Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the COVID-19 Pandemic and Beyond

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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 the COVID-19 crisis has fundamentally disrupted both the functioning of the criminal punishment 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.

Equitable tolling is a procedural accommodation courts can afford habeas petitioners when their petitions are filed after the statutory deadline but the interests of equity and fairness demand review of petitioners' claims on the merits. This Article 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

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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.

INTRODUCTION

For more than two years, 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

[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); Matt Zalaznick, *K-12 closing tracker: A growing number of districts will start 2022 remote*, DIST. ADMIN. (Dec. 23, 2021), https://districtadministration.com/school-closings-

paused or delayed critical functions.[2] People experiencing "disaster stress" are overwhelmed, anxious, and fatigued.[3] All this 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. In an effort to reduce the spread of the virus, state and federal facilities have imposed lockdowns, suspended in-person visitation, halted work programs, and adopted new health and safety 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

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tracker-where-covid-shut-down-schools-again/; Alexander W. Bartik et al., *The impact of COVID-19 on small business outcomes and expectations*, 117 PROCEEDINGS OF THE 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*, https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue (last updated July 16, 2021) ("COVID-19 continues to cause delays in some of our services."); FEDEX, *What to know about shipment delays* (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] *See, e.g.*, Miriam Berger, *Prisons are covid hot spots. But few countries are prioritizing vaccines for inmates*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/world/2021/01/14/global-coronavirus-vaccines-prisons/; Eric Reinhart, *To help stop the spread of COVID-19, stop packing a major hot spot: prisons and jails*, USA TODAY (Sept. 23, 2021), https://www.usatoday.com/story/opinion/policing/2021/09/23/covid-empty-prisons-jails/8335430002/?gnt-cfr=1; 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 Why Decarceration Is Vital For Public Health Amid COVID-19*, PARTNERS IN HEALTH (Jan. 26, 2021), https://www.pih.org/article/why-decarceration-vital-public-health-amid-covid-19.

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 prisons. 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, complex rules and procedures.[6] Federal habeas petitioners—who are typically incarcerated 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 other 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 stand in the way of timely filing, so long as petitioners exercise reasonable diligence in pursuing their claims. As the COVID-19 pandemic has wrought havoc in U.S. carceral facilities and in the criminal punishment system more broadly, many petitioners have asked courts to equitably toll their limitations periods to accommodate delayed filings. Courts, however, have not universally granted these requests.

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[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 et al., *Executive Summary: Habeas Litigation in U.S. District Courts*, NAT'L CTR. CTS. 1, 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 14 and accompanying text.

This Article examines how courts have enforced the statute of limitations for habeas petitions during the COVID-19 pandemic. In particular, it focuses on the availability of equitable tolling for petitioners facing extraordinary circumstances that preclude timely filing. It begins by describing the legal landscape of pre-pandemic equitable tolling doctrine, including controlling Supreme Court and courts of appeals precedent. It then explains 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. It concludes by advocating that courts adopt the latter approach, because Supreme Court and circuit court precedents mandate a flexible, totality-of-the-circumstances style of analysis and because a totality approach allows courts to recognize and address meaningfully the experiences of incarcerated litigants.

Although this Article focuses on how courts have responded to late habeas petitions during COVID-19, courts must continue to apply the totality-of-the-circumstances approach even after the effects of the COVID-19 pandemic are mitigated. A holistic, flexible approach to equitable tolling provides courts with a framework for addressing how the conditions of incarceration create substantial burdens on individuals and exacerbate challenges to someone's full participation in the criminal legal system. During the pandemic, courts have embraced a holistic, flexible analysis that attends to the actual, practical conditions defining how incarcerated litigants experience postconviction proceedings. Pandemic-era equitable tolling litigation demonstrates that courts can recognize and credit the lived experiences of incarcerated litigants, a practice that courts can and must continue after the conditions created by COVID-19 have subsided.

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] Petitions for habeas corpus are typically filed following a

[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]. A full discussion of the evolution of habeas

person's conviction, direct appeal, and state postconviction proceedings.[9] In federal habeas proceedings, petitioners may "collaterally attack," or challenge, aspects of their convictions and sentences that violate federal law.[10] Although some scholars have lauded habeas corpus as "the most effective weapon yet devised for the protection of . . . liberty,"[11] Congress greatly restricted the availability of habeas review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[12] Now, to obtain postconviction review and relief through habeas corpus, incarcerated people must comply with the complex procedural requirements that characterize habeas proceedings.[13]

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, typically after their conviction becomes final or in certain other statutorily defined circumstances.[14] The practical result of this strict limitations period is that judicial review is impossible for many petitioners to obtain. In fact, district courts deny about a quarter of all non-capital habeas petitions as barred by AEDPA's statute of limitations.[15] Petitions that would otherwise be dismissed, however, may be heard if the limitations

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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* Frank v. Magnum, 237 U.S. 309 (1915); Brown v. Allen, 344 U.S. 443 (1953).

[9] *See, e.g.*, *Death Penalty 101*, ACLU (Mar. 10, 2022), https://www.aclu.org/other/death-penalty-101 (summarizing trial-level and postconviction proceedings, including federal habeas proceedings).

[10] 28 U.S.C. § 2254(a).

[11] McFeeley, *supra* note 8, at 589.

[12] 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, § 3.2 (providing an overview of AEDPA and how it modified procedures and standards governing habeas litigation).

[13] *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).

[14] 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, § 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 state and federal governments alike are considered "habeas" petitions. *See infra* note 20.

[15] King et al., *supra* note 6, at 6.

period is equitably tolled.

A. Equitable Tolling Under AEDPA

Under AEDPA's one-year limitations period, district courts may be obligated to deny review of habeas petitions because incarcerated people were not able to file them quickly enough, even if petitioners' requests for relief are meritorious. However, in 2010, the Supreme Court recognized in *Holland v. Florida* that equitable tolling may apply in the habeas context,[16] allowing courts to excuse petitioners' delay.[17] Equitable tolling is "a remedy that may be awarded at the discretion of the court and allows a petitioner to assert a claim after the statutory limitations period has expired."[18] In *Holland*, the Court cautioned against an overbroad interpretation of AEDPA that would "close courthouse doors that a strong equitable claim would ordinarily keep open,"[19] and held that AEDPA's statute of limitations was subject to equitable tolling.[20] Under *Holland*, when a habeas petitioner files his petition after the AEDPA statute of limitations has expired, the reviewing court can still consider the merits of the petitioner's claim if the court finds that equitable tolling is

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[16] Prior to 2010, the Supreme Court had indirectly addressed the availability of equitable tolling for habeas petitioners without affirmatively answering the question of whether AEDPA could be equitably tolled. In 2005, the Court declined to extend equitable tolling to a petitioner due to his lack of diligence. Pace v. DiGuglielmo, 544 U.S. 408, 418–19 (2005) ("[P]etitioner's lack of diligence precludes equity's operation."). Then, in 2007, the Court again denied a habeas petitioner equitable tolling without first determining whether AEDPA so permits, because both the petitioner and state government "agree[d] that equitable tolling is available." Lawrence v. Florida, 549 U.S. 327, 336–37 (2007).

[17] 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, *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).

[18] Marni von Wilpert, Holland v. Florida*: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORD. L. REV. 1429, 1439 (2010).

[19] *Holland*, 560 U.S. at 649.

[20] 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).

warranted.[21] The Court explained that a habeas petitioner is 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."[22]

The "extraordinary circumstances" and "diligence" requirements are distinct elements,[23] 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 attorney,[24] had failed to exercise "reasonable diligence."[25] Accordingly, instead of definitively answering the question of whether "extraordinary circumstances" were present in Mr. Holland's case,[26] the Court remanded his case and others like it so

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[21] Typically, courts wait until *after* a petitioner has filed a habeas petition before addressing the issue of equitable tolling. However, some courts have allowed petitioners to request that their statute of limitations is equitably tolled before it expires. Although this kind of prospective request for equitable tolling is generally disfavored, some courts have granted prospective requests for equitable tolling during the pandemic. *See infra* note 95.

[22] *Holland*, 560 U.S. at 649 (internal quotation marks omitted); *see also* Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (explaining petitioner was not entitled to equitable tolling where he failed to establish the requisite diligence); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (explaining that courts are "less forgiving in receiving late filings where the claimant failed to exercise due diligence").

[23] Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 256–57 (2016).

[24] 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 cannons 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.*

[25] *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 et al., *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 470–78 (2016).

[26] 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

that lower courts could make those conclusive determinations.[27] Although the Court has not provided an exhaustive list of circumstances that are considered "extraordinary,"[28] 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,"[29] and has reiterated that extraordinary circumstances must have "stood in the way" of a timely habeas petition.[30]

Interpreting this language, lower courts have elaborated on

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right to counsel.").

[27] *Holland*, 560 U.S. at 654; *see, e.g.*, Perkins v. Ammons, 562 U.S. 1027 (2010); Whitfield v. McNeil, 561 U.S. 1002 (2010); Melson v. Allen, 561 U.S. 1001 (2010).

[28] Lower courts have taken various approaches to determining what makes particular circumstances "extraordinary." The Second Circuit, for example, has explained that "'extraordinary' refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period." Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011). The Seventh Circuit, on the other hand, has declined to label some circumstances "extraordinary" if those conditions "appear to be relatively common prison experiences." Moreland v. Eplett, 18 F.4th 261, 272 (7th Cir. 2021). *See also* Rush v. Sec'y, Fla. Dep't of Corr., No. 21-10218-C, 2021 WL 3134763, at *1 (11th Cir. June 22, 2021) (denying equitable tolling where habeas petition was due on June 18, 2020, and petitioner filed 42 days late on July 30, 2020, reasoning that petitioner "could not show extraordinary circumstances, as his circumstances were not different than any other prisoner attempting to access legal resources, as they all were subject to COVID-19 protocols"). *See infra* Part I.0.

[29] Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 256–57 (2016) (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, 848 F. App'x 624, 629 (5th Cir. 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").

[30] *See Menominee*, 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"); Anaya v. Sec., Fla. Dep't of Corr., No. 21-11110-E, 2021 WL 4704638, at *1 (11th Cir. 2021) (habeas petitioner must demonstrate that "extraordinary circumstances 'thwarted his efforts' to file a timely petition") (quoting Arthur v. Allen, 452 F.3d 1234, 1252 (11th Cir. 2006)).

Holland's two-part test when evaluating claims for equitable tolling and have provided additional guidance for courts assessing the presence or absence of extraordinary circumstances.[31] 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."[32] In other words, there must be a "causal relationship between the extraordinary circumstance and the untimely filing."[33] Courts enforce

[31] *Holland*, 560 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); *Vannoy*, 848 F. App'x at 628 (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) (alteration in original)); 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).

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

[33] 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

this nexus requirement rigorously,[34] denying equitable tolling when petitioners fail to establish *how* extraordinary conditions have prevented timely filing,[35] 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."[36] Even in light of the nexus requirement, courts have recognized the availability of equitable tolling in a variety of different circumstances.

B. When Are "Extraordinary Circumstances" Present?

In addition to claims of egregious attorney negligence like those at issue in *Holland*,[37] 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 failed to make pertinent legal information about AEDPA or a petitioner's own case available to the petitioner[38] and where a court or state official misled

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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 . . . .").

[34] As the Second Circuit has explained, "[a]lthough 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.

[35] Young v. Johnson, 842 F. App'x 89 (9th Cir. 2021).

[36] Mayberry v. Dittman, 904 F.3d 525, 531 (7th Cir. 2014).

[37] 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).

[38] *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 also* 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

a litigant about the deadline for filing timely claims.[39] Courts have also granted equitable tolling where the state has failed to provide incarcerated litigants with the resources necessary to file their petitions by their AEDPA deadlines, including their case files, access to law libraries, and adequate time to work on a petition.[40] 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.[41]

Courts have also permitted equitable tolling when litigants' physical or mental conditions have prevented them from filing on time. The Second Circuit has explained that a petitioner's "medical conditions, whether physical or psychiatric, can manifest extraordinary circumstances" as long as those circumstances *cause* the petitioner to lose their opportunity to file in a timely manner.[42] 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."[43] Other courts of appeals have held

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circumstances for equitable tolling purposes").

[39] *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 38, at 148 (collecting cases).

[40] *See* United States v. Clay, No. 2:20-236, 2021 WL 2018996, at *3 (S.D. Tex. May 18, 2021) ("The Fifth Circuit has held that lack of access to an adequate prison law library may toll the one-year limitations period to file a federal habeas petition in some circumstances."); Primus, *supra* note 38, at 148.

[41] 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).

[42] 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).

[43] 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

specifically that a petitioner's mental incompetence may create extraordinary circumstances when their condition prevents timely filing.[44]

Given that courts have already recognized how 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. Moreover, as discussed below, pandemic-era equitable tolling litigation demonstrates how courts are equipped to evaluate incarcerated people's lived experiences when deciding whether "extraordinary circumstances" preclude their timely filing. By recognizing the extraordinary nature of the pandemic, as well as the extraordinary impact the pandemic has had on incarcerated people's lives, courts are situated to conduct a more meaningful analysis of the barriers standing in incarcerated habeas petitioners' way. The totality-of-the-circumstances approach permits courts to inquire into the pervasive, systemic conditions that affect someone's ability to file a habeas petition on time. Courts must adopt such a framework, not only to promote meaningful review of habeas claims during the pandemic, but also to promote meaningful review after the pandemic subsides.

Seventh Circuit explained that access to "legal information is controllable; 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.

[44] 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, 1097–101 (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 . . . .").

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.[45] 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."[46] Each new wave of the virus "pos[es] a renewed threat to a high-risk population with spotty access to healthcare and little ability to distance."[47]

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,[48] adopted special visiting protocols,[49] and suspended visitation

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[45] *See Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE, https://eji.org/news/covid-19s-impact-on-people-in-prison/ (last updated Apr. 16, 2021) (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 ("America's prisons, jails and detention centers have been among the most dangerous places when it comes to infections from the coronavirus."); *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last updated July 1, 2021) (collecting data about the rate of infection and death among incarcerated populations).

[46] 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.

[47] Beth Schwartzapfel & Keri Blakinger, *Omicron Has Arrived. Many Prisons and Jails Are Not Ready*, MARSHALL PROJECT (Dec. 22, 2021), https://www.themarshallproject.org/2021/12/22/omicron-has-arrived-many-prisons-and-jails-are-not-ready.

[48] *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.").

[49] *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

altogether.[50] During lockdowns, incarcerated people may spend twenty-two to twenty-three hours per day inside their cells, with only one hour a day allotted for using the library, showers, computers, and telephones.[51] Incarcerated people have reported that, while in medical quarantine due to COVID-19 exposure, they would be let out of their cells "for only 20 minutes each day, to make phone calls, shower, and clean [their] living space."[52] Staff shortages created by the pandemic also contribute to the suffering experienced by those behind bars, as staff shortages result in "large scale lockdowns" and "very serious security consequences."[53] Some incarcerated people report feeling "less concerned about catching the virus than about being locked down because of it," because lockdowns mean "facing months confined to their cells and bunks with no way to call home, see their families or go outside."[54] As Christopher Blackwell reported in March 2022, "in prison, we are still deep in the throes of the pandemic."[55] Blackwell wrote that "the pandemic has led to severe restrictions on the things that make prison more bearable—visits, positive programming, recreational activities, and educational opportunities. And there is no return to normalcy in sight."[56] These restrictions make it substantially harder for incarcerated people to access lawyers and legal resources.

In addition to limiting access to programming and legal resources, prison responses to the COVID-19 pandemic have also increased the

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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).

[50] *BOP Modified Operations*, FED. BUREAU OF PRISONS (Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp ("During modified operations in response to COVID-19, the BOP suspended social visitation.").

[51] 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*, *supra* note 50 ("[I]nmates are limited in their movements to prevent congregate gathering and maximize social distancing . . . . Inmate movement in small numbers is authorized" for laundry, showers, telephone use, and commissary visits.).

[52] Christopher Blackwell, *The Pandemic Isn't Over Inside Prisons—And It Might Never Be*, APPEAL (Mar. 11, 2022), https://theappeal.org/covid-prisons-quarantine-lockdown/.

[53] Schwartzapfel & Blakinger, *supra* note 47.

[54] *Id.*

[55] Blackwell, *supra* note 52.

[56] *Id.*

punitive and violent nature of U.S. incarceration.[57] Inside carceral facilities, "even those who don't contract COVID-19 are still victims to the stress and trauma of life during a pandemic,"[58] compounding the trauma already experienced by those confined to cages.[59] Incarcerated people have reported that they are not able to take the same kind of COVID-19 prevention measures that many non-incarcerated people can. For example, incarcerated people often 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 practice social distancing.[60] Moreover, incarcerated people, as a group, are at higher risk of severe COVID-19 symptoms because many incarcerated people "suffer from chronic diseases caused by adverse health conditions."[61] The inability to take action to prevent contracting the virus further contributes to the fear and anxiety that incarcerated

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[57] *Decarceration During COVID-19: A Messaging Toolkit for Campaigns for Mass Release*, CMTY. JUST. EXCHANGE & PUB. HEALTH AWAKENED 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.").

[58] Lexi Wessling, *Quick Take: Maintaining mental wellness of staff and inmates during custodial pandemonium*, CORRECTIONS 1 (Apr. 16, 2020), https://www.corrections1.com/coronavirus-covid-19/articles/quick-take-maintaining-mental-wellness-of-staff-and-inmates-during-custodial-pandemonium-0niHn2Za1zFP8gmq/.

[59] *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, https://project-nia.org/uploads/documents/Research-Reports/were-in-it-for-the-long-haul.pdf (last visited May 11, 2022) ("[I]ncarceration is expensive, traumatic, disruptive, and ineffective.").

[60] 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 and diagnostic tools.

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

[61] Osman Elbek, *COVID-19 Pandemic Threatening Prison Population*, 21 TURKISH THORACIC J. 433 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7752107/pdf/ttj-21-6-433.pdf.

people experience.[62] In sum, people who have been imprisoned during the 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.[63] Federal law permits sentencing courts to vacate and modify sentences when petitioners present "extraordinary and compelling reasons" for doing so,[64] and multiple federal courts of appeals have affirmed that district courts can consider "*any* extraordinary and compelling reason for release" that a petitioner presents.[65] One court granting compassionate release explained that "the COVID-19 pandemic presents an extraordinary and unprecedented threat to incarcerated individuals."[66] Another court noted that "nothing could be more extraordinary and compelling than this pandemic."[67] As compassionate release litigation makes clear, federal courts are willing to acknowledge the extraordinary circumstances created by the pandemic—and they may

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[62] *See* Strassle & Berkman, *supra* note 61, 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.'").

[63] 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 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).

[64] 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*, REGUL. REV. (Feb. 22, 2021), https://www.theregreview.org/2021/02/22/downey-compassionate-release-during-covid-19/.

[65] 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).

[66] United States v. Williams-Bethea, 464 F. Supp. 3d 562, 568–69 (S.D.N.Y. 2020).

[67] 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)).

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.[68] In the habeas context, 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.[69] But for 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* courts approach the extraordinary circumstances prong of the equitable tolling inquiry with a flexible, holistic approach that allows them to consider the totality of the circumstances affecting a petitioner's ability to timely file.

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 whether extraordinary circumstances warrant equitable tolling in the context of habeas corpus, the appropriate framework for assessing a petitioner's circumstances embraces flexibility, rejects strict adherence to arbitrary and archaic legal rules, and directs 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

[68] 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, at *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, 597 (3d Cir. 2020).

[69] *See, e.g.*, *Taylor*, 2021 WL 1164813, at *3 ("The COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis.").

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."[70] Pandemic-era cases demonstrate how courts are able to deploy a flexible analysis that takes into account all of the circumstances surrounding an incarcerated person's delay. These cases reflect a practical awareness of what incarceration is like and how incarcerated people are susceptible to external circumstances that create obstacles to timely filing. Courts must continue utilizing a flexible approach capable of recognizing and addressing how litigants experience extraordinary circumstances even when pandemic-related conditions subside.

Supreme Court and courts 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.[71] 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.[72]

Whether to make equitable tolling available, therefore, is a flexible, "fact-intensive" inquiry, free from the constraints of "archaic rigidity."[73] Courts must make "case-by-case" determinations about a petitioner's entitlement to "equitable intervention" when "new situations"

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[70] Dillon v. Conway, 642 F.3d 358, 362 (2d Cir. 2011).

[71] 560 U.S. 631, 649 (2010).

[72] *Id.* at 649–50 (internal quotations and citations omitted).

[73] *Id.* at 650–54 (internal quotations omitted).

so demand it.[74]

In light of the Supreme Court's decision in *Holland*, and particularly given 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 that any particular circumstance satisfy that standard independently.[75] Courts adopting a circumstance-by-circumstance approach, on the other hand, will isolate and evaluate each fact contributing to a petitioner's delay, determining whether any one fact alone is sufficiently extraordinary.[76] 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 independently of one another.

Consistent with the Supreme Court's guidance in *Holland*, a number of circuit courts have adopted a totality-of-the-circumstances approach for assessing the presence of extraordinary circumstances and the availability of equitable tolling more broadly. These courts have concluded that, when evaluating extraordinary circumstances, "a court is not bound by 'mechanical rules' and must decide the issue based on all the circumstances of the case before it."[77] 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.[78] 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.[79] Among the factors considered were his

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[74] *Id.* at 650.

[75] *Id.* at 649–50; *see infra* Section III.A.

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

[77] Smith v. Davis, 953 F.3d 582, 600 (9th Cir. 2020) (quoting *Holland*, 560 U.S. at 649–50).

[78] Ross v. Varano, 712 F.3d 784, 803 (3d Cir. 2013).

[79] *Id.*

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."[80] Taken together, the Third Circuit concluded that these facts constituted extraordinary circumstances and warranted equitable tolling.[81]

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.[82] In *Jones v. United States*, for example, Mr. Jones sought equitable tolling when he filed his habeas petition three months after his AEDPA deadline.[83] 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 illiterate" and "must rely on other prisoners for knowledge of changes in the legal landscape."[84] He also explained that he had a variety of medical conditions that interfered with his ability to obtain legal information.[85] 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."[86]

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[80] *Id.*

[81] *Id.* at 804; *see* Massey v. Superintendent Coal Township SCI, No. 19-2808, 2021 WL 2910930 (3d Cir. July 12, 2021) ("Upon consideration of the totality of the circumstances, and cognizant of the strength of the presumption in favor of granting equitable tolling in habeas cases, we hold that the narrow factual circumstances presented here constitute extraordinary circumstances that warrant equitable tolling.").

[82] *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.").

[83] Jones v. United States, 689 F.3d 621, 627 (6th Cir. 2012).

[84] *Id.*

[85] *Id.*

[86] *Id.* In some recent, unpublished decisions, the Sixth Circuit appears to have also applied the circumstance-by-circumstance approach. *See* Wons v. Braman, No. 20-2214, 2021 WL 2370681, at *2 (6th Cir. May 27, 2021); Carter v. Phillips, No. 20-6038, 2021 WL 867105, at *2 (6th Cir. Mar. 4, 2021). Similarly, the Eighth Circuit has evaluated

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*.[87] 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."[88] 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."[89] 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.[90]

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.[91] 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."[92] 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

extraordinary circumstances using the circumstance-by-circumstance approach on at least one occasion. *See* Muhammad v. United States, 735 F.3d 812, 815–16 (8th Cir. 2013).

87 763 F.3d 674, 686 (7th Cir. 2014).

88 *Id.*

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

90 *Id.* at 686–87.

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

92 *Id.*

timely filing of his habeas petition."[93]

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 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 the COVID-19 pandemic. In light of the extensive, disruptive impact of the 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.[94] On the merits of the extraordinary circumstances inquiry,[95] many courts have been persuaded by petitioners'

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[93] *Id.* (quoting *Socha*, 763 F.3d at 686); *see also* Ademiju v. United States, 999 F.3d 474, 477 (7th Cir. 2021) ("Adejimu argues that three combined factors in his case warrant equitable tolling . . . . We do not agree that these proffered factors, considered alone or together, demand equitable tolling to such a degree that the district court abused its discretion in declining to apply it.").

[94] *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).

[95] 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, 2021 WL 327638, at *5 (W.D.N.C. Feb. 1, 2021) (denying equitable tolling because "[p]etitioner fail[ed] to explain how he exercised due diligence"); Mickens v. Garman, No. 2:20-cv-03857, 2021 WL 3109650, at *3 (E.D. Pa. July 22, 2021) ("Even if this Court assumes, arguendo, that the denial of access to the law library due to COVID-19 constitutes an 'extraordinary circumstance,' Mickens has failed to show that he diligently pursued his rights."); *see also* Donald v. Pruitt, 853 F. App'x 230, 234 (10th

arguments,[96] and others have conceded that COVID-19 "could—in certain circumstances—conceivably warrant equitable tolling."[97] District courts, however, have not uniformly applied a flexible approach when evaluating petitions seeking equitable tolling during the pandemic.[98] When courts do address the presence or absence of extraordinary circumstances, they typically proceed through one of two modes of

Cir. 2021) (denying petitioner's certificate of appealability after determining that petitioner failed to demonstrate sufficient diligence to warrant equitable tolling).

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, 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."); Evans v. Fitch, No. 1:20cv226, 2021 WL 151758, at *3 (S.D. Miss. Jan. 17, 2021) (holding that it "has no jurisdiction to grant pre-petition tolling"); Sanchez-Torres v. Sec., Fla. Dep't Corr., No. 3:17-cv-939, 2020 WL 5666647, at *1 (M.D. Fla. May 19, 2020); 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. 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").

[96] *See infra* Section III.A.

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

[98] 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").

analysis: (1) a flexible, totality-of-the-circumstances approach that considers the aggregate effect of a petitioner's circumstances and reflects *Holland*'s repudiation of rigid legal rules; or (2) a circumstance-by-circumstance approach in which courts determine whether each reason asserted is independently extraordinary. Each approach frames 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?" This section explains how the totality-of-the-circumstances approach flows from and is consistent with *Holland*'s emphasis on flexibility in equitable procedure,[99] as well as how the circumstance-by-circumstance approach is inconsistent with the flexibility that *Holland* identifies as the cornerstone of equitable tolling in the habeas context.[100] Particularly in light of the conditions created by the COVID-19 pandemic, district courts should now more than ever apply the totality-of-the-circumstances approach to the extraordinary circumstances inquiry. And, even after the conditions created by the pandemic subside, 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 arguments as to why equitable tolling is 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 COVID-19—that make it more challenging for petitioners to access legal resources.[101] 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."[102] With petitioners' experiences in mind, courts will also consider arguments raised in

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[99] Holland v. Florida, 560 U.S. 631, 649–51 (2010).
[100] *Id.*
[101] *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, 686–87 (7th Cir. 2014)).
[102] *Socha*, 763 U.S. at 685–86.

opposition to the request for equitable tolling.[103] 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]"[104] of a petitioner's circumstances rather than demanding evidence of an independently extraordinary single event or fact.[105]

A holistic approach to the extraordinary circumstances inquiry better situates courts to consider, for example, the myriad ways that incarceration during COVID-19 makes filing a timely petition 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."[106] Adopting an all-encompassing approach to equitable tolling provides courts with the opportunity to engage with the realities of imprisonment and recognize how novel prison conditions can constitute extraordinary circumstances.[107]

A pandemic-era California district court case, *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.[108] In addition to the conditions that

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[103] *See, e.g.*, *id.* at 685–86 ("The state tries to pick off each of the circumstances Socha identifies, explaining why in isolation it is not enough to justify equitable tolling.").

[104] *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)).

[105] *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.").

[106] Holland v. Florida, 560 U.S. 631, 650 (2010).

[107] *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.").

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

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," as well as how courthouses in California had been closed for months and would likely remain closed "for the foreseeable future."[109] Furthermore, the district court explained that its "ability to function" had been "severely impaired as a result of the ongoing pandemic."[110] In light 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.[111]

That district court has extended prospective equitable tolling to Mr. Cowan on three other occasions.[112] 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."[113] Although his original AEDPA deadline was May 15, 2020, Mr. Cowan ultimately filed his habeas petition on November 5, 2021, after the court had granted four motions to equitably toll his statute of limitations, culminating in a total of 539 days past his original statute of limitations equitably tolled.[114]

While Mr. Cowan's case is certainly extraordinary, he is not alone. Other petitioners have successfully requested equitable tolling during the pandemic as well.[115] Using a flexible and holistic approach,

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[109] *Id.* at *3.
[110] *Id.* at *6.
[111] *Id.* at *3.
[112] *See* Cowan v. Davis, No. 1:19-cv-00745, 2021 WL 1388169, at *4 (E.D. Cal. Apr. 13, 2021); Cowan v. Davis, No. 1:19-cv-00745, 2020 WL 6544251, at *4 (E.D. Cal. Nov. 6, 2020); Cowan v. Davis, No. 1:19-cv-00745, 2020 WL 1503423, at *3 (E.D. Cal. Mar. 30, 2020). "Prospective" equitable tolling is when a petitioner requests that habeas petition be accepted past the statutory deadline *before* it is actually filed late. Mr. Cowan's request for tolling came before his statute of limitations expired, when his attorneys realized they could not assemble a complete habeas petition by the original deadline. *See supra* note 95.
[113] *Cowan*, 2021 WL 1388169, at *3–4; *see also* Contreras v. Davis, No. 1:19-cv-01523, 2021 WL 2025401, at *4 (E.D. Cal. May 21, 2021) ("[T]his case involves complex issues and a voluminous record, suggesting that an extensive investigation is required of the defense team. The amended lodging of the record in this case spans 10,820 pages . . . .").
[114] First Amended Petition for Writ of Habeas Corpus, Cowan v. Davis, No. 1:19-cv-00745, Doc. No. 41 (E.D. Cal. Nov. 5, 2021).
[115] *See, e.g.*, Brown v. Davis, 482 F. Supp. 3d 1049, 1060 (E.D. Cal. 2020); Contreras v.

district courts have made equitable tolling available in cases where a petitioner has "been on lock-down since March 14, 2020," been unable to access the law library,[116] and where the pandemic has "interfered" in a petitioner's plans to obtain statutory tolling by pursuing unexhausted claims in state court.[117] Even as pandemic-related conditions have ostensibly been mitigated, courts continue to recognize how the "exceptional circumstances" of COVID-19 have created "varying and somewhat cyclical impediments" to petitioners' ability to present their claims in habeas petitions.[118] Recent decisions granting equitable tolling "notwithstanding available COVID-19 vaccines and safety guidelines and protocols" reflect not only the continued impact of COVID-19 on incarcerated populations, but also how courts can consider a petitioner's circumstances holistically despite positive pandemic-related developments.[119]

Even courts that have denied prospective requests for 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 retroactively.[120] For

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Davis, No. 1:19-cv-01523, 2020 WL 5588589, at *7 (E.D. Cal. Sept. 18, 2020); *Contreras*, 2021 WL 2025401, at *3–4.

[116] 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.").

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

[118] Contreras v. Davis, No. 1:19-cv-01523, 2021 WL 5414285, at *5 (E.D. Cal. Nov. 19, 2021) ("Petitioner has made a sufficient showing that notwithstanding available COVID-19 vaccines and safety guidelines and protocols, exceptional circumstances raised by the ongoing COVID-19 pandemic have presented varying and somewhat cyclical impediments to a constitutionally adequate mitigation investigation and development and presentation of new claims.").

[119] *See* Order, Contreras v. Davis, No. 1:19-cv-01523, Doc. No. 41 (E.D. Cal. Feb. 9, 2022) ((extending equitable tolling to and including June 9, 2022).

[120] Unlike the court in *Cowan v. Davis*, some courts will refuse to hear a motion for equitable tolling until after the statute of limitations period has expired. *See* Pickens v. Shoop, No. 1:19-cv-558, 2020 WL 3128536, at *1–3 (S.D. Ohio June 12, 2020) (declining to grant prospective equitable tolling, despite acknowledging the state of emergency, travel restrictions, and stay at home orders imposed in Ohio making it "obvious that 'extraordinary circumstances' likely stand in the way of [petitioner's] timely filing a complete petition. In fact, that is probably an understatement"); *cf.* Thompson v. United States, No. 3:20-cv-00700, 2021 WL 2457750, at *4 n.5 (M.D. Tenn. June 15, 2021) (concluding that "Petitioner was not reasonably diligent in pursuing his claims," and therefore not "address[ing] whether COVID-19 and the accompanying

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."[121] 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.[122] The court concluded, "[w]ithout question," that the pandemic's interference with Mr. Fitzgerald's ability to develop his habeas petition constituted "extraordinary circumstances."[123] 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 and considering the cumulative circumstances resulting in a petitioner's delay.[124]

Adopting the holistic approach also 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.[125] For example, in *Dunn v. Baca*, the district court for the District of Nevada explained and excused Mr. Dunn's delay because:

BOP lockdown constitute an extraordinary circumstance").

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

[122] *Id.* at *2.

[123] *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.").

[124] 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").

[125] 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* 6 (Oct. 10, 2019), https://drive.google.com/file/d/1NPW9cNv6AsbKYF_se4d8lIHQ5cyHOvOx/view (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.").

> 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 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.[126]

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."[127]

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."[128] 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

[126] Dunn v. Baca, No. 3:19-cv-00702, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020); *see* Mullner v. Williams, No. 2:20-cv-00535, 2020 WL 6435751, at *2 (D. Nev. Nov. 2, 2020) (reiterating the language from *Dunn*); Dale v. Williams, No. 3:20-cv-00031, 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).

[127] Holland v. Florida, 560 U.S. 631, 650 (2010).

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

> assert habeas claims on behalf of their condemned client. The court has ample grounds to grant petitioner's motion for equitable tolling.[129]

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.[130]

In another case, *Rivera v. Harry*, the district court granted Mr. Rivera's request for equitable tolling, noting that:

> Rivera had to file the Petition within 65 days of April 9, 2020 . . . . However, due to the COVID-19 pandemic, Rivera was quarantined in his cell for 23 hours and 45 minutes per day from March 2020 through July 2020 and the prison's law library was closed, so he was not able to timely file the Petition. The prison's safeguards against the COVID-19 pandemic prevented Rivera from timely filing the Petition, and Rivera diligently pursued his rights by filing the Petition on July 11, 2020, almost immediately after the prison lifted the quarantine and reopened the law library.[131]

Cases such as *Dunn v. Baca*, *Maury v. Davis*, and *Rivera v. Harry* 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.[132] Perhaps the pandemic is insufficient on its own to justify equitable tolling. But by employing the totality approach, district courts can consider and afford due weight to the challenges that incarcerated people experience in such novel and pervasive circumstances, recognizing how these circumstances can and do prohibit a petitioner's timely filing when considered in the aggregate.[133]

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[129] *Id.* at *4.

[130] *Id.*

[131] Rivera v. Harry, No. 20-3990-KSM, 2022 WL 93612, at *5 (E.D. Pa. Jan. 10, 2022).

[132] *See, e.g.*, Payne v. Shinn, No. CV-20-0459, 2021 WL 3511136, at *3 (D. Ariz. Aug. 10, 2021) (finding in a case where the death penalty was imposed that "the ongoing pandemic is an extraordinary circumstance that has hindered Payne's counsel by preventing or delaying in-person contact with Payne and obstructing counsel's attempts to obtain records and interview relevant witnesses"); Forde v. Shinn, No. CV-21-0098, 2021 WL 3491949, at *3–4 (D. Ariz. Aug. 9, 2021) (explaining the same); Zuniga v. Bean, No. 2:20-cv-00619, 2021 WL 1565783, at *1 (D. Nev. Apr. 21, 2021) (granting prospective equitable tolling where the pandemic interfered with defense counsel's attempts to communicate with Mr. Zuniga and various witnesses).

[133] Dunn v. Baca, No. 3:19-cv-00702, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020); *Maury*, 2020 WL 5088738, at *3.

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.[134] 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 intensified the violent nature of incarceration[135] and how exacerbated prison conditions contribute to the barriers in people's ways as they navigate postconviction review proceedings.[136] 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."[137] 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.[138] Courts applying this approach take each purportedly extraordinary circumstance in turn, determining whether that circumstance alone is sufficiently extraordinary to warrant equitable tolling.[139] Typically, courts using this

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[134] *See* Dockery v. Heretick, No. 17-4114, 2021 WL 3929707, at *29 (E.D. Pa. Sept. 1, 2021) ("[T]he 'extraordinary circumstance' prong requires a flexible approach.").

[135] *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).

[136] *See Decarceration During COVID-19*, *supra* note 57, 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.").

[137] Socha v. Boughton, 763 F.3d 674, 685 (7th Cir. 2014).

[138] *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); Gillon v. Atchley, No. 2:20-cv-04960, 2021 WL 1232461, at *5 (C.D. Cal. Mar. 10, 2021); Holguin v. Pfeiffer, No. 1:20-cv-01715, 2021 WL 3883697, at *8–10 (E.D. Cal. Aug. 31, 2021).

[139] *See, e.g.*, Martinez v. Hooks, No. 5:19-cv-00117-MR, 2021 WL 5100956, at *7 (W.D.N.C. Nov. 2, 2021) ("None of the Petitioner's grounds for relief, *considered individually or together*, support equitable tolling.") (emphasis added); Whitaker v. Ward, 2021 WL 5742538, at *2 (S.D. Ga. Dec. 2, 2021) (independently dismissing petitioner's stated grounds for equitable tolling, which included no law library access and failure to understand AEDPA's statute of limitations); Zurita-Cruz v. Kansas, No. 21-3035, 2021 WL 5564620, at *1–2 (D. Kan. Nov. 29, 2021) (same); Dao v. Raupp, No. 20-1545, 2021 WL 3732952, at *4 (D.N.J. Aug. 24, 2021); Mahan v. Steward, No. 1:21-cv-90, 2021 WL 776989, at *1 (W.D. Mich. Mar. 1, 2021); *see also infra* notes 142–46

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 them 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," courts adopting this approach fail to recognize "the full picture"[140] 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 circumstance one-by-one fall victim to the "'evils of archaic rigidity'"[141] that *Holland* 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 habeas 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.[142] 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.[143] Finally, Mr. Mahan argued that he contracted COVID-19 and was incapacitated for months, which the court rejected because he did not

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and accompanying text.

[140] *Socha*, 763 F.3d at 685–86.

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

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

[143] *Id.* at *2.

sufficiently demonstrate or explain how his being sick "stood in his way" of filing a petition on time.[144]

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."[145] 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."[146] Because the district court evaluated Mr. Mahan's equitable tolling arguments individually and independently, the court failed to consider how any combination of 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."[147] The court gave 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 Mr. Mahan failed to demonstrate a causal nexus between the asserted extraordinary circumstance and missing his deadline.[148] Relying on the rigorous application of distinguishable precedent and the nexus requirement, the court denied Mr. Mahan's request for equitable tolling.

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[144] *Id.*

[145] Jones v. United States, 689 F.3d 621, 627–28 (6th Cir. 2012).

[146] *Id.* at 627.

[147] 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).

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

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,[149] district courts' reliance on these rules is fairly common.[150] Overreliance on and strict adherence to the nexus requirement and rules derived from precedent appear frequently among district court decisions employing the circumstance-by-circumstance approach,[151] 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. Relying 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.[152] Strict adherence to precedent, however,

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[149] *Holland*, 560 U.S. at 650.

[150] *See, e.g.*, Lara v. McDowell, No. 1:21-cv-00044, 2021 WL 2805644, at *6–7 (E.D. Cal. July 6, 2021) (concluding that Mr. Lara's inability to speak English, his misunderstanding of AEDPA's exhaustion requirement, and his lack of law library access were not each individually considered extraordinary circumstances under Ninth Circuit precedent); Young v. Warden, Marion Corr. Inst., No. 1:20-cv-887, 2021 WL 2377240, at *5 (S.D. Ohio June 10, 2021) (adopting the circumstance-by-circumstance approach and concluding that attorney error, pro se status, lack of knowledge of the law, and limited access to legal materials were not extraordinary circumstances); Harris v. Inch, No. 3:20-cv-5890, 2021 WL 2384567, at *4 (N.D. Fla. Apr. 23, 2021) (applying the circumstance-by-circumstance approach and denying equitable tolling despite petitioner's allegations of a mental health condition, his failure to understand the statute of limitations, and the pandemic-related lockdown at his prison facility).

[151] *See infra* Subsection III.B.1 and III.B.2 (providing examples of district courts' application of the circumstance-by-circumstance approach).

[152] *See, e.g.*, Ortega-Cadelan v. Langford, No. 20-3178, 2021 WL 4149079, at *1–2 (D. Kan. Sept. 13, 2021) (determining that "settled" Tenth Circuit precedent precluded finding ignorance of the law and limited access to legal materials sufficient to demonstrate "extraordinary circumstances").

fails to account for the ways in which current habeas petitioners are differently situated from those who have previously litigated equitable tolling claims, particularly 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,"[153] district courts must abandon the circumstance-by-circumstance approach and the strict adherence to precedent that courts adopting this approach so often invoke.

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.[154] Much like the district

[153] *Holland*, 560 U.S. at 650. 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 649–51, 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).

[154] *See* Gillon v. Atchley, No. 2:20-cv-04960, 2021 WL 1232461, at *4 (C.D. Cal. Mar. 10, 2021); Heyward v. Clarke, No. 3:20CV577, 2021 WL 2232046, at *2–3 (E.D. Va. June 2, 2021) ("Generally, restricted access to a law library does not qualify as an extraordinary circumstance. Moreover, Heyward fails to explain why that lack of access

court in Mr. Mahan's case, many 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.[155] For the same reason, courts have dismissed arguments based on a petitioner's pro se status and lack of familiarity with the law.[156] Focusing solely on previous determinations about whether circumstances are extraordinary, however, directly conflicts with *Holland*'s mandate to "avoid mechanical rules."[157] Despite *Holland*'s instruction to be cognizant of new, anomalous circumstances, courts that strictly adhere to precedent fail to recognize how, for example, 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

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hindered his ability to bring any of his present claims sooner.") (internal citations omitted); United States v. Pizzaro, No. 16-63, 2021 WL 76405, at *2 (E.D. La. Jan. 8, 2021); *infra* note 155 (collecting cases).

[155] *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, 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)).

[156] *See, e.g.*, Shaw v. United States, No. 2:20-cv-112, 2021 WL 3205067, at *3 (S.D. Ga. June 24, 2021) (refusing to consider whether attorney negligence and the lockdown of the prison facility where petitioner was incarcerated could justify equitable tolling, given Eleventh Circuit and district court precedent); Phillips v. United States, No. 8:20-cv-1862-T-27AAS, 2021 WL 679259, at *3 (M.D. Fla. Feb. 22, 2021) (concluding that Eleventh Circuit Court of Appeals' precedent holds that lockdowns and lack of law library access are not extraordinary circumstances); Robinson v. Dykes, No. 1:19-cv-132, 2020 WL 5038796, at *8 (N.D. Fla. June 19, 2020) (same); Gillon v. Atchley, No. 2:20-cv-04960, 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. Pliler, 590 F.3d 782, 789 (9th Cir. 2009)).

[157] *Holland*, 560 U.S. at 650 (internal quotations omitted); *see, e.g.*, *Dillon*, 642 F.3d at 362–63.

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,[158] but courts adopting the circumstance-by-circumstance approach have rejected these arguments because previous cases have classified prison lockdowns as "hardly extraordinary."[159] 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 2020 to June 2020, when his habeas petition was due on June 17, 2020.[160] 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 deadline.[161] 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.[162]

By relying on precedent to reject Mr. Chapman-Sexton's 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, facility-wide, and brought about by a global pandemic that wrought havoc on the U.S. legal system.[163] Despite these unprecedented conditions, the district

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[158] *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.").

[159] 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.

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

[161] *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.*

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

[163] *Id.*; *see also* Melissa Chan, *'I Want This Over.' For Victims and the Accused, Justice*

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.[164] Other district courts have similarly applied outdated, non-binding district court precedent to deny petitioners equitable tolling, without considering how current conditions of confinement are radically different than the "sporadic prison lockdowns" at issue in prior cases.[165]

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 of previously litigated cases. Such rigidity and inflexibility conflict with *Holland*'s instruction to make case-by-case assessments about the availability of equitable tolling.[166] 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.[167]

2. Strictly Applying 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. The nexus requirement, as courts have explained, is derived from the Supreme Court's requirement that petitioners are entitled to equitable

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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).

[164] *Chapman-Sexton*, 2021 WL 292027 at *3.

[165] For example, in *Sholes v. Cates*, No. 1:21-cv-01006, 2021 WL 5567381, at *4–5 (E.D. Cal. Nov. 29, 2021), the court cited a Central District of California decision from 1997, which held that prison lockdowns "lasting several days" could not constitute "extraordinary circumstances" for equitable tolling purposes. *See* United States v. Van Poyck, 980 F. Supp. 1108, 1111 (C.D. Cal. 1997). The "[b]rief security lock-downs" at issue in *Van Poyck* bear little resemblance to the extensive restrictions imposed by carceral facilities during a global pandemic spanning multiple years. *Id.*

[166] Holland v. Florida, 560 U.S. 631, 650 (2010).

[167] *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).

tolling only if they show that "'some extraordinary circumstance stood in [their] way' and prevented timely filing."[168] Relying on this language from *Holland*, lower courts have demanded that petitioners precisely identify the causal relationship between extraordinary circumstances and their untimely filing,[169] and have denied the claims of petitioners who fail to specifically or compellingly demonstrate such a causal relationship.[170] 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.[171]

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.[172] When presented with

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[168] *Holland*, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[169] For an explanation of the nexus requirement, see *supra* note 32 and accompanying text.

[170] *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, 2021 WL 540492, at *4 (E.D. Cal. Jan. 4, 2021); Humphreys v. Haynes, No. C20-5426, 2020 WL 7365671, at *3–4 (W.D. Wash. Nov. 13, 2020); Howard v United States, No. 4:20-CV-1632, 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).

[171] *See Holland*, 560 U.S. at 659; Butler v. Bauman, No. 2:21-cv-79, 2021 WL 1809880, at *3 (W.D. Mich. May 6, 2021) ("There can be little question that the COVID-19 pandemic is an extraordinary circumstance; but Petitioner's brief explanation does not suffice to explain how the pandemic stood in his way and prevented timely filing."); Schoening v. Christianson, No. 2:21-cv-11955, 2021 WL 4290242, at *3 (E.D. Mich. Sept. 21, 2021) (same).

[172] *See, e.g.*, United States v. Marshall, No. 5:21-cv-00072, 2021 WL 3854469, at *3 (E.D. Ken. Aug. 5, 2021) (declining to grant equitable tolling despite petitioner's allegations "that the pandemic prevented him from accessing his legal materials and the law library" because "he does not assert that he could not have obtained a § 2255 form or filed a basic motion identifying the facts he believes warrant collateral relief during lockdown—even if such a motion required later supplementation or additional legal argumentation through briefing materials . . . Marshall does not cite any fact-specific circumstances related to the pandemic that prevented him from timely filing a § 2255 motion, beyond a general lack of access to legal resources. This does not warrant equitable tolling"); Foster v. Warden, Allendale Corr. Inst., No. 4:21-783, 2021 WL 3195914, at *2 (D.S.C. June 1, 2021) ("Petitioner's only allegation as to timeliness was 'covid-19' without further allegation. This is insufficient to plead equitable tolling of the limitations found in 28 U.S.C. [§] 2244(d). Petitioner has not demonstrated . . . that some extraordinary circumstances stood in his way to prevent him from timely filing his federal

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."[173] But petitioners asserting that they have experienced more generalized hardships during the pandemic have been less successful.[174] 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 equitable tolling is justified.[175]

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.[176] An Ohio district court declined to find extraordinary circumstances, despite a petitioner's assertion that he lacked access to legal resources, because that petitioner did not identify which specific legal materials he would have needed to file a timely petition.[177] A

habeas petition."); Garcia v. United States, No. C21-0322, 2021 WL 3403540, at *3 (W.D. Wash. Aug. 4, 2021) ("Here, Mr. Garcia states only that he was exposed to COVID-19 and was transferred between facilities 'at the height of' the pandemic. He does not explain how his exposure to COVID-19 and his transfer caused his untimely filing and made it 'impossible' to mail a timely petition on March 2, 2021, rather than a late petition on March 3, 2021."); Williams v. United States, No. 3:21-cv-84, 2021 WL 2877911, at *6 (W.D.N.C. July 8, 2021) ("Plaintiff fails to allege when restrictions on his email, telephone, and library access began; how long the restrictions lasted; or how the restrictions prevented him from timely filing . . . . Petitioner has thus failed to carry his burden of demonstrating that he was precluded by extraordinary circumstances from timely filing.").

[173] Fitzgerald v. Shinn, No. CV-19-5219, 2020 WL 3414700, at *2 (D. Ariz. June 22, 2020).

[174] *See, e.g.*, United States v. Harris, 2021 WL 1823109, at *3 (E.D. Va., May 6, 2021) ("Petitioner fails, however, to state with any specificity how any of the conditions complained of prevented him from acting diligently to protect his rights or from filing his § 2255 Motion on time. . . . Petitioner's allegations concerning his time in the SHU are similarly vague and lack supporting factual details and, therefore, do not support the application of equitable tolling."); Webster v. Sec'y, Fla. Dep't Corr., 2021 WL 1566848, at *4 (N.D. Fla. Mar. 29, 2021) ("Webster's bare assertions regarding restrictions on access to the law library and his legal property during the COVID-19 pandemic are unavailing.").

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

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

[177] Pryor v. Erdos, No. 5:20cv2863, 2021 WL 4245038, at *9 (N.D. Ohio Sept. 21, 2021)

Washington district court denied equitable tolling where a petitioner's "submissions and assertions" about the delay caused by COVID-19 were "vague and conclusory."[178] 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."[179] A Connecticut district court has held that a petitioner "cannot meet his burden of establishing that a court should apply the doctrine of equitable tolling simply by making a passing reference to the pandemic or the resulting lockdown," and instead must explain "how COVID-19 specifically prevented him from filing this motion on time."[180] A Michigan district court has gone so far as to deny equitable tolling where a petitioner did "not carr[y] his burden of establishing that the COVID-19 pandemic *barred his access to the Court*" entirely.[181]

But the nexus requirement is exactly the kind of bright-line rule that *Holland* cautions against rigidly applying[182]—especially in light of the culmination of conditions, like those brought about by the pandemic, that significantly create and intensify barriers to the timely filing of habeas petitions.[183] Under the circumstance-by-circumstance approach,

("While Pryor complains generally that Covid prevented him from having access to other, unidentified legal materials, he fails to sufficiently explain what additional materials he needed or why lack of access to those materials actually prevented him from timely filing his petition."). *Cf.* Andrade v. Johnson, No. 3:20-cv-01147, 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").

[178] Humphreys v. Haynes, No. C20-5426, 2020 WL 7365671, at *3–4 (W.D. Wash. Nov. 13, 2020); United States v. West, No. 4:18-cr-737, 2022 WL 44670, at *5 (N.D. Ohio Jan. 5, 2022) (declining to find extraordinary circumstances present given petitioner's "vague allegations" and "generalized complaints about limited [library] access during the lockdown"); Trapp v. Oberlander, 2022 WL 36236, at *3 (M.D. Pa. Jan. 4, 2022) ("[C]onclusory assertions are not sufficient for a petitioner to benefit from the equitable tolling doctrine.").

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

[180] United States v. Aigbekaen, No. JKB-15-0462, 2021 WL 1816967, at *1 (D. Md. May 6, 2021).

[181] Hawkins v. McCauley, No. 21-cv-10411, 2021 WL 4593958, at *5 (E.D. Mich. Oct. 6, 2021) (emphasis added).

[182] Holland v. Florida, 560 U.S. 631, 650 (2010); *see* Jimenez v. Butcher, 839 F. App'x 918, 919–20 (5th Cir. 2021) ("Because we are reviewing the dismissal of Jimenez's first federal habeas petition, we must take care 'not to apply the statute of limitations too harshly.'") (citing Jackson v. Davis, 933 F.3d 408, 410 (5th Cir. 2019)).

[183] *See, e.g.*, Carter v. United States, No. C20-1654, 2021 WL 1978697, at *4 (W.D.

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. This overemphasis on the nexus requirement results in courts failing to appreciate how the totality of a petitioner's circumstances may, in fact, "stand in the way" of timely filing.[184] 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 cannot ignore how pandemic conditions cumulatively affect a petitioner's ability to meet their AEDPA deadline.

Adopting a flexible approach does not preclude courts from enforcing the nexus requirement, however. Courts may consider the aggregated circumstances impacting a petitioner's ability to timely file but still conclude that those circumstances were not sufficiently related to the untimely filing. A district court in Mississippi, for example, considered all of the circumstances that the petitioner attributed his delay to, including his separation from his legal materials, a pandemic-related prison lockdown, and "tragic events in his personal life" such as the death of his son.[185] Ultimately, though, the district court denied equitable tolling after concluding that enough of these circumstances were mitigated prior to the expiration of the petitioner's statute of limitations.[186] Similarly, a district court in Virginia declined to extend

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Wash. May 18, 2021) ("The Court finds that extraordinary circumstances—the COVID-19 pandemic—stood in Carter's way from filing this petition a month earlier. . . . While Carter has not provided great detail about how the COVID-19 pandemic impacted his filing efforts, the Court accepts his averment that the pandemic has frustrated his access the law library and that this prevented his filing a month earlier."); *see also* Dunn v. Baca, No. 3:19-cv-00702, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020); Maury v. Davis, No. 2:12-cv-1043, 2020 WL 5088738, at *3 (E.D. Cal. Aug. 28, 2020); *supra* Section I.C.

[184] *E.g.*, Sloan v. United States, No. 18-cr-40051, 2021 WL 6102164 (C.D. Ill. Dec. 23, 2021) ("[Petitioner], like many inmates, faced barriers to legal research during the one-year filing period under § 2255(f) due to the COVID-19 pandemic. However, . . . Sloan has fallen short of explaining how the extraordinary circumstances created by the COVID-19 pandemic *prevented* timely filing.") (emphasis in original).

[185] United States v. Nelson, No. 1:21cv260, 2021 WL 3574869, at *2 (S.D. Miss. Aug. 11, 2021).

[186] *Id.*

equitable tolling to a petitioner who cited lockdowns, transfers between multiple prison facilities, and lack of law library access as reasons for her delay, despite considering all of those circumstances together.[187] The petitioner had been able to file a motion for compassionate release, which, the court reasoned, demonstrated an insufficient nexus between her inability to file a habeas petition on time and the extraordinary circumstances alleged.[188] Courts applying the totality approach can and do still enforce the nexus requirement, but they do so in accordance with *Holland*'s demand for flexibility.

In addition to rejecting claims based on an insufficiently specific relationship between the pandemic and a late filing, courts have also rejected claims for equitable tolling on nexus grounds after finding that the petitioner had a meaningful period of time before the pandemic to file a habeas petition.[189] When a large portion of a petitioner's 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, these courts 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 the COVID-19 pandemic.[190]

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[187] United States v. Martinez, No. 1:19CR00011-003, 2021 WL 3549898, at *1–2 (W.D. Va. Aug. 11, 2021).

[188] *Id.* at *2.

[189] Some petitioners have argued that the pandemic warrants 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. 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).

[190] As one district court explained, a court may find a petitioner "entitled to equitable

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 his AEDPA deadline in June 2020.[191] 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.[192] 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.[193] Therefore, because Mr. Turner *could have* filed earlier, the district court concluded he had not satisfied either aspect of the *Holland* test.[194] This requirement of a heightened showing of diligence is a product of courts over-enforcing the nexus requirement, again in contravention of *Holland*'s mandate to jettison "archaic" and "absolute legal rules" when equity so demands.[195] Furthermore, neither *Holland* nor AEDPA demands that petitioners must bring their claims as soon as they possibly

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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. 4:20-CV-1632, 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, 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 *Thomas*, 2020 WL 7229705, at *2); 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."); Mack v. Alves, No. 21-cv-11532, 2021 WL 6197279, at *2 (D. Mass. Dec. 30, 2021) (declining to extend equitable tolling to petitioner who "fail[ed] to explain why he was unable to file his petition during the initial months of the limitations period before the COVID-19 restrictions were imposed").

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

[192] *Id.*

[193] *Id.*

[194] *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), 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.*

[195] Holland v. Florida, 560 U.S. 631, 650 (2010).

can,[196] and the Supreme Court has explained that "[t]he diligence required for equitable tolling purposes is reasonable diligence, *not* maximum feasible diligence."[197] AEDPA does not require that courts deny review solely because petitioners filed in the last month of their allotted one-year limitations period rather than the first, especially when unforeseeable circumstances ultimately impeded their ability to file at all.[198] Accordingly, courts may consider whether petitioners had ample opportunity to file their petition when assessing the totality of the circumstances surrounding their delay, but concluding that the pandemic did not stand in a petitioner's way merely because they did not file as early as possible—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.[199]

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

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[196] *See id.* at 653 (emphasis added); 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).

[197] *Holland*, 560 U.S. at 653.

[198] *See id.*; 28 U.S.C. § 2244(d)(1); 28 U.S.C. 2255(f).

[199] *See, e.g.*, Piper v. United States, No. 4:21-CV-061, 2021 WL 1250328, at *2 (N.D. Tex. Apr. 5, 2021) ("[T]olling based on the COVID-19 pandemic is not available where the movant has made no showing of diligence before the lockdown."); Edwards v. United States, No. 3:21-cv-00358, 2021 WL 3666886, at *2 (W.D.N.C. Aug. 18, 2021) ("While Plaintiff's efforts may have been hampered by lock downs and COVID-19-related restrictions at his facility for approximately five months during the year after his conviction became final, Petitioner was not without ample opportunity to prepare his motion."); Scott v. United States, 2021 WL 3910766, at *2 (E.D. Mo. Sept. 1, 2021) (finding petitioner did not demonstrate sufficient diligence where, "[i]n his motion, movant vaguely stated he 'initially started to investigate whether he had any claims to raise' prior to the [COVID-19] lockdown. However, he does not allege, either in the motion or in the response now before the Court, that he actually did anything that would arguably amount to diligent pursuit of his rights during the approximately four months that elapsed prior to the lockdown, nor does he claim an inability to do so").

effects of the pandemic, how carceral facilities have responded, and how a petitioner's circumstances can and do rise to the level required to justify equitable tolling when evaluated holistically.

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 recognize the unique hardships faced by habeas litigants and account for the ways in which the pandemic has fundamentally altered the lived experiences 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.[200] As the Court explained in *Holland*, 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.[201] 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.[202] Furthermore, as COVID-era cases demonstrate, the circumstance-by-circumstance approach necessarily limits the scope of the court's extraordinary circumstances analysis and over-relies on rules

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[200] *Holland*, 560 U.S. at 650–51 ("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).

[201] *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").

[202] *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.").

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.[203] 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 reject rigid adherence to legal rules and favor an approach that takes into account, in the aggregate, all of the circumstances affecting a petitioner's ability to timely file.[204] Courts of appeals have repeatedly emphasized that "the proper application of [Supreme Court] precedent" favors a "flexible" approach, in which courts decide the extraordinary circumstances issue "based on all the circumstances of the case before it"[205] and by "consider[ing] the record as a whole."[206] 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.[207] Moreover, the Third Circuit has interpreted *Holland* as holding that "courts should favor flexibility over adherence to mechanical rules" when deciding whether to grant equitable tolling.[208] Other courts of appeals have similarly repudiated strict adherence to "rigid and nonvariable

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[203] *Id.*; *Dillon*, 642 F.3d at 362.

[204] *See supra* Part II.

[205] Smith v. Davis, 953 F.3d 582, 593, 600 (9th Cir. 2020); *see* Ross v. Varano, 712 F.3d 784, 803 (3d Cir. 2013) ("The totality of these circumstances makes it clear that Ross satisfied the second prong of the showing required to justify equitable tolling."); Jones v. United States, 689 F.3d 621, 627 (6th Cir. 2012) ("Although any one of the above factors may not constitute 'extraordinary circumstances' alone, the combination of all these factors justifies applying equitable tolling.").

[206] *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).

[207] *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.").

[208] *Ross*, 712 F.3d at 799; *see Dillon*, 642 F.3d at 362.

rules," which the circumstance-by-circumstance approach fosters,[209] repeatedly holding instead that "a court is not bound by 'mechanical rules.'"[210] District courts must adopt the totality approach, not only in accordance with *Holland*, but also in accordance with courts of appeals' affirmation and explanation of the flexible, holistic assessment *Holland* requires.

One possible objection to adopting a more flexible—and perhaps more generous—approach to the extraordinary circumstances inquiry is that "[f]ederal courts have typically extended equitable relief only sparingly,"[211] and accordingly, an approach that renders courts more likely to award equitable tolling is inconsistent with this rule of equity. The totality-of-the-circumstances approach, however, does not necessarily entitle every late habeas petitioner to equitable tolling.[212] Even when courts adopt the totality approach to the extraordinary circumstances inquiry, petitioners must still demonstrate sufficient diligence before convincing a court that they are entitled to equitable tolling.[213] Examples of courts invoking this basis to deny equitable tolling abound.[214] Thus, equitable tolling can still be granted "sparingly" even

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[209] *Dillon*, 642 F.3d at 362–63.

[210] *Smith*, 953 F.3d at 600; Palacios v. Stephens, 723 F.3d 600, 608 (5th Cir. 2013) (noting the court's "disinclination to create bright-line rules constraining [its] equitable tolling analysis"). *Cf.* Hutchinson v. Florida, 677 F.3d 1097, 1099 (11th Cir. 2012) ("[A]lthough equitable relief is flexible and all the facts and circumstances must be considered, we should 'draw upon decisions made in other similar cases for guidance.' We take that statement to mean that this is not an area free of rules of law, governed entirely by the chancellor's foot, but we are instead bound by precedent to the extent that there is precedent.") (quoting Holland v. Florida, 560 U.S. 631, 650 (2010)).

[211] Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).

[212] 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."); *see Holland*, 560 U.S. at 649. The totality approach itself does not necessitate a finding that extraordinary circumstances exist, *see infra* note 222, and petitioners still must satisfy this standard as well as the diligence requirement before a court can permit equitable tolling.

[213] *Holland*, 560 U.S. at 648–50.

[214] *See, e.g.*, Ford v. Gonzales, 683 F.3d 1230, 1239 (9th Cir. 2012) (declining to award equitable tolling where petitioner did not demonstrate that "extraordinary circumstances beyond a prisoner's control make it *impossible* to file a petition on time") (emphasis in original); *Hutchinson*, 677 F.3d at 1103 ("We need not decide whether Hutchinson has established that extraordinary circumstances stood in the way of his meeting the § 2244(d) filing deadline, because he has not carried his burden of showing that he pursued his rights diligently."); Patterson v. Lafler, 455 F. App'x 606, 611 (6th Cir. 2012) (concluding that petitioner did not prove that he acted with reasonable diligence and not reaching the question of whether extraordinary circumstances precluded timely filing); Manning v. Epps, 688 F.3d 177 (5th Cir. 2012) (reversing grant of equitable tolling by

when courts employ a holistic, totality approach to one prong of the *Holland* inquiry.[215]

Furthermore, the nexus requirement also ensures that equitable tolling will be awarded sparingly, even when courts adopt the totality approach to the extraordinary circumstances inquiry. The nexus requirement operates to preclude courts from equitably tolling statutes of limitations where extraordinary circumstances are not sufficiently related to a petitioner's delay.[216] 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.[217] 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."[218] Thus, the benefit of the totality approach is not that it removes the nexus requirement altogether,[219] but rather, that it provides courts with an

district court where petitioner did not exercise due diligence).

[215] *See* Ross v. Varano, 712 F.3d 784, 799 (3d Cir. 2013) ("We have held that equitable tolling is appropriate where principles of equity would make the rigid application of a limitation period unfair, but that a court should be sparing in its use of the doctrine.").

[216] *See supra* notes 34–36 and accompanying text (explaining the nexus requirement and its effects).

[217] *See* Mighty v. United States, No. 15-CR-06109, 2021 WL 3036926, at *2 (W.D.N.Y. July 19, 2021) (denying equitable tolling on diligence grounds while noting that "the Court may be inclined to find that the circumstances of Petitioner's injury and the lockdown (and other restrictions) necessitated by the COVID-19 outbreak at FCI Elkton are 'extraordinary' and sufficient to equitably toll the limitations period"); Brown v. Adams, No. 3:20-CV-788, 2021 WL 3598544, at *4 (W.D. Ken. Aug. 13, 2021) (ultimately finding that petitioner had not exercised sufficient diligence but noting "the Court understands that the lockdowns which were implemented as the pandemic took hold during 2020 made it difficult, if not impossible, for prisoners to utilize library facilities to prepare court filings"); Johnson v. Greene, No. 21 C 3622, 2021 WL 4942037, at *2 (N.D. Ill. Oct. 22, 2021) (noting that, even if the pandemic allowed petitioner to demonstrate extraordinary circumstances, he "must also show that he had been pursuing his rights diligently"); *see also* Carpenter v. Douma, 840 F.3d 867, 872 (7th Cir. 2016) (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).

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

[219] *See, e.g.*, *Carpenter*, 840 F.3d at 872 (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).

opportunity to avoid an overly particular application of the nexus requirement.

The COVID-19 pandemic illuminates the inappropriateness of a strictly enforced nexus requirement. 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.[220] Clearly, the pandemic has disrupted life inside and outside of prisons—creating both mild inconveniences and devastating losses that have severely impacted communities and individuals.[221] Through the totality approach, courts can account for the pervasiveness of pandemic-related disruptions while still ensuring that those circumstances actually "stand in the way" of timely filing.[222] Employing the totality approach therefore allows courts to alleviate the exacting particularity with which petitioners must demonstrate how extraordinary circumstances caused their delay. Instead, the totality approach encourages courts to consider the uniquely challenging circumstances that incarcerated people have been subjected to, without rigidly adhering to distinguishable, pre-pandemic rules. This flexible assessment is necessary given the equitable considerations that *Holland* emphasizes.[223]

The totality approach also 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

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

[221] *See, e.g.*, *supra* Section III.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.

[222] *Holland*, 560 U.S. at 652. Despite adopting a flexible approach, district courts employing the totality approach may still hold that a petitioner has not satisfied their burden to demonstrate that extraordinary circumstances are present. *See, e.g.*, Barnes v. Alabama, No. 4:20-cv-01514, 2021 WL 3439411, at *3 (N.D. Ala. June 25, 2021) (declining to extend equitable tolling while considering holistically petitioner's circumstances, including that his family had been unable to timely contact the clerk of court and courthouse closures due to COVID-19); United States v. Clay, No. 2:20-236, 2021 WL 2018996, at *2–3 (S.D. Tex. May 18, 2021) (denying equitable tolling where petitioner did not test positive for COVID-19, did not file a habeas petition within the first six months of her limitations period, and filed other motions during her limitations period).

[223] *Holland*, 560 U.S. at 648–50.

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.[224] 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 in any form justify equitable tolling.[225] But a flexible approach allows courts to "meet new situations"—including the unprecedented global pandemic and the prolonged lockdowns that incarcerated people have experienced since the pandemic began—"that demand equitable intervention."[226] 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.[227] 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.

As the conditions relating to COVID-19 wane, it remains necessary for courts to adopt a totality-of-the-circumstances style approach to account for the myriad circumstances that presently or potentially will affect petitioners' ability to timely file. Although the COVID-19 pandemic has been an unprecedented global crisis, courts should not assume that it will be the *only* disaster of its kind. Environmental crises, for example, similarly threaten to impact incarcerated populations in disproportionate ways, creating not only adverse health effects but also barriers to incarcerated people's ability to pursue postconviction relief.[228]

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[224] *Id.* at 650.

[225] *See* Chapman-Sexton v. United States, No. 2:20-CV-3661, 2021 WL 292027, *3 (S.D. Ohio Jan. 28, 2021); *supra* Section III.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).

[226] *Holland*, 560 U.S. at 650.

[227] *Compare* Rivera v. Harry, No. 20-3990, 2022 WL 93612, at *5 (E.D. Pa. Jan. 10, 2022) (considering petitioner's quarantine and inability to access the law library), *with* Strickland v. Crow, No. Civ-21-0064-HE, 2021 WL 3032668, at *2 (W.D. Okla. July 19, 2021) ("[A] prison lockdown does not qualify as an extraordinary circumstance justifying equitable tolling absent a showing that some additional circumstance prevented the timely filing of the petition."), *and* Strickland v. Crow, No. Civ-21-64-HE, 2021 WL 3566406, at *4 (W.D. Okla. June 8, 2021) ("Temporary deprivation of access to the law does not automatically warrant equitable tolling.").

[228] *See* Candice Bernd et al., *America's Toxic Prisons: The Environmental Injustices of Mass* Incarceration, EARTH ISLAND J. & TRUTHOUT (June 1, 2017),

Prisons and jails across the United States are "sites of environmental devastation and climate violence."[229] Many incarcerated people—who are disproportionately poor people and people of color—are and will be exposed to hazardous materials, as nearly 600 prison facilities in the United States are located within three miles of federally recognized contaminated sites.[230] Environmental degradation has extensive and disruptive effects on prison populations. People who are "detained in toxic jails and prisons risk diseases, cancers, and death as a consequence and often guaranteed outcome of their confinement."[231] Incarcerated people at such contaminated sites often become sick or are transferred to other facilities, further away from their families, to decrease the likelihood of illness.[232] Similar to COVID-19, the ubiquity of this exposure does not mean that these circumstances are any less extraordinary. Courts must be equipped to recognize the impact of these circumstances on incarcerated people, and adopting the totality-of-the-circumstances approach is the only way to consider these circumstances meaningfully when assessing equitable tolling.

Climate catastrophes also have the potential to disrupt people's ability to advocate for themselves while imprisoned.[233] In 2005, when

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https://www.earthisland.org/journal/americas-toxic-prisons/ (contextualizing U.S. incarceration as an environmental problem and explaining that many prisons "are built on some of the least desirable and most contaminated lands in the country, such as old mining sites, Superfund cleanup sites, and landfills"); Dustin S. McDaniel, et al., *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette*, ABOLITIONIST L. CTR. & HUM. RTS. COAL. (Sept. 1, 2014), http://abolitionistlawcenter.org/no-escape-bw-1-4mb/ (reporting that 81% of people incarcerated at SCI Fayette in Pennsylvania—which is "situated in the midst of a massive toxic waste dump—experienced adverse health symptoms such as throat, sinus, and respiratory conditions); *see generally* DERECKA PURNELL, BECOMING ABOLITIONISTS 237–47 (2022) ("Fighting for abolitionist futures means that we have to undermine climate change and environmental degradation, and resist policing and militarism as solutions to these problems . . . . Organizing for abolition alongside climate justice is imperative because policing and carceral responses will continue to manage internally displaced people, especially Black people, indigenous people, and people of color who are constantly displaced from colonialism, capitalism, and climate change.").

[229] PURNELL, *supra* note 228, at 247; *see generally id.* at 247–51.

[230] Bernd et al., *supra* note 228.

[231] PURNELL, *supra* note 228, at 247.

[232] *See* Bernd et al., *supra* note 228 (reporting that 2,600 predominantly African American and Filipino people were transferred from two California state prisons where they were at high risk of contracting valley fever).

[233] *See What About the Folks Inside?*, FIGHT TOXIC PRISONS (Dec. 12, 2021), https://fighttoxicprisons.wordpress.com/2021/12/12/what-about-the-folks-inside/ ("Disasters are ALWAYS the greatest danger to prisoners."); PURNELL, *supra* note 228,

Hurricane Katrina struck the southeastern United States, nearly eight thousand people detained at the Orleans Parish Prison were not evacuated before the storm.[234] When they were eventually allowed out of the flooding prison facility, they were transferred to over thirty different detention facilities across Louisiana.[235] Meanwhile, courts throughout the state faced "major logistical problems," as courthouses were closed, flooded, or inaccessible.[236] More recently, incarcerated populations were "some of the last people to be considered" when devastating tornadoes struck Mayfield, Kentucky,[237] and when Hurricane Ida struck southern Louisiana.[238] Localized disasters such as hurricanes and tornadoes may leave incarcerated people in flooded facilities without heat, air conditioning, power, or even food.[239] Whether these disasters are geographically limited or global in scale, the federal judiciary must be prepared to address how similar crises will affect incarcerated communities. Courts must adopt an approach to equitable tolling that permits them to take these kinds of circumstances and burdens into account, long after the effects of the COVID-19 pandemic have dissipated.

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."[240] Among the hardships arising from noncompliance with AEDPA's strict statute of limitations are continued incarceration and the preclusion of further judicial review

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at 247.

[234] Garrett & Tetlow, *supra* note 41, at 136.

[235] *Id.* at 135–39.

[236] *Id.* at 145–48.

[237] *See What About the Folks Inside?*, *supra* note 233.

[238] *Hurricane Ida – Support for Incarcerated People Impacted By the Storm*, FIGHT TOXIC PRISONS (Aug. 27, 2021), https://fighttoxicprisons.wordpress.com/2021/08/27/tropical-storm-ida/ ("It is unclear what happened to people in prisons and jails that were hit by Hurricane Ida. We know do know is that countless people were left behind in carceral facilities that did not evacuate.").

[239] *Hurricane Laura Aftermath: Demand Safety for ICE Detainees*, FIGHT TOXIC PRISONS (Aug. 31, 2020), https://fighttoxicprisons.wordpress.com/2020/08/31/hurricane-laura-aftermath-demand-safety-for-ice-detainees/ ("In the aftermath of the Category 4 Hurricane Laura, we know that incarcerated people in parts of Louisiana and Southeast Texas have been experiencing power outages, water shortages, and other impacts of the hurricane combined with institutional abuse and neglect.").

[240] Holland v. Florida, 560 U.S. 631, 650 (2010) (internal quotations omitted).

of petitioners' convictions and sentences. 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 various challenges to a petitioner's ability to timely file.

District courts adopting a totality-of-the-circumstances approach to the extraordinary circumstances inquiry 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, for example, by recognizing the toll that the pandemic has taken on incarcerated people. Courts must adopt an analytical framework that provides habeas petitioners the flexibility that is clearly warranted during extraordinary times.

By the time incarcerated people seek to file federal habeas petitions, they have already been subjected to the violent, overwhelming power of the carceral state. Adopting a flexible approach to equitable tolling cannot and will not remedy the harms inflicted on people who are policed, surveilled, incarcerated, and disempowered in the criminal punishment system. Addressing these harms will ultimately take much more than adopting a holistic, flexible approach to an obscure legal doctrine. But while advocates and organizers work to address the root causes of violence and incarceration, building a world where incarceration is obsolete,[241] incarcerated litigants will continue working toward their release. The approach to equitable tolling proposed in this Article is just one way that courts can ensure that incarcerated litigants are heard, after circumstances they cannot control preclude them from meeting an arbitrary and harsh statutory deadline.

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[241] *See generally*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 10 (2003).