not entitled to equitable tolling because “these circumstances, even when combined, are nothing but ordinary.”⁷⁸ Although it denied Mr. Carpenter’s request for equitable tolling, the Seventh Circuit reiterated that courts must “look at ‘the entire hand’ that [a petitioner] was dealt” when determining whether a petitioner’s circumstances “truly prevented timely filing of his habeas petition.”⁷⁹

As courts of appeals have made clear, the totality-of-the-circumstances approach is not only a viable, administrable way to assess the presence of extraordinary circumstances, but it is compelled given the Supreme Court’s instruction in *Holland v. Florida*. Circuit court decisions demonstrate clearly how the totality approach is consistent with the Supreme Court’s most recent explanation of the flexibility that courts must provide to habeas petitioners seeking review of untimely claims. These decisions also demonstrate how the alternative approach—the circumstance-by-circumstance approach, which isolates each allegedly extraordinary circumstance rather than considering all circumstances in the aggregate—is inconsistent with the flexibility that *Holland* demands. The

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ 763 F.3d 674, 686 (7th Cir. 2014).

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Holland v. Florida*, 560 U.S.631, 650 (2010)).

⁷⁶ *Id.* at 686-87.

⁷⁷ *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016).

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014)).

appropriateness of the totality-of-the-circumstances approach and the inappropriateness of the circumstance-by-circumstance approach are further illuminated by district court determinations about the availability of equitable tolling since the onset of COVID-19. In light of the extensive, disruptive impact of the COVID-19 pandemic, district courts must continue to embrace the totality-of-the-circumstances approach while rejecting a needlessly and inappropriately narrow framework.

III. COMPETING APPROACHES TO THE EXTRAORDINARY CIRCUMSTANCES INQUIRY

Since March 2020, habeas petitioners have argued that circumstances created by the COVID-19 pandemic are extraordinary enough to justify equitable tolling.⁸⁰ On the merits of the extraordinary circumstances inquiry,⁸¹ many courts have been persuaded by petitioners' arguments,⁸² and others have conceded that COVID-19 "could—in certain circumstances—conceivably warrant equitable tolling."⁸³ District courts, however, have not uniformly applied a flexible approach when evaluating petitions seeking equitable tolling during the pandemic.⁸⁴

When courts do address the presence or absence of extraordinary circumstances, they typically proceed through one of two modes of analysis: (1) a flexible, totality-of-the-circumstances approach that reflects *Holland's* repudiation of rigid legal rules when assessing the availability of equitable tolling; or (2) a circumstance-by-circumstance approach in which courts determine whether

⁸⁰ See, e.g., *Livingston v. Sec'y Fla. Dep't of Corr.*, No. 3:20-cv-357-J-34MCR, 2020 WL 1812284, at *1-2 (M.D. Fla. Apr. 9, 2020) (denying petitioner's request for prospective equitable tolling).

⁸¹ Before courts address the extraordinary circumstances present in these cases, they may dismiss requests for equitable tolling because the petitioner was not diligent and therefore failed to meet the other *Holland* requirement. See, e.g., *Chase v. United States*, No. 5:20-cv-80-KDB, 2021 WL 327638, at *5 (W.D.N.C. Feb. 1, 2021) (denying equitable tolling because "Petitioner fail[ed] to explain how he exercised due diligence"). Courts may also dismiss claims for equitable tolling before reaching the merits of the extraordinary circumstances inquiry because the petitioner has requested *prospective* equitable tolling, which not all courts recognize or explicitly allow. In these cases, petitioners have argued that they *anticipate* that the conditions of the pandemic will cause them to be delayed in filing their habeas petitions, and they proactively ask courts to delay that deadline. Some district courts have allowed for prospective equitable tolling in light of the pandemic. See *Maury v. Davis*, No. 2:12-cv-1043 WBS DB, 2020 WL 5088738, at *3 (E.D. Cal. Aug. 28, 2020) (granting prospective equitable tolling because the "petitioner has adequately demonstrated that the pandemic is causing, and will cause, limitations on his counsel's work") (emphasis added). Other courts have denied these requests and have instead required that petitioners *actually file* a petition before ruling on whether equitable tolling is available. See, e.g., *Livingston*, 2020 WL 1812284, at *1-2 ("The Court acknowledges the difficult circumstances the pandemic has caused on all facets of life, including life in prison. . . . [but] the principle of equitable tolling is an after-the-fact analysis of circumstances that may have prevented a petitioner from timely filing and does not authorize a court to grant prospective relief on equitable grounds."); *Chung v. Director, Tex. Dep't Crim. Just.*, No. 3:21-CV-7-X-BH, 2021 WL 1379517, at *1-2 (N.D. Tex. Mar. 24, 2021); *United States v. Smith*, No. ELH-18-17, 2020 WL 4016242, at *2 (D. Md. July 16, 2020). In other cases, courts explain that these prospective requests are too speculative to warrant equitable tolling, which demands a "fact-specific" or "claim-dependent" assessment about whether extraordinary conditions in fact render a petitioner unable to file on time. See *McWhorter v. Davis*, 493 F. Supp. 3d 871, 879 (E.D. Cal. Oct. 7, 2020); *Pickens v. Shoop*, No. 1:19-cv-558, 2020 WL 3128536, at *3 (S.D. Ohio June 12, 2020) (noting that the court "is inclined to find equitable tolling" for any claims petitioner eventually presents that "even facially appear[] to have required the type of in-person contact, or any other activities such as travel, that the current state of emergency impedes").

⁸² See *infra* Section II.A.

⁸³ *United States v. Haro*, No. 8:18CR66, 2020 WL 5653520, at *4 (D. Neb. Sept. 23, 2020).

⁸⁴ Not all district courts that have denied equitable tolling provide a thorough explanation of the reasons for their decisions. See, e.g., *Mix v. Warden, Ohio Reformatory for Women*, No. 2:21-CV-126, 2021 WL 977875, at *3 (S.D. Ohio Mar. 16, 2021) (noting only that "a petitioner's pro se status, ignorance of the law, or limited access to the law library do not constitute extraordinary circumstances warranting equitable tolling of the statute of limitations").

each reason asserted is independently extraordinary. These two approaches frame the relevant inquiry differently. The first asks, “Are the circumstances in this case, overall, extraordinary enough to justify equitable tolling?” while the second asks, “Which of these asserted circumstances alone qualifies as extraordinary enough to justify equitable tolling?”

In this section, I describe these competing approaches as applied by district courts during the pandemic, explaining how the totality-of-the-circumstances approach flows from and is consistent with *Holland*’s emphasis on flexibility in equitable procedure.⁸⁵ I explain how the circumstance-by-circumstance approach is inconsistent with the flexibility that *Holland* identifies as the cornerstone of equitable tolling in the habeas context⁸⁶ because such a narrow approach prioritizes strict adherence to legal rules over holistic, case-specific determinations. I ultimately conclude, in light of the conditions of confinement created by the COVID-19 pandemic, that district courts should now more than ever adopt a flexible totality-of-the-circumstances approach to the extraordinary circumstances inquiry. District courts must consider whether all of the circumstances surrounding a petitioner’s untimely filing are extraordinary when considered in the aggregate, rather than independently considering and rejecting specific reasons why equitable tolling may be warranted.

A. The Flexible Totality-of-the-Circumstances Approach

Courts adopting the totality-of-the-circumstances approach begin by recognizing the arguments that a petitioner has raised in favor of equitable tolling, including any health issues, attorney misconduct, and the conditions inside of prison—often exacerbated by the pandemic—that make it more challenging for petitioners to access lawyers and legal resources.⁸⁷ Rather than “looking at each of the circumstances encountered . . . in isolation,” the totality-of-the-circumstances approach considers “the full picture with which [a petitioner] is contending.”⁸⁸ With petitioners’ experiences in mind, courts will also consider arguments raised in opposition to the request for equitable tolling.⁸⁹ Importantly, this approach permits courts to consider what a petitioner has experienced beyond what is explicitly stated in parties’ briefs—including practical and obvious impediments created by the pandemic—and to find extraordinary circumstances present in light of the “cumulative effect[s]”⁹⁰ of a petitioner’s circumstances rather than demanding evidence of an independently extraordinary single event or fact.⁹¹

A holistic approach to the extraordinary circumstances inquiry better situates courts to consider the myriad ways that incarceration during COVID-19 makes filing a timely petition

⁸⁵ *Holland v. Florida*, 560 U.S. 631, 649-51 (2010).

⁸⁶ *Id.*

⁸⁷ *See, e.g.*, *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016) (noting that the petitioner’s circumstances “taken alone, would be insufficient to justify equitable tolling,” but ultimately evaluating those circumstances “us[ing] a ‘flexible standard’”) (quoting *Socha v. Boughton*, 763 F.3d 674, 687 (7th Cir. 2014)).

⁸⁸ *Id.* at 685-86.

⁸⁹ *See, e.g.*, *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014) (“The state tries to pick off each of the circumstances Socha identifies, explaining why in isolation it is not enough to justify equitable tolling.”).

⁹⁰ *Id.* at 686 (“In *Holland*, the Supreme Court . . . wrote instead that a person’s case is to be considered using a ‘flexible’ standard that encompasses all of the circumstances that he faced and the cumulative effect of those circumstances.”) (citing *Holland v. Florida*, 560 U.S. 631, 650 (2010)).

⁹¹ *Id.* (“It does not matter that one could look at each of the circumstances encountered by Socha in isolation and decide that none by itself required equitable tolling. The mistake made by the district court and the state was to conceive of the equitable tolling inquiry as the search for a single trump card, rather than an evaluation of the entire hand that the petitioner was dealt.”).

challenging, if not impossible. This approach encourages and enables courts to consider the cumulative effect of the shutdowns, delays, and isolation that have arisen or intensified during the pandemic when measuring the extraordinary nature of a petitioner's circumstances, and is therefore consistent with the Supreme Court's instruction in *Holland* to "correct [] particular injustices" when circumstances "warrant special treatment."⁹² Adopting an all-encompassing approach to equitable tolling provides courts with the opportunity to engage with the realities of imprisonment and recognize how the experience of incarceration is, in fact, extraordinary—especially in light of the conditions caused by the COVID-19 pandemic.⁹³

A pandemic-era California district court case called *Cowan v. Davis* illustrates the totality approach's consistency with *Holland*'s flexible analysis and emphasis on equitable principles. In requesting that his August 13, 2020 AEDPA deadline be equitably tolled, Mr. Cowan cited various stay-at-home orders, cancelled prison visits, and his counsel's restricted ability to assemble a record.⁹⁴ In addition to the conditions that Mr. Cowan raised, the district court explained that it would consider the "complexity of the legal proceedings and whether the state would suffer prejudice from the delay."⁹⁵ The court also took into account that courthouses in California had been closed for months, "will remain so for the foreseeable future," and that "this court's ability to function as it normally has been severely impaired as a result of the ongoing pandemic."⁹⁶ In light of all of these considerations, the court extended Mr. Cowan's deadline to November 2020, concluding that "the extraordinary circumstances brought about by the COVID-19 pandemic have rendered [Mr. Cowan] presently unable to file a proper federal habeas petition" on time.⁹⁷

That district court has extended prospective equitable tolling to Mr. Cowan on three other occasions, as well.⁹⁸ Most recently, in April 2021, the court noted that the record for federal habeas review in Mr. Cowan's capital case spans nearly 17,000 pages and that the "extraordinary circumstances arising from the ongoing COVID-19 pandemic make the filing of a complete federal habeas [] petition extremely unlikely."⁹⁹

While Mr. Cowan's case is certainly extraordinary, the district court that permitted equitable tolling in his case is not alone. Other courts have employed the totality approach and granted petitioners equitable tolling during the pandemic, as well.¹⁰⁰ Using a flexible and holistic approach, district courts have made equitable tolling available in cases where a petitioner has "been on lockdown since March 14, 2020," been unable to access the law library,¹⁰¹ and where the pandemic has

⁹² *Holland v. Florida*, 560 U.S. 631, 650 (2010).

⁹³ *Cf. Escobar v. May*, No. 18-1933-RGA, 2021 WL 797876, at *3 (D. Del. Mar. 2, 2021) ("[R]outine aspects of prison life . . . do not constitute extraordinary circumstances for equitable tolling purposes.").

⁹⁴ *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 WL 4698968, at *2 (E.D. Cal. Aug. 13, 2020).

⁹⁵ *Id.* at *3.

⁹⁶ *Id.* at *6.

⁹⁷ *Id.* at *3.

⁹⁸ *See Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2021 WL 1388169, at *4 (E.D. Cal. Apr. 13, 2021); *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 WL 6544251, at *4 (E.D. Cal. Nov. 6, 2020); *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 WL 1503423, at *3 (E.D. Cal. Mar. 30, 2020).

⁹⁹ *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2021 WL 1388169, at *3-4 (E.D. Cal. Apr. 13, 2021).

¹⁰⁰ *See, e.g., Brown v. Davis*, 482 F. Supp. 3d 1049, (E.D. Cal. 2020); *Contreras v. Davis*, No. 1:19-cv-01523-AWI-SAB, 2020 WL 5588589 (E.D. Cal. Sept. 18, 2020).

¹⁰¹ *Monroe v. United States*, No. 4:17-cr-11, 2020 WL 6547646, at *3 (E.D.V.A. Nov. 6, 2020) ("The Court recognizes that Petitioner may have experienced issues in attempting to timely file the present motion while facing the impact of a global pandemic. Accordingly, the Court will toll the filing deadline . . . as the circumstances surrounding the pandemic were both extraordinary and beyond Petitioner's control.").

“interfered” in a petitioner’s plans to obtain statutory tolling by pursuing unexhausted claims in state court.¹⁰²

Even courts that have denied prospective grants of equitable tolling as premature have recognized the extraordinary conditions created by the pandemic through a totality-of-the-circumstances analysis, all but guaranteeing that equitable tolling would be granted retrospectively.¹⁰³ For instance, in *Fitzgerald v. Shinn*, a capital petitioner argued that the pandemic prevented his counsel from investigating and developing all potentially meritorious claims due to “the governmental, institutional, and societal limitations placed on travel and contact with other persons in response to COVID-19.”¹⁰⁴ These conditions included the suspension of visitation at the facility where Mr. Fitzgerald was incarcerated, which prohibited his defense team “from monitoring his mental state, discussing sensitive and personal details necessary to their investigation, and establishing the rapport and trust that are necessary” for effective representation.¹⁰⁵ The court concluded, “[w]ithout question,” that the pandemic’s interference with Mr. Fitzgerald’s ability to develop his habeas petition constituted “extraordinary circumstances.”¹⁰⁶

Although petitioners such as Mr. Fitzgerald are unable to point to any specific extraordinary event—such as total abandonment by their attorneys or the complete destruction of their legal materials—the absence of one major extraordinary event is not dispositive for courts employing the totality approach.¹⁰⁷ By considering claims for equitable tolling holistically, courts are able to recognize how cumulative circumstances, including those arising during and because of the pandemic, preclude a petitioner’s timely filing, consistent with *Holland*’s mandate to “‘meet new situations [that] demand equitable intervention.’”¹⁰⁸

Furthermore, adopting the holistic approach encourages courts to consider the lived experiences of habeas petitioners when evaluating whether and how the extreme conditions of incarceration justify and excuse late filings.¹⁰⁹ For example, in *Dunn v. Baca*, the district court for the District of Nevada explained and excused Mr. Dunn’s delay because:

The problem is the COVID-19 pandemic. Visits to prison are restricted to keep the disease from spreading into the prisons. Travel to other areas for investigation is

¹⁰² *Crawford v. Morrison*, No. 1:20-cv-691, 2020 WL 6144433, at *2-4 (W.D. Mich. Oct. 20, 2020).

¹⁰³ *Pickens v. Shoop*, No. 1:19-cv-558, 2020 WL 3128536, at *1-3 (S.D. Ohio June 12, 2020) (referencing the state of emergency, travel restrictions, and stay at home orders imposed in Ohio and concluding that it “seems obvious that ‘extraordinary circumstances’ likely stand in the way of [petitioner’s] timely filing a complete petition. In fact, that is probably an understatement”).

¹⁰⁴ *Fitzgerald v. Shinn*, No. CV-19-5219-PHX-MTL, 2020 WL 3414700, at *1 (D. Ariz. June 22, 2020).

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.* at *2, *4 (“There is little doubt that ultimately, the COVID-19 pandemic will be considered an extraordinary circumstance meriting tolling for some period of time.”).

¹⁰⁷ *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014) (characterizing the extraordinary circumstances inquiry not as “the search for a single trump card,” but instead as “an evaluation of the entire hand that the petitioner was dealt”).

¹⁰⁸ *Holland v. Florida*, 560 U.S. 631, 650 (2010).

¹⁰⁹ Centering the experiences of incarcerated people is fundamental to the movement away from systems of carceral punishment. See generally NO NEW JAILS NYC, *Close Rikers Now, We Keep Us Safe*, at 6, https://drive.google.com/file/d/1NPW9cNv6AsbKYF_se4d8IIHQ5cyHOvOx/view (last visited May 3, 2020) (highlighting the experiences of incarcerated people in order to explain how “closing jails increases safety”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019) (“Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably. Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”).

difficult. Trying to interview people on potentially sensitive issues while maintaining distance also is unwise. Courthouses are closed, and so obtaining records is difficult to impossible. Counsel for Dunn and for Respondents are working from home, as are their colleagues. The Court has received many requests for extension of time from both due to technical difficulties of setting up secure remote connections to their work computers, and their home computers might not be as efficient as their work computers. Some people have children whose schools or day-cares have closed. The parents have suddenly and unexpectedly become teachers, in addition to their normal work duties. In short, the COVID-19 pandemic is an extraordinary circumstance that is preventing parties from meeting deadlines established both by rules and by statutes.¹¹⁰

The decision in *Dunn v. Baca* accounts for the unprecedented disruptions that the pandemic has created for everyone involved in the criminal legal system and demonstrates how courts can be attentive to the practical challenges faced by people coming before them. The district court's decision exemplifies how courts employing the totality approach can recognize and credit the various ways that the pandemic has impeded litigants' ability to timely file, concluding that these impediments constitute "specific circumstances, often hard to predict in advance, [that] could warrant special treatment."¹¹¹

Similarly, in *Maury v. Davis*, a magistrate judge in the Eastern District of California recommended granting a petitioner's motion for equitable tolling after finding that there was "no dispute" whether "the effects of the COVID-19 pandemic are extraordinary and are ongoing."¹¹² There, the court wrote:

This court will not recommend a result that would force petitioner's counsel to choose between risking the safety of themselves, their staff, potential witnesses, and all of their families to conduct interviews or risking the loss of the right to assert habeas claims on behalf of their condemned client. The court has ample grounds to grant petitioner's motion for equitable tolling.¹¹³

As the magistrate judge explained, the choice counsel faced—to risk their own health and safety, or to forfeit their client's opportunity for judicial review—contributed to his decision to recommend that equitable tolling be granted.¹¹⁴ *Maury v. Davis* and *Dunn v. Baca* both reflect an awareness of the ways in which the pandemic has fundamentally shaped and altered the lives of habeas petitioners and their attorneys, creating circumstances that make the daunting task of submitting a habeas petition all the more challenging to navigate. Perhaps these challenges are insufficient on their own to justify equitable tolling. But by employing the totality approach, district courts can still consider

¹¹⁰ *Dunn v. Baca*, No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020); see *Mullner v. Williams*, 2020 WL 6435751, at *2 (D. Nev. Nov. 2, 2020) (reiterating the language from *Dunn*); *Dale v. Williams*, 2020 WL 4904624, at *1-2 (D. Nev. Aug. 20, 2020) (reiterating the language from *Dunn* and granting equitable tolling where petitioner was unable to undergo a competency exam because the doctor was prohibited from entering the facility where he was incarcerated).

¹¹¹ *Holland*, 560 U.S. at 650.

¹¹² *Maury v. Davis*, No. 2:12-cv-1043 WBS DB, 2020 WL 5088738, at *3 (E.D. Cal. Aug. 28, 2020).

¹¹³ *Id.* at *4.

¹¹⁴ *Id.*

and afford due weight to the ways that these challenges can and do prohibit a petitioner's timely filing.¹¹⁵

District courts adopting a flexible totality-of-the-circumstances approach are better able to consider the experiences of the litigants who come before them than are courts adopting a narrower approach to the extraordinary circumstances inquiry. Using a holistic evaluation of the circumstances that stand in the way of a petitioner's timely filing, courts can take steps to recognize how the pandemic has exacerbated the violent nature of incarceration¹¹⁶ and how that harm contributes to the barriers in people's way as they navigate postconviction review proceedings.¹¹⁷ A narrower approach—the circumstance-by-circumstance approach—necessarily prohibits district courts from taking into account conditions that, when considered “in isolation[,] . . . [are] not enough to justify equitable tolling.”¹¹⁸ District courts employing the totality-of-the-circumstances approach are therefore better situated to consider adequately the various material conditions impeding habeas litigants' ability to timely file.

B. *The Circumstance-By-Circumstance Approach*

Despite *Holland's* clear demand for flexibility, many of the courts that have evaluated claims for equitable tolling during the pandemic have proceeded using a circumstance-by-circumstance analysis.¹¹⁹ Courts assessing claims using this approach take each purportedly extraordinary circumstance in turn, determining whether that circumstance alone is sufficiently extraordinary to warrant equitable tolling.¹²⁰ Typically, courts using this approach tend to consider—and dismiss—each reason asserted by a petitioner independently, without considering how all of a petitioner's conditions operate together to preclude a petitioner from timely filing. Even if the cumulative circumstances *might* justify equitable tolling, the circumstance-by-circumstance approach precludes courts from considering that possibility. The circumstance-by-circumstance approach functionally limits the scope of the extraordinary circumstances inquiry by ruling out, one by one, various facts that a petitioner argues justify equitable tolling.

The circumstance-by-circumstance approach thus runs contrary to the analysis and principles adopted in *Holland* and emulated among circuit courts. By considering each of a petitioner's asserted circumstances “in isolation,” these courts fail to recognize “the full picture”¹²¹ surrounding a petitioner's untimely claim and thus cannot adequately assess whether a petitioner is entitled to equitable tolling. Furthermore, courts seeking to address and eliminate each allegedly extraordinary circumstances one-by-one fall victim to the “evils of archaic rigidity”¹²² that *Holland*

¹¹⁵ *Dunn*, 2020 WL 2525772, at *2; *Maury*, 2020 WL 5088738, at *3.

¹¹⁶ See *United States v. Smith*, No. ELH-18-17, 2020 WL 4016242, at *1 (D. Md. July 16, 2020) (describing the conditions in federal prison facilities during the pandemic).

¹¹⁷ See *Decarceration During COVID-19*, *supra* note 45, at 9 (“People are never safer in jails or prisons, which already are sites of violence and death, a reality only compounded by the COVID-19 pandemic.”).

¹¹⁸ *Socha v. Boughton*, 763 F.3d 674, 685 (7th Cir. 2014).

¹¹⁹ See, e.g., *Cannon v. United States*, No. 3:20-cv-00097, 2021 WL 537195, at *4 (D.N.D. Feb. 12, 2021); *Spice v. Davids*, No. 1:21-cv-180, 2021 WL 1206648, at *4-5 (W.D. Mich. Mar. 31, 2021); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750–51 (6th Cir. 2011); *Gillon v. Atchley*, No. 2:20-cv-04960-DOC-JDE, 2021 WL 1232461, at *5 (C.D. Cal. Mar. 10, 2021).

¹²⁰ See, e.g., *Mahan v. Steward*, No. 1:21-cv-90, 2021 WL 776989, at *1 (W.D. Mich. Mar. 1, 2021); *infra* note 123-127 and accompanying text.

¹²¹ *Socha*, 763 F.3d at 685-86.

¹²² *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

cautions against because, in addressing circumstances independently, courts rely unforgivingly on mechanical rules and distinguishable precedent.

A district court's dismissal of Gary Mahan's petition as untimely illustrates the shortcomings of the circumstance-by-circumstance approach in the context of the COVID-19 pandemic. Mr. Mahan, incarcerated in Michigan, presented a number of arguments that the district court dismissed in turn. First, he argued that his lack of library access prevented his timely filing, which the district court rejected because circuit precedent from 2011 categorized "lack of access to law library resources" as insufficient to constitute an extraordinary circumstance.¹²³ Second, Mr. Mahan suggested his limited knowledge of the appeals process and pro se status inhibited his timely filing, which the court rejected due to circuit precedent from 2012 holding that lack of knowledge of the law is not itself an extraordinary circumstance.¹²⁴ Finally, Mr. Mahan argued that he contracted COVID-19 and was incapacitated for months, which the court rejected because he did not sufficiently demonstrate or explain how his being sick "stood in his way" of filing a petition on time.¹²⁵

Mr. Mahan's case exposes the flaws of applying the circumstance-by-circumstance approach to the extraordinary circumstances inquiry, especially in light of the pandemic. By considering and eliminating each circumstance that Mr. Mahan presented in isolation, the district court failed to consider whether "the combination of all of these factors justifies applying equitable tolling."¹²⁶ As the Sixth Circuit has explained, although a petitioner "must show more than just his status as pro se or his limited access to a law library" in order to demonstrate entitlement to equitable tolling, *Holland* instructs lower courts "not to be rigid in [their] application of these principles and to consider each claim for equitable tolling on a case-by-case basis."¹²⁷ Because the district court evaluated Mr. Mahan's arguments in favor of equitable tolling individually and independently, the court failed to consider how any combination of the Mr. Mahan's circumstances could rise to the extraordinary level required *in his case*, in direct contravention of the Sixth Circuit's explanation of what *Holland* demands.

Furthermore, instead of making a case-specific determination about the cumulative effect that these circumstances had on Mr. Mahan's ability to timely file, the district court relied heavily on legal rules—including distinguishable precedent and the nexus requirement—in conflict with *Holland*'s mandate to embrace the "flexibility inherent in equitable procedure."¹²⁸ The court gives two primary reasons for rejecting Mr. Mahan's circumstances as insufficiently extraordinary: first, because pre-pandemic precedent has previously determined that each reason is insufficient on its own to justify equitable tolling; and second, because he failed to demonstrate a causal nexus between the asserted extraordinary circumstance and missing his deadline.¹²⁹ Relying on the rigorous

¹²³ Mahan v. Steward, No. 1:21-cv-90, 2021 WL 776989, at *1 (W.D. Mich. Mar. 1, 2021).

¹²⁴ *Id.* at *2.

¹²⁵ *Id.*

¹²⁶ Jones v. United States, 689 F.3d 621, 627-28 (6th Cir. 2012).

¹²⁷ *Id.* at 627.

¹²⁸ Holland v. Florida, 560 U.S. 631, 650 (2010) (internal quotations omitted); see Dillon v. Conway, 642 F.3d 358, 362 (2d Cir. 2011) ("[R]ejecting the notion that rigid and nonvariable rules must guide courts of equity, the Supreme Court concluded that 'given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments.'" (citing *Holland*, 560 U.S. at 651) (emphasis added)).

¹²⁹ Mahan v. Steward, No. 1:21-cv-90, 2021 WL 776989, at *1-2 (W.D. Mich. Mar. 1, 2021).

application of distinguishable precedent and the nexus requirement, the court denied Mr. Mahan's request for equitable tolling.

Although this kind of “hard and fast adherence” to precedent and the nexus requirement conflicts directly with the flexible, case-by-case analysis that *Holland* demands,¹³⁰ the district court's reliance on these rules in Mr. Mahan's case is fairly common. Overreliance on and strict adherence to the nexus requirement and rules derived from precedent appear frequently among district courts employing the circumstance-by-circumstance approach, whereas courts applying the totality-of-the-circumstances approach are less susceptible to the “archaic rigidity” condemned in *Holland*. As detailed below, rigidly applied rules—including the nexus requirement and rules derived from precedent about the insufficient or extraordinary nature of specific circumstances—contradict *Holland* because they prohibit courts from recognizing the real, practical impediments that surround an untimely habeas petition and impede a court's ability to conduct case-by-case assessments of whether extraordinary circumstances are present.

1. Reliance on Precedent to Determine When Circumstances Are Individually and Independently Insufficient

Like the court in Mr. Mahan's case, district courts assessing whether circumstances are extraordinary enough to warrant equitable tolling consider whether other courts have previously determined that a particular reason is independently insufficient to constitute an extraordinary circumstance. Strict adherence to precedent, however, fails to account for the ways in which current habeas petitioners are differently situated from those who litigated equitable tolling claims before the pandemic. Because *Holland* demands that courts “exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment,”¹³¹ district courts must abandon the circumstance-by-circumstance approach and the strict adherence to precedent that courts adopting this approach so often invoke.

¹³⁰ *Holland*, 560 U.S. at 650.

¹³¹ *Id.* The Second Circuit's decision in *Dillon v. Conway*, 642 F.3d 358, 362-63 (2d Cir. 2011), provides an excellent illustration of a court rejecting the application of a strict rule of precedent in favor of a more flexible analysis. In *Dillon*, the Second Circuit held that it was appropriate to grant equitable tolling to a petitioner whose attorney had filed his habeas petition one day late due to a miscalculation, after the attorney promised Mr. Dillon that he would not wait until the deadline to file. *Id.* The Second Circuit determined that extraordinary circumstances were present even though attorney miscalculations are usually considered “garden variety” errors that do not entitle petitioners to equitable tolling. *Id.*; see *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). Given the “heartbreaking” chronology of Mr. Dillon's case, as well as “the lawyer's deeply misleading statement to his client that he would not wait until the last day to file the petition,” the court ultimately concluded that Mr. Dillon was entitled to equitable relief. *Dillon*, 642 F.3d at 364. *Dillon v. Conway* exemplifies how a court considering the totality of the circumstances might reach a different conclusion than a court employing the circumstance-by-circumstance approach. Had the Second Circuit adopted the circumstance-by-circumstance approach, it would likely have assessed the missed deadline and the broken promise each in isolation—and because the Supreme Court has explained that mere negligence and “a simple miscalculation that leads a lawyer to miss a filing deadline does not warrant equitable tolling,” see *Holland*, 560 U.S. at 649-50 (internal citations and quotations omitted), the Second Circuit would likely have found that precedent foreclosed relief for Mr. Dillon. However, because the Second Circuit adopted a totality-of-the-circumstances approach, it considered *all* of the circumstances surrounding the missed deadline. In particular, the court emphasized that counsel had promised Mr. Dillon that he would not wait until the very last day to file the petition but did so anyway. *Dillon*, 642 F.3d at 362-63. Although the attorney's negligence, taken alone, would have been insufficiently extraordinary, the circumstances surrounding the miscalculation, including counsel's broken promise, elevated Mr. Dillon's case from mere attorney error to extraordinary circumstances. *Id.* (“Although miscalculating a deadline is the sort of garden variety attorney error that cannot *on its own* rise to the level of extraordinary circumstances, Dillon's case involves more than a simple miscalculation.”) (emphasis in original) (internal citations omitted).

During the pandemic, habeas petitioners have frequently argued that they are entitled to equitable tolling due in part to lack of access to the prison library for extended periods of time.¹³² Much like the district court in Mr. Mahan's case, many other district courts confronted with this fact dismiss it when evaluating potentially extraordinary circumstances because courts have previously held that lack of library access is not extraordinary on its own.¹³³ For the same reason, courts have dismissed arguments based on a petitioner's pro se status and lack of familiarity with the law.¹³⁴ Focusing solely on previous determinations about whether circumstances are extraordinary, however, directly conflicts with *Holland's* mandate to "avoid mechanical rules."¹³⁵ Despite *Holland's* instruction to be cognizant of new, anomalous circumstances, courts that strictly adhere to precedent fail to recognize how the context of the global pandemic distinguishes contemporary requests for equitable tolling from pre-pandemic requests. The narrowness of the circumstance-by-circumstance approach enables courts to apply precedent without considering the novel burdens that the pandemic imposes on habeas litigants and how the pandemic impedes their ability to timely file in unprecedented ways.

Courts' analyses of prison lockdowns during the pandemic, for example, illuminate how the circumstance-by-circumstance approach results in the rigid application of inapplicable, mechanical rules. Many petitioners have asserted that perpetual lockdowns during the pandemic inhibited their ability to timely file,¹³⁶ but courts adopting the circumstance-by-circumstance approach have rejected these arguments because previous cases have classified prison lockdowns, on their own, as "hardly extraordinary."¹³⁷ For instance, in *Chapman-Sexton v. United States*, Mr. Chapman-Sexton filed a motion with the court on June 25, 2020, six days after his statute of limitations period expired, requesting equitable tolling due to the lockdown imposed at his federal prison facility from April to June 2020, when his habeas petition was due.¹³⁸ He filed his completed habeas petition approximately one month later, including with it a number of Bureau of Prisons memoranda explaining how the facility had been locked down during the months preceding his AEDPA

¹³² See *Gillon v. Atchley*, No. 2:20-cv-04960-DOC-JDE, 2021 WL 1232461, at *4 (C.D. Cal. Mar. 10, 2021); *United States v. Pizzaro*, No. 16-63, 2021 WL 76405, at *2 (E.D. Lo. Jan. 8, 2021); *infra* note 133 (collecting cases).

¹³³ See, e.g., *Phillips v. United States*, No. 8:20-cv-1862-T-27AAS, 2021 WL 679259, at *3 (M.D. Fla. Feb. 22, 2021) ("[R]estricted access to a law library or legal documents do not constitute extraordinary circumstances to warrant equitable tolling.") (citing *Castillo v. United States*, No. 16-17028-E, 2017 WL 5591797, at *3 (11th Cir. May 4, 2017)); *Mims v. United States*, No. 4:20-CV-1538 RWS, 2021 WL 409954, at *4 (E.D. Mo. Feb. 5, 2021) (denying equitable tolling where petitioner argued he lacked access to the law library during the pandemic) (citing *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000)); *Chapman-Sexton v. United States*, No. 2:20-CV-3661, 2021 WL 292027, *3 (S.D. Ohio Jan. 28, 2021) (concluding that "limited access to the prison's law library or to legal materials do[es] not justify equitable tolling" because "[s]uch conditions are typical for many prisoners") (citing *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750–51 (6th Cir. 2011)).

¹³⁴ See, e.g., *Gillon v. Atchley*, No. 2:20-cv-04960-DOC-JDE, 2021 WL 1232461, at *5 (C.D. Cal. Mar. 10, 2021) ("[A] state prisoner's pro se status, lack of legal expertise, ignorance of the law, and lack of education do not warrant equitable tolling.") (citing *Ford v. Piler*, 590 F.3d 782, 789 (9th Cir. 2009)).

¹³⁵ *Holland*, 560 U.S. at 650 (internal quotations omitted); see, e.g., *Dillon v. Conway*, 642 F.3d 358, 362–43 (2d Cir. 2011).

¹³⁶ See, e.g., *Johnson v. United States*, No. 8:20-cv-2280-T-27TGW, 2021 WL 1103708, at *3 (M.D. Fla. Mar. 23, 2021) ("[T]he Eleventh Circuit has held that prison lockdowns and restricted access to a law library or legal documents do not constitute extraordinary circumstances to warrant equitable tolling.")

¹³⁷ *United States v. Trevillion*, No. 8:18-CR-8, 2021 WL 1313077, at *1 (D. Neb. Apr. 8, 2021) (citing *Warren v. Kelly*, 207 F. Supp. 2d 6, 10 (E.D.N.Y. 2002)). The *Trevillion* court's reliance on this decades old, out-of-circuit district court case is particularly suspect, given that *Warren v. Kelly* cited no authority referencing lockdowns and there was no lockdown alleged by the petitioner in that case.

¹³⁸ *Chapman-Sexton v. United States*, No. 2:20-CV-3661, 2021 WL 292027, *3 (S.D. Ohio Jan. 28, 2021).

deadline.¹³⁹ The district court, however, concluded that months of lockdown could not justify equitable tolling in Mr. Chapman-Sexton's case, citing a pre-pandemic court of appeals decision categorizing "general allegations of placement in segregation" as insufficient to constitute extraordinary circumstances.¹⁴⁰

In relying on precedent to reject his argument, the court conspicuously failed to consider how the circumstances surrounding Mr. Chapman-Sexton's lockdown were distinct from the "general allegations" of segregation that courts had previously found to be insufficient. The "segregation" that Mr. Chapman-Sexton experienced from April to June of 2020 was extensive, continuous, and brought about by a global pandemic that wrought unprecedented havoc on the criminal legal system.¹⁴¹ Despite these unprecedented conditions, the district court steadfastly held that Mr. Chapman-Sexton had not demonstrated that his delay was due to extraordinary circumstances and denied his request for equitable tolling.¹⁴²

By adopting the circumstance-by-circumstance approach—and, accordingly, by relying on precedent to dismiss proffered extraordinary circumstances—courts fail to distinguish how petitioners' conditions during the pandemic differ from the conditions at issue in previously litigated cases. Such rigidity and inflexibility conflict with *Holland's* instruction to make case-by-case assessments about the availability of equitable tolling.¹⁴³ Adopting a holistic examination of the circumstances, on the other hand, permits and encourages courts to recognize how pandemic-era habeas litigants are differently situated from prior petitioners, and thus potentially entitled to equitable tolling despite facially similar extraordinary circumstances.¹⁴⁴

2. Strict Application of the Nexus Requirement to Find an Insufficient Connection Between Pandemic Circumstances and Untimely Filing

In addition to relying on legal rules derived from precedent about the insufficiency of particular circumstances, district courts have denied equitable tolling due to the rigid application of the nexus requirement. Even while conceding or assuming that the pandemic has created sufficiently extraordinary circumstances, some district courts have rejected claims for equitable tolling because a petitioner failed to demonstrate precisely how the pandemic "stood in the way" of timely filing.¹⁴⁵ The nexus requirement, as courts have explained, is derived from the Supreme Court's requirement that petitioners are entitled to equitable tolling only if they show that "some extraordinary circumstance stood in [their] way' and prevented timely filing."¹⁴⁶ Relying on this language from *Holland*, lower courts have demanded that petitioners precisely identify the causal relationship

¹³⁹ *Id.* Mr. Chapman-Sexton also included with his petition a letter from his attorney explaining the delay in providing Mr. Chapman-Sexton with his legal documents. *Id.*

¹⁴⁰ *Id.* (citing *Andrews v. United States*, No. 17-1693, 2017 WL 6376401, at *2 (6th Cir. Dec. 12, 2017)).

¹⁴¹ *Id.*; see also Melissa Chan, 'I Want This Over.' For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts, TIME (Feb. 23, 2021), <https://time.com/5939482/covid-19-criminal-cases-backlog/> (explaining the deleterious effects of court delays for people affected by the criminal legal system).

¹⁴² *Chapman-Sexton*, 2021 WL 292027 at *3.

¹⁴³ *Holland v. Florida*, 560 U.S. 631, 650 (2010).

¹⁴⁴ See, e.g., *Monroe v. United States*, No. 4:17-cr-11, 2020 WL 6547646, at *3 (E.D.V.A. Nov. 6, 2020) (granting equitable tolling after concluding that lockdown conditions during the pandemic constituted extraordinary circumstances).

¹⁴⁵ See *Holland*, 560 U.S. at 659.

¹⁴⁶ *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

between extraordinary circumstances and their untimely filing¹⁴⁷ and have denied the claims of petitioners who fail to specifically or compellingly demonstrate such a causal relationship.¹⁴⁸

During the COVID-19 pandemic, courts rejecting claims for equitable tolling due to an insufficient nexus tend to do so because a petitioner has failed to explain with sufficient detail or precision how the pandemic created a barrier to timely filing. When presented with specific complaints about the pandemic—for example, that travel restrictions make interviewing witnesses impossible—courts have agreed that “the global COVID-19 pandemic is an extraordinary circumstance that is currently interfering with the development of [petitioners’] habeas claims.”¹⁴⁹ But petitioners asserting that they have experienced more generalized hardships during the pandemic have been less successful. In the context of COVID-19, as one district court explained, the strict application of the nexus requirement means that a petitioner must show that “the COVID-19 pandemic *specifically* prevented him from filing his motion” before a court is justified in permitting equitable tolling.¹⁵⁰

A Missouri district court, for example, denied a petitioner equitable tolling because he “offer[ed] no explanation for how the pandemic impeded his ability to pursue his rights,” alleging only that he could not access the law library during the lockdowns imposed to stop the virus’s spread.¹⁵¹ A Washington district court also denied equitable tolling where a petitioner’s “submissions and assertions” about the delay caused by COVID-19 were “vague and conclusory.”¹⁵² Similarly, a district court in Pennsylvania held that a petitioner’s “conclusory assertion” about the pandemic’s effect on the criminal legal system failed to demonstrate an “apparent nexus between COVID-19 and [the petitioner’s] failure to timely file his motion.”¹⁵³

But the nexus requirement is exactly the kind of rule that *Holland* cautions against rigidly applying—especially in light of the culmination of conditions, like those brought about by the pandemic, that obviously and significantly create and intensify barriers to the timely filing of habeas petitions.¹⁵⁴ Under the circumstance-by-circumstance approach, however, district courts isolate each reason for a petitioner’s delay and assess whether that reason alone “stood in the way” of a timely habeas petition, enforcing the nexus requirement as to each asserted extraordinary circumstance. When petitioners do not establish clearly and specifically how one particular circumstance impeded their ability to timely file, courts employing the circumstance-by-circumstance approach will dismiss or ignore that condition as failing *Holland*’s extraordinary circumstance requirement. In doing so, those courts fail to appreciate how the totality of a petitioner’s circumstances may, in fact, “stand in

¹⁴⁷ For an explanation of the nexus requirement, see *supra* note 26 and accompanying text.

¹⁴⁸ See, e.g., *Cannon v. United States*, No. 3:20-cv-00097, 2021 WL 537195, at *4 (D.N.D. Feb. 12, 2021); *Robertson v. Johnson*, No. CV 20-9064-JLS(E), 2021 WL 540492, at *4 (E.D. Cal. Jan. 4, 2021); *Humphreys v. Haynes*, No. C20-5426-BJR-MAT, 2020 WL 7365671, at *3-4 (W.D. Wash. Nov. 13, 2020); *Howard v. United States*, No. 4:20-CV-1632 JAR, 2021 WL 409841, at *4 (E.D. Mo. Feb. 5, 2021); *United States v. Henry*, No. 2:20-cv-01821, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2020); *Spice v. Davids*, No. 1:21-cv-180, 2021 WL 1206648, at *4-5 (W.D. Mich. Mar. 31, 2021).

¹⁴⁹ *Fitzgerald v. Shinn*, No. CV-19-5219-PHX-MTL, 2020 WL 3414700, at *2 (D. Ariz. June 22, 2020).

¹⁵⁰ *Taylor v. United States*, No. 4:20CV1489, 2021 WL 1164813, at *3 (E.D. Mo. Mar. 26, 2021) (emphasis added).

¹⁵¹ *Howard v. United States*, No. 4:20-CV-1632 JAR, 2021 WL 409841, at *4 (E.D. Mo. Feb. 5, 2021).

¹⁵² *Humphreys v. Haynes*, No. C20-5426-BJR-MAT, 2020 WL 7365671, at *3-4 (W.D. Wash. Nov. 13, 2020). *Cf.* *Andrade v. Johnson*, No. 3:20-cv-01147-MMA-RBM2021, WL 848171, at *6-7 (S.D. Cal. Mar. 4, 2021) (concluding that “the denial of Petitioner’s legal materials was an extraordinary circumstance” even though “Petitioner did not point to a specific document necessary to prepare the Petition”).

¹⁵³ *United States v. Henry*, No. 2:20-cv-01821, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2020).

¹⁵⁴ See *Dunn v. Baca*, No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020); *Mauray v. Davis*, No. 2:12-cv-1043 WBS DB, 2020 WL 5088738, at *3 (E.D. Cal. Aug. 28, 2020); *supra* Section II.A.

the way” of timely filing. Because the totality-of-the-circumstances approach demands that courts measure the extraordinary nature of a petitioner’s circumstances in the aggregate, courts adopting the totality approach are precluded from ignoring how the cumulative effects of pandemic conditions affect a petitioner’s ability to meet their AEDPA deadline. The rigid application of the nexus requirement is functionally only available under the circumstance-by-circumstance approach.

In addition to rejecting claims based on an insufficiently specific relationship between a late filing and the pandemic, courts have also rejected claims for equitable tolling on nexus grounds after finding that the petitioner had time before the pandemic to file a habeas petition.¹⁵⁵ When a large portion of the statute of limitations has expired prior to the pandemic, some courts have held that findings of extraordinary circumstances are conditional upon whether a petitioner exercised diligence before the pandemic began. Otherwise stated, a court will conclude that extraordinary circumstances stood in the way of timely filing *only if* the petitioner was diligent in pursuing a habeas petition before the onset of COVID-19.¹⁵⁶

For example, in *Turner v. United States*, the district court rejected Mr. Turner’s assertions that the COVID-19 pandemic stood in the way of his filing by June 2020, his AEDPA deadline.¹⁵⁷ Mr. Turner explained that access to his legal materials and the prison law library had been severely restricted due to COVID-19 protocols at the prison where he was incarcerated.¹⁵⁸ However, the court noted that as of November 2019, “[l]ong before any COVID-19 lockdowns would have been in place,” Mr. Turner “had all the information he needed” to file his petition.¹⁵⁹ Therefore, because Mr. Turner *could have* filed earlier, the district court concluded he had not satisfied either aspect of

¹⁵⁵ Some petitioners have argued that the pandemic warranted equitable tolling even though their statute of limitations expired well before the pandemic began. In these cases, courts are reluctant to credit petitioners’ arguments that the pandemic *actually* caused them to miss their deadlines. In *Spice v. Davids*, for example, a district court in Michigan noted that Mr. Spice “offer[ed] a colorable reason to equitably toll the period of limitations from October of 2020 to February of 2021 based on prison lockdowns because of the COVID-19 threat,” but ultimately concluded that Mr. Spice could not demonstrate a nexus between the pandemic and his untimely filing because the petition was over two years late. *Spice v. Davids*, No. 1:21-cv-180, 2021 WL 1206648, at *4-5 (W.D. Mich. Mar. 31, 2021). See also *Thomas v. Burt*, No. 1:20-cv-349, 2020 WL 3001672, at *3 (W.D. Mich. May 7, 2020) (“Petitioner alleges that he ‘was denied access to the Court after being placed in temp[orary] seg[regation] during the COVID-19 pandemic,’” but “COVID-19 did not emerge until December 2019,” which was “well after Petitioner’s opportunity to file his habeas petition had expired in June 2019. Petitioner has [not] shown . . . that any efforts to mitigate the effect of COVID-19 stood in his way to prevent him from timely filing his petition.”) (internal citation omitted); *Taylor v. Valentine*, No. 5:20-cv-00139, 2021 WL 864145, at *2 (W.D. Ken. Mar. 8, 2021) (rejecting the assertion that the circumstances of the pandemic, including limited availability to the law library, justified equitable tolling because the “vast majority of [petitioner’s] time expired” in 2015 and 2016, before the conditions petitioner complained about had begun).

¹⁵⁶ As one district court explained, a court may find a petitioner “entitled to equitable tolling when presented with evidence showing that the [petitioner’s] diligent pursuit of their right to file a § 2255 [or § 2254] motion had been interrupted by the COVID-19 pandemic.” *United States v. Thomas*, No. CR 18-135, 2020 WL 7229705, at *2 (E.D. La. Dec. 8, 2020); see *Howard v. United States*, No. No. 4:20-CV-1632 JAR, 2021 WL 409841, at *4 (E.D. Mo. Feb. 5, 2021) (using the same language as *Thomas*); see, e.g., *Mims v. United States*, No. 4:20-CV-1538 RWS, 2021 WL 409954, at *4 (E.D. Mo. Feb. 5, 2021) (“[P]etitioners have sought equitable tolling due to prison lockdowns and the closure of prison law libraries as a result of COVID-19. In those cases, ‘prisoners are not entitled to equitable tolling if there is no evidence that they diligently pursued their right to file a § 2255 motion’ prior to the lockdown.”) (quoting *United States v. Thomas*, No. CR 18-135, 2020 WL 7229705, at *2 (E.D. La. Dec. 8, 2020)); *Piper v. United States*, No. 4:21-CV-061-O, 2021 WL 1250328, at *2 (Apr. 5, 2021); *United States v. Henry*, No. 2:20-cv-01821, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2020) (“There were at least seven (7) pandemic-free months of the one-year limitation period in which Mr. Henry seemingly did nothing in pursuit of filing his motion, at least nothing that the record reflects.”).

¹⁵⁷ *Turner v. United States*, No. 16-cr-40044-1-JES, 2021 WL 796135, at *3 (C.D. Ill. Mar. 2, 2021).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the *Holland* test.¹⁶⁰ This additional showing of diligence required of petitioners is a product of the overenforcement of the nexus requirement, again in contravention of *Holland*'s mandate to jettison "archaic" and "absolute legal rules" when equity so demands.¹⁶¹

Furthermore, although the diligence requirement is beyond the scope of this Article, it is worth noting that neither *Holland* nor AEDPA demands that petitioners must bring their claims as soon as they possibly can.¹⁶² While petitioners must exercise "reasonable diligence," AEDPA does not require that courts deny review solely because petitioners chose to file in the last month of their allotted one-year limitations period rather than the first, especially when unforeseeable circumstances impede their ability to do so.¹⁶³ Accordingly, courts may consider whether petitioners had ample opportunity to file their petition when assessing the totality of the circumstances surrounding their delay, but determining conclusively that the pandemic did not stand in a petitioner's way merely because he did not file at his earliest convenience—in accordance with the rigid application of the nexus requirement that the circumstance-by-circumstance approach fosters—is contrary to *Holland*'s demand for flexibility.

Whatever the reason for discounting any one of the arguments a petitioner presents, when courts proceed through the circumstance-by-circumstance approach, they routinely dispose of various facts that petitioners allege contribute to the extraordinary circumstances prohibiting their timely filing. Considering each circumstance in isolation lends itself to the rigid application of mechanical rules, in lieu of a more flexible and holistic analysis. The circumstance-by-circumstance approach effectively precludes courts from considering the cumulative effects of the pandemic and how carceral facilities have responded. In adopting the circumstance-by-circumstance approach, courts fail to recognize how a petitioner's circumstances, when evaluated holistically, can and do rise to the level required to justify equitable tolling, especially in the context of COVID-19. Accordingly, to comport with equitable interests as *Holland* demands, courts must adopt a more flexible approach to the extraordinary circumstances inquiry when evaluating the availability of equitable tolling.

C. Why Courts Must Embrace the Totality Approach

District courts can and must reject the restrictive circumstance-by-circumstance approach and instead adopt a totality-of-the-circumstances approach when evaluating extraordinary circumstances for equitable tolling. Only through adopting the totality approach can district courts adequately embrace the flexibility that *Holland* requires and that numerous courts of appeals have emulated and affirmed. Furthermore, through the totality approach, courts can also recognize the

¹⁶⁰ *Id.* at *1-3. Similarly, in *United States v. Cruz*, Mr. Cruz asserted that "the COVID-19 pandemic prevented him from fully presenting his claims until August," but the court cast doubt on this assertion, noting that "the pandemic did not manifest in this country until mid-March." No. 15-cr-260(13) (PAM/TNL), 2020 WL 5995260, at *2 (D. Minn. Oct. 9, 2020). Because Mr. Cruz "[did] not explain why he was unable to research and present his claims in the eleven and one-half months before April 4, 2020[,] [h]e has not established that he was pursuing his rights diligently and that equitable tolling is warranted." *Id.*

¹⁶¹ *Holland v. Florida*, 560 U.S. 631, 650 (2010).

¹⁶² *See id.* at 653; 28 U.S.C. §§ 2244(d)(1), 2255(f); *see also* *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 756 (2016) (confirming the two distinct elements of *Holland*'s test); *Brown v. Holbrook*, No. 2:20-cv-01753, 2021 WL 1392998, at *3-4 (W.D. Wash. Mar. 22, 2021) (denying equitable tolling due to counsel's "garden variety negligence," namely, that counsel did not timely file Mr. Brown's habeas petition because he was quarantining due to a possible COVID-19 exposure).

¹⁶³ *See Holland*, 560 U.S. at 653; 28 U.S.C. § 2244(d)(1); 28 U.S.C. 2255(f).

unique hardships faced by habeas litigants and account for the ways in which the pandemic has fundamentally altered the lived experience of petitioners and their attorneys.

The Supreme Court has, in no uncertain terms, emphasized the need for flexibility when courts assess whether habeas petitioners are entitled to equitable tolling due to the interference of extraordinary circumstances.¹⁶⁴ When courts are required to meet new and unprecedented circumstances, flexibility and adaptability must predominate over adherence to strict and archaic legal rules—the rigid application of which is particularly inappropriate when special circumstances demand that courts promote innovation and compassion.¹⁶⁵ The Court’s critique of the Eleventh Circuit’s “overly rigid per se approach” in *Holland* counsels lower courts to reject the circumstance-by-circumstance approach in favor of a more holistic analysis.¹⁶⁶ Furthermore, in light of the COVID-19 pandemic, the circumstance-by-circumstance approach necessarily limits the scope of the court’s extraordinary circumstances analysis and over-relies on rules and precedent from distinguishable pre-pandemic cases. Such rigidity is contradictory to *Holland*’s instruction to evaluate the availability of equitable tolling on a case-by-case basis, taking guidance from previous decisions but recognizing when new circumstances warrant deviation from old rules.¹⁶⁷ The totality approach, therefore, is the only meaningful framework with which to effectuate *Holland*’s flexibility mandate.

The totality approach has also proliferated among courts of appeals, emerging as the dominant interpretation of what *Holland* requires of lower courts. Courts of appeals have explained that *Holland* requires a flexible, holistic assessment and prohibits the narrowness of the circumstance-by-circumstance approach. As the Third Circuit noted, “In *Holland* . . . the Supreme Court emphasized that in considering whether there could be equitable tolling, courts should favor flexibility over adherence to mechanical rules,”¹⁶⁸ and accordingly, courts evaluating the availability of equitable tolling must “consider the record as a whole.”¹⁶⁹ The Seventh Circuit has explicitly rejected an approach that prohibits the cumulative assessment of the factors that a petitioner contends with when seeking to file a timely habeas petition,¹⁷⁰ and the Second Circuit has repudiated strict adherence to “rigid and nonvariable rules,” which the circumstance-by-circumstance approach

¹⁶⁴ *Holland*, 560 U.S. at 659-51 (“In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.”) (internal citations and quotations omitted).

¹⁶⁵ *Id.* (“Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.”); see *Dillon v. Conway*, 642 F.3d 358, 362 (2d Cir. 2011) (explaining that in *Holland*, the Supreme Court “reject[ed] the notion that rigid and nonvariable rules must guide courts of equity”).

¹⁶⁶ *Holland*, 560 U.S. at 653-54 (“[B]ecause the Court of Appeals erroneously relied on an overly rigid per se approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief.”).

¹⁶⁷ *Id.*; *Dillon*, 642 F.3d at 362.

¹⁶⁸ *Ross v. Varano*, 712 F.3d 784, 799 (3d Cir. 2013); see *Dillon*, 642 F.3d at 362.

¹⁶⁹ *Ross*, 712 F.3d at 803; see *Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014) (explaining that *Holland* dictates that “courts are expected to employ ‘flexible standards on a case-by-case basis’”) (internal citations omitted).

¹⁷⁰ *Socha*, 763 F.3d at 685 (“The state tries to pick off each of the circumstances Socha identifies, explaining why in isolation it is not enough to justify equitable tolling. Incarceration alone, for example, does not qualify as an extraordinary circumstance. . . . It does not matter that one could look at each of the circumstances encountered by Socha in isolation and decide that none by itself required equitable tolling. The mistake made by the district court and the state was to conceive of the equitable tolling inquiry as the search for a single trump card, rather than an evaluation of the entire hand that the petitioner was dealt.”).

allows.¹⁷¹ District courts must adopt the totality approach, not only in accordance with *Holland*, but also with courts of appeals' affirmation and explanation of what *Holland* requires.

Not only is the totality approach consistent with *Holland*'s emphasis on flexibility, but it is also consistent with the nexus requirement as appellate courts have explained it. When considering the totality of the circumstances, courts are still able to assess whether the conditions surrounding an untimely petition “*actually* impaired [a petitioner's] ability to pursue his claims.”¹⁷² The benefit of the totality approach is not that it removes the nexus requirement altogether,¹⁷³ but rather, that it provides courts with an opportunity to avoid an overly particular application of the nexus requirement. The COVID-19 pandemic illuminates the inappropriateness of a strictly enforced nexus requirement, because even if petitioners cannot identify a specific instance where the pandemic interfered with their ability to file a timely motion, the idea that the pandemic has not created impediments that stand in the way of timely filing is absurd and disingenuous.¹⁷⁴ Clearly, the pandemic has disrupted life in and outside of prisons—creating both mild inconveniences and devastating losses that have severely impacted communities and individuals.¹⁷⁵ Through the totality approach, courts can account for the pervasiveness of pandemic-related disruptions while still ensuring that the “circumstances of a case must be ‘extraordinary’ before equitable tolling can be applied.”¹⁷⁶ Employing the totality approach therefore allows courts to alleviate the exacting particularly with which petitioners must demonstrate how extraordinary circumstances caused their delay, especially where the attendant circumstances are as clearly extraordinary as they are in the context of the pandemic. Courts can enforce the nexus requirement while embracing flexibility, and in fact, courts have made clear that considering “the entire hand” a petitioner is dealt does not mean that a court will necessarily make equitable tolling available.¹⁷⁷

Even if courts employ a totality-of-the-circumstances approach, petitioners must still demonstrate sufficient diligence before convincing a court that they are entitled to equitable tolling,¹⁷⁸ so the totality approach does not automatically entitle all petitioners to have their late claims heard during the pandemic.¹⁷⁹ Rather, a totality approach encourages courts to consider the uniquely challenging circumstances that incarcerated people have been subjected to, without rigidly

¹⁷¹ *Dillon*, 642 F.3d at 362-63.

¹⁷² See *Holland*, 560 U.S. at 653 (emphasis added) (internal quotation marks omitted).

¹⁷³ See, e.g., *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016) (applying the totality-of-the-circumstances approach but still concluding that an insufficient nexus existed between the extraordinary circumstances presented and the petitioner's delay).

¹⁷⁴ *Holland*, 560 U.S. at 649; *Dunn v. Baca*, No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772, at *1 (D. Nev. May 18, 2020).

¹⁷⁵ See, e.g., *supra* Section II.A (discussing *Dunn v. Baca* and *Maury v. Davis*); Daniel Moritz-Rabson, ‘A living hell’: Inside US prisons during the COVID-19 pandemic, AL JAZEERA (Feb. 26, 2021), <https://www.aljazeera.com/features/2021/2/26/a-living-hell-inside-us-prisons-during-the-covid-19-pandemic>; Osea Giuntella et al., *Lifestyle and mental health disruptions during COVID-19*, PNAS (Mar. 2, 2021), <https://www.pnas.org/content/118/9/e2016632118>.

¹⁷⁶ *Holland*, 560 U.S. at 652.

¹⁷⁷ See *Carpenter*, 840 F.3d at 872 (employing a totality approach but denying equitable tolling where a petitioner “failed to meet his burden of demonstrating that his physical and mental health issues, even when combined with the other circumstances he classifies as extraordinary” *actually* impaired his ability to timely file).

¹⁷⁸ *Holland*, 560 U.S. at 649.

¹⁷⁹ *Taylor v. United States*, No. 4:20CV1489, 2021 WL 1164813, at *3 (E.D. Mo. Mar. 26, 2021) (“The COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis.”).

adhering to distinguishable, pre-pandemic rules. This flexible assessment is necessary given the equitable considerations that *Holland* emphasizes.¹⁸⁰

Furthermore, the totality approach permits courts to recognize how the conditions created by the pandemic culminate into a set of circumstances that meet and surpass the extraordinary circumstances standard. This approach is better-suited than the circumstance-by-circumstance approach for courts seeking to “relieve hardships” that “arise from a hard and fast adherence” to legal rules.¹⁸¹ Consider the rule, as applied in some district courts, that *prison lockdowns are not extraordinary*, for example. Under the circumstance-by-circumstance approach, petitioners cannot successfully argue that facility lockdowns justify equitable tolling.¹⁸² But a flexible approach allows courts to “meet new situations”—including the unprecedented global pandemic and the year-long lockdown that incarcerated people have experienced since the pandemic began—“that demand equitable intervention.”¹⁸³ Under a totality approach, courts *can* hold that lockdowns contribute to the circumstances justifying equitable tolling, whereas a circumstance-by-circumstance approach would preclude the court from considering lockdowns altogether.¹⁸⁴ Courts adopting the totality approach can differentiate between the facts of the pre-pandemic cases giving rise to strict legal rules and pandemic-era circumstances that warrant an equitable departure from those rules, as *Holland* dictates.

CONCLUSION

The Supreme Court has explained that “courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules.”¹⁸⁵ Among the hardships arising from noncompliance with AEDPA’s strict statute of limitations are continued incarceration and the preclusion of further judicial review of a petitioner’s conviction and sentence. Accordingly, district courts must embrace flexibility by adopting a holistic approach to evaluate the potentially extraordinary circumstances that may warrant equitable tolling—and they must reject a narrow approach that ignores the cumulative impact of pandemic-related challenges on a petitioner’s ability to timely file.

By adopting a totality-of-the-circumstances approach to the extraordinary circumstances inquiry, district courts can conduct equitable tolling analyses consistent with the approach adopted by the Supreme Court and numerous courts of appeals. Using this approach, courts can also afford due weight to the experiences of incarcerated litigants and recognize the toll that the pandemic has taken on prison populations. Courts must adopt an analytical framework that guarantees habeas petitioners the flexibility that is clearly warranted during such extraordinary times.

¹⁸⁰ *Holland*, 560 U.S. at 648-50.

¹⁸¹ *Holland*, 560 U.S. at 650.

¹⁸² See *Chapman-Sexton v. United States*, No. 2:20-CV-3661, 2021 WL 292027, *3 (S.D. Ohio Jan. 28, 2021); *infra* Section II.B (explaining how district courts employing the circumstance-by-circumstance approach have dismissed arguments that prison lockdowns contribute to the extraordinary circumstances justifying equitable tolling).

¹⁸³ *Holland*, 560 U.S. at 650.

¹⁸⁴ See, e.g., *Chapman-Sexton*, 2021 WL 292027 at *3 (citing *Andrews v. United States*, No. 17–1693, 2017 WL 6376401, at *2 (6th Cir. Dec. 12, 2017)).

¹⁸⁵ *Holland*, 560 U.S. at 650 (internal quotations omitted).