No. 23-147

IN THE

Supreme Court of the United States

LEANDER MANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government suggests that the dispute here is whether certain prisoners are entitled to "automatic" equitable tolling of the AEDPA limitations period, or whether instead they must satisfy the requirements of *Holland v. Florida*, 560 U.S. 631 (2010). Opp. 10. If that were true, the government would be right that this Court need not weigh in—no circuit has endorsed "automatic" equitable tolling, and the circuits are (of course) in agreement that this Court's holding in *Holland* is binding.

But that is not the dispute. Instead, as explained in the Petition, the dispute is *how* to apply the *Holland* requirements: via stop-clock tolling, as in the Second and Eleventh Circuits, or instead through an amorphous judicial inquiry into how long a petition should have taken to prepare, as in the decision below as well as in the Fifth and Ninth Circuits. Both approaches apply *Holland* by requiring causation and diligence. But what *type* of causation and what *level* of diligence must be shown varies by circuit—and the different tests produce different results.

In the stop-clock circuits, the causation required is but-for causation, and the diligence required is the reasonable diligence ordinarily needed to file a timely petition. If those are established, the period of extraordinary circumstances is excluded from the limitations period, allowing a full year of untolled time. In three other circuits, however—including in the court below—but-for causation and reasonable diligence are not enough. Instead, petitioners must show that extraordinary circumstances were the *sole* cause of their late filing and that they could not have

filed sooner through greater diligence. Under that approach, petitioners may be allowed just a fraction of the limitations period. Indeed, the Sixth Circuit below went so far as to require Mann to show it was *impossible* for him to timely file—and held that "five or six months" of time to work on his petition was fatal to his tolling request.

The government's fundamental misunderstanding of the dispute means its opposition brief largely misses the mark. It dismisses the existence of a circuit split simply by pointing out that the stop-clock circuits each enforce causation requirements, as do the circuits on the other side. But that superficial similarity glosses over the profound differences in the circuits' approaches as well as the profound error of the decision below.

Ultimately, the government fails to undermine what the Petition established: this case provides an ideal vehicle to resolve an important question that has divided the circuits.

ARGUMENT

I. THE GOVERNMENT FAILS TO REFUTE THE EXISTENCE OF A CIRCUIT SPLIT.

Because the government mistakenly believes stop-clock tolling eliminates the causation and diligence requirements, it contends that no circuit has adopted stop-clock tolling, and thus that there is no circuit split. That is wrong.

Before addressing each circuit's approach, it is helpful to correct what seems to be at the heart of the government's mistake: the idea that "[t]he only way for a court to evaluate whether an extraordinary circumstance caused the untimely filing is . . . to

determine whether a petitioner acting with reasonable diligence could have filed his claim, despite the extraordinary circumstance, before the limitations period expired." Opp. 10 (quoting *Smith v. Davis*, 953 F.3d 582, 595 (9th Cir. 2020)). Not so. A but-for cause need not make an outcome inevitable. Consider a simple example. You can truthfully say traffic caused you to be late if you would have been on time had there been no traffic, even if you could have been on time *despite* the traffic by leaving earlier or taking a different route. So too for habeas petitions: if the petition would have been timely absent the extraordinary circumstances, the extraordinary circumstances caused the late filing—even if the petitioner could have somehow overcome them. It is thus simply not true that the only way to evaluate causation is to ask whether a petitioner could have filed on time despite the barriers he faced. In other words, there is more than one way to implement *Holland*—including through stop-clock tolling.

With that in mind, it is clear that the cases the government points to in the Second and Eleventh Circuits do nothing to refute the circuit split.

Start with the Second Circuit. The government claims that *Hizbullahankhamon v. Walker*, 255 F.3d 65 (2d Cir. 2001), is inconsistent with stop-clock tolling because equitable tolling was denied to an individual held in solitary confinement for 22 days at the beginning of his limitations period. Opp. 15. But the court rejected tolling there because it concluded that there was *no connection* between the extraordinary circumstances and the late filing: "[i]t cannot plausibly be said that, but for those 22 days," the petition would have been timely filed.

Hizbullahankhamon, 255 F.3d at 76. In other words, as a factual matter, the asserted "extraordinary circumstances" had nothing to do with the untimely filing. Because but-for causation was absent, the court had no occasion to decide whether stop-clock tolling or some other approach was appropriate.

When the Second Circuit did confront that question in *Harper v. Ercole*, 648 F.3d 132 (2d Cir. 2011), it expressly adopted stop-clock tolling, explaining that if causation and diligence are established, the court should then "suspend the statute of limitations for the period of extraordinary circumstances and determine timeliness by reference to the total untolled period." *Id*. at 139. Courts in the Second Circuit are thus not tasked with resolving how long a petition should have taken to prepare, instead focusing on but-for causation and reasonable diligence and then granting petitioners a full year of untolled time.

The same is true in the Eleventh Circuit, where the government points to *San Martin v. McNeil*, 633 F.3d 1257 (11th Cir. 2011), as purportedly inconsistent with stop-clock tolling. But in *San Martin*, as in *Hizbullahankhamon*, the court denied equitable tolling because there was no but-for causal link between the asserted extraordinary circumstances and the delayed filing (among other reasons). As the court explained, the petitioner there "ha[d] not begun to explain how the two-week delay in receiving notice of the Supreme Court's denial of his certiorari petition ultimately caused the late filing of his federal habeas petition" a year later. *Id*. at 1270. In other words, there was no reason to think petitioner would have timely filed had the purportedly "extraordinary"

circumstances he pointed to not occurred—the delay was irrelevant to the timeliness of his filing.

In cases where but-for causation is established, though, the Eleventh Circuit has emphatically adopted stop-clock tolling. In *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002) (per curiam), the court explained in plain terms that "[t]olling means just what it says—the clock is stopped while tolling is in effect."[1] *Id.* at 712. As in the Second Circuit, then, courts in the Eleventh Circuit considering equitable tolling need not ask whether petitioners could theoretically have filed their petitions on time despite the extraordinary circumstances. Here again, once but-for causation and reasonable diligence are shown, the petitioner is entitled to a full year in which to prepare and file the petition.

The opposite is true in the Sixth, Fifth, and Ninth Circuits, where courts routinely demand that petitioners prepare habeas petitions in just a fraction of the time permitted them by statute. In these circuits, it is not enough to show that the petition would have been timely but for the extraordinary circumstances or that a petitioner exercised the degree of diligence required to file within one year of untolled time. Instead, petitioners must show something more—although exactly how much more varies by circuit.

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[1] The government points out that *Knight* was decided prior to this Court's decision in *Holland*, but it never explains why this fact is relevant. Opp. 17. Nothing in *Knight* is inconsistent with *Holland*, and neither this Court nor the Eleventh Circuit has suggested that *Knight* is no longer good law.

The Sixth Circuit's formulation in this case was particularly stringent: to be eligible for tolling, the court explained, Mann was required to show that timely filing was "impossible." Pet.App.5a. Under this standard, any amount of time free of extraordinary circumstances immediately prior to the deadline would likely prove fatal to an equitable tolling claim. And indeed, the court rejected Mann's claim because he had "five to six months" during the limitations period where he did not face extraordinary circumstances. *Id.* On the court's view, he could obtain equitable tolling only if he proved "that period was insufficient" to prepare and file a Section 2255 motion. *Id.* The court never considered, much less gave dispositive weight to, the question whether Mann's petition would have been timely but for the extraordinary circumstances he faced. Unlike in the Second and Eleventh Circuits, then, petitioners seeking equitable tolling in the Sixth Circuit will rarely be able to obtain a full year of untolled time—instead, they can be allotted only the bare minimum time judicially determined to be "sufficient" for the petition at issue.

The Fifth Circuit likewise directs courts to evaluate the sufficiency of the untolled time available to the petitioner—and the time must be far less than a year in order to justify tolling in that circuit. To be sure, if a petitioner has just "one week, three weeks, [or] one month" in which to prepare a petition, tolling may be available. *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019). But tolling was *not* allowed when the petitioner had "seven weeks" of unobstructed time. *Id.* In the Fifth Circuit, then, a petitioner who faces extraordinary circumstances for an entire year and

then takes a mere two months to prepare and file the petition will likely be denied tolling. That result could never be reached in the stop-clock circuits, where such a petitioner would plainly be entitled to tolling.

The Ninth Circuit, too, recently rejected stop-clock tolling, although it also expressly rejected the impossibility standard applied by the Sixth Circuit here. *See Smith*, 953 F.3d at 590. There, the majority of the sharply divided en banc court embraced a "free-floating judicial determination of whether, notwithstanding the impediment" created by extraordinary circumstances, the petitioner could have filed earlier. *Id.* at 602 (Berzon, J., dissenting, joined by Thomas, C.J., and Murguia, Watford, and Hurwitz). Again, then, even a diligent petitioner whose late filing was caused by extraordinary circumstances is not allowed a full year of untolled time in which to prepare a petition, but instead is permitted only so much time as the judges consider sufficient for a given petition.

In at least two circuits, then, a petitioner is guaranteed a full year in which to complete his petition if extraordinary circumstances are a but-for cause of his failure to meet the deadline and he otherwise exercises reasonable diligence. But in at least three circuits, petitioners get far less time through equitable tolling. The split is clear and requires this Court's intervention.

II. THE DECISION BELOW IS WRONG.

Beyond conflicting with decisions of the Second and Eleventh Circuits, the decision below also relied on an incorrect test to reach an incorrect result. In arguing otherwise, the government is forced to insist that

neither the Sixth Circuit below nor this Court in its prior cases really meant what they said. Those arguments lack merit.

First, the government does not defend the Sixth Circuit's imposition of an impossibility requirement on Mann. Instead, it claims that the Sixth Circuit did not really mean "impossible" when it said "impossible," but instead meant only that a petitioner was required to take "reasonable steps." Opp. 17-18. But the Sixth Circuit could not have been more clear in imposing impossibility as the measure of causation in this case—explaining the requirement that a petitioner "must show that the circumstances actually caused him to miss the deadline," the Sixth Circuit elaborated: "In other words, [Mann] must demonstrate that [extraordinary circumstances] made compliance *impossible*." Pet.App.5a (emphasis added). And the court later repeated the point, insisting that "even if Mann was physically unable to file for two months, he must still show that compliance with the deadline was *impossible* before it could be tolled for that period." Pet.App.6a (emphasis added). The government simply waves away this clear articulation of the test, while offering no reason to doubt that the court meant what it said. While the government may wish to distance itself from the impossibility standard, that does nothing to undermine the Sixth Circuit's own explanation of its holding.

Had the Sixth Circuit applied the correct standard, Mann would have been entitled to equitable tolling and his petition considered timely. Mann provided more than sufficient evidence to demonstrate that his petition would have been timely but for the existence of extraordinary circumstances related to the Covid

pandemic. And he showed that he exercised the reasonable diligence required to file a petition within one year. For those reasons, the magistrate judge was correct to recommend equitable tolling, and the Sixth Circuit was wrong to deny it.

Second, the government attempts to minimize this Court's consistent understanding that equitable tolling traditionally entails stop-clock tolling. But the government does not point to any competing tradition under which equitable tolling has been understood differently, or otherwise refute the fact that stop-clock tolling is the traditional form of equitable tolling. Instead, the government attempts to dismiss much of this Court's discussion of equitable tolling as irrelevant because it is contained in cases that "did not directly involve the application of equitable tolling," Opp. 12, regardless of how central the discussion of equitable tolling was to those decisions. *See* Pet. 22-25. More fundamentally, even if these discussions had all been pure dicta (and they are not), this Court's consistent articulation of basic principles of tolling must be taken seriously. After all, it is those general principles of equitable tolling that Congress is presumed to have incorporated into the AEDPA statute of limitations. *Holland*, 560 U.S. at 645-46.

The government's limited substantive engagement with this Court's tolling precedents relies again on the mistaken view that stop-clock tolling is somehow "automatic" and thus inconsistent with requiring causation and diligence. In particular, the government claims this Court "implicitly rejected" stop-clock tolling in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Opp. 11. But *Pace* involved a petitioner whose conviction had become final long before AEDPA was

enacted, and who chose to "wait[] years, without any valid justification," to pursue his claims. 544 U.S. at 419. By any measure, then, that petitioner "s[a]t on his rights," showing no diligence. *Id.* As relevant here, then, *Pace* simply reenforces the *Holland* requirements—and does not suggest petitioners should be allowed less than a year to file.

Finally, the government suggests AEDPA's "statutory purpose" is best effectuated by rejecting stop-clock tolling. That too is wrong. As this Court explained in *Holland*, equitable tolling is available under AEDPA because the statute incorporates "prior law," including that "under which a petition's timeliness was always determined under equitable principles." *Holland*, 560 U.S. at 648. Yet in the face of extensive law establishing stop-clock tolling as traditional in the equitable tolling context, the government points to no "prior law" that implemented equitable tolling in any other form. To the extent the government believes its preferred approach is more consistent with AEDPA's purpose simply because it will allow fewer claims, this Court already rejected that simplistic view of congressional purpose in *Holland*. As explained there, while "AEDPA seeks to eliminate delays in the federal habeas review process, . . . [i]t did not seek to end every possible delay at all costs." *Id.* at 648-49.

In any event, petitioners seeking equitable tolling under the stop-clock approach still face a daunting test. For one thing, the basic premise of a request for equitable tolling is that a petitioner faced "extraordinary circumstances." By definition, this requirement will not ordinarily be met. Moreover, those extraordinary circumstances must be a but-for

cause of the delay in filing. That requirement, too, will rarely be met—at a minimum, it means the extraordinary circumstances must have occurred during the one-year limitations period and the petition must be timely once the extraordinary circumstances are accounted for. And even if these basic requirements are satisfied, a petitioner still may not be able to establish but-for causation, depending on the specific facts of the case, as *Hizbullahankhamon* and *San Martin* show. Finally, the petitioner must demonstrate at least reasonable diligence, ensuring that a petitioner is not able to manufacture the extraordinary circumstances he faces and sharply limiting any potential for abuse.

By contrast, the test applied by the Sixth Circuit has no clear limiting principle. Indeed, the government does not deny that, by its logic, a petitioner could be ineligible for equitable tolling because he had just hours or days before the deadline in which to prepare and file a petition. The Sixth Circuit's test thus runs head-first into this Court's explanation that equitable tolling requires just "reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal citation and quotation omitted).

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE AN IMPORTANT QUESTION.

As explained in the Petition, this case provides an ideal opportunity to resolve the circuit split, as the question presented is dispositive of the equitable tolling issue. Pet. 28-29.

The government does not identify any meaningful vehicle problems. Its sole attempt to undermine this case as a vehicle is to suggest that Mann would not be

entitled to equitable tolling even under the Ninth Circuit's test. Opp. 18. But it offers nothing except its own *ipse dixit* to support that contention. The Sixth Circuit focused on its own impossibility-based standard, and did not evaluate Mann's claim for tolling under any other test. Although the contours of the Ninth Circuit's test are not well-defined, Mann may well be entitled to tolling under that test, which expressly does not require "impossibility" as the Sixth Circuit did here. More importantly, the record is clear that Mann would at least be entitled to tolling under the correct stop-clock approach.

CONCLUSION

This Court should grant the petition for certiorari.

DECEMBER 12, 2023

Respectfully submitted,

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