IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

GARY FERKO,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-3467
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S SUPPLEMENTAL BRIEF

1. First, the Court requests the parties address whether Section 7105 can be characterized as a statute of limitations such that the presumption in favor of equitable tolling applies? *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96 (1990); *Arellano v. McDonough*, 598 U.S. __ (2023).

38 U.S.C. § 7105(b) should not be characterized as a statutory time limitation such that the presumption of equitable tolling applies. "Because the doctrine effectively extends an otherwise discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). Courts presume that Congress intends that statutes will be construed in conformity with established law. *United States v. Wells*, 519 U.S. 482, 495, 117 S. Ct. 921, 929, 137 L. Ed. 2d 107 (1997) (citation omitted) (presuming that Congress intended a statute to be construed in conformity with existing Supreme Court precedent); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166,

2169, 115 L. Ed. 2d 96 (1991) (presuming that Congress intended a statute to be construed in conformity with common law) (citation omitted). Yet, a presumption is nothing more than an inference based on known information. Thus, while "it makes sense to infer Congress' intent to incorporate a background principle into a new statute where the principle has previously been applied in a similar manner," *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 175 (2014), "Congress' silence . . . cannot show that it intended to apply an unusual modification of those rules." *Meyer v. Holley*, 537 U.S. 280, 286 (2003); *Credit Suisse Sec. (USA) L.L.C. v. Simmonds*, 566 U.S. 221, 229 (2012) (finding "it is preferable to apply [a] form [of equitable tolling] which Congress was certainly aware of, as opposed to the rule the Ninth Circuit has fashioned"); *id*. at 229 n.7 (rejecting "the Second Circuit's rule . . . [because it] departs from usual equitable tolling principles").

A. Because the time limitation in Section 7105 has jurisdictional significance, it is not amenable to equitable tolling.

The doctrine of equitable tolling "derive[s] from the traditional power of the courts to "'apply the principles . . . of equity jurisprudence.'" *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 582 U.S. 497, 507 (2017) (quoting *Young v. United States*, 535 U.S. 43, 50. The Supreme Court has repeatedly recognized that a court's equitable power does not extend to jurisdictional requirements, which are those requirements that mark the bounds of a "'court's adjudicatory authority.'" *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). A limitations period will be considered

jurisdictional where "'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.'" *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023) (quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015)). Courts will look for "a clear tie between the deadline and the jurisdictional grant." *Boechler, P.C.*, 142 S. Ct. at 1499. Further, the Supreme Court "will not undo a 'definitive earlier interpretation' of a statutory provision as jurisdictional without due regard for principles of stare decisis." *Wilkins v. United States*, 143 S. Ct. at 877 (quoting *John R. Sand & Gravel Co. v. United State*s, 552 U.S. 130, 138 (2008)). A "definitive earlier interpretation' of a statutory provision as jurisdictional" is one in which "the prior decision addressed whether a provision . . . . truly operates as a limit on a court's subject-matter jurisdiction—and whether anything in the decision 'turn[ed] on that characterization.'" *Id.* at 872 (*quoting Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 (2006) (alteration original)).

This case presents both a clear tie between the NOD filing deadline and VA's jurisdiction and a definitive jurisdictional interpretation. The subsection 7105(b) time limitation is incorporated into subsection 7105(c). The latter subsection as it existed at the time of Appellant Ferko's November 2004 rating explicitly stated that, "If no notice of disagreement is filed in accordance with this chapter [38 USCS §§ 7101 et seq.] within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with

this title." *See* 38 U.S.C. § 7105(c) (2004). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has expressly recognized that this provision is jurisdictional. *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996) ("hold[ing] that [38 U.S.C. § 7104(b)] means that the Board [of Veterans Appeals ("Board")] does not have jurisdiction to consider a claim which it previously adjudicated unless new and material evidence is presented, and before the Board may reopen such a claim, it must so find."); *Jackson v. Principi*, 265 F.3d 1366, 1369 (Fed. Cir. 2001) (concluding that 38 U.S.C. § 7105(c) imposes the same "jurisdictional responsibility" with respect to claims previously denied by the regional office as 38 U.S.C. § 7104(b) imposes with respect to claims previously denied by the Board).

In reaching this conclusion, the Federal Circuit explained that "any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits, that a potential jurisdictional defect may be raised by the court or tribunal, sua sponte or by any party, at any stage in the proceedings, and, once apparent, must be adjudicated," and described the question of whether new and material evidence sufficient to reopen the claim had been submitted as an "obvious threshold question" that the Board must address before it can "re-adjudicate service connection or other issues going to the merits." *Barnett*, 83 F.3d at 1383-84 (Fed. Cir. 1996) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31 (1990)). Thus, the Federal Circuit definitively interpreted the time limitation as jurisdictional and that interpretation precludes equitable tolling.

B. Even assuming that the provision is not jurisdictional, the *Irwin* presumption is inapt because the time limit does not function like the time limitations to which the *Irwin* presumption applies.

For the presumption in favor of equitable tolling to apply, a time limitation must have the same functional characteristics as time limitations that were historically amenable to tolling. *Lozano*, 572 U.S. 1, 15 (2014); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) (finding the presumption "inapt" where, historically, the time limitation at issue had not been amenable to tolling); *see also Boechler, P.C.,* 142 S. Ct. at 1500 ("[T]he nonjurisdictional nature of the filing deadline does not help [Appellant] unless the deadline can be equitably tolled."). Most statutory time limitations "seek primarily to protect defendants against stale or unduly delayed claims" and [s]uch statutes . . . typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Other statutory time limitations, however, advance other goals, "such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, . . . promoting judicial efficiency," *id.* at 133, or impose "substantive limitations on the amount of recovery," *United States v. Brockamp*, 519 U.S. 347, 352 (1997). "The Court has often read the time limits of these statutes as more absolute[,] . . . as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand & Gravel Co.*, 552 U.S. at 133–34; *see Brockamp*, 519 U.S. at 352.

Traditionally, equitable tolling applies to a limitations statute is "designed to encourage plaintiffs 'to pursue diligent prosecution of known claims,'", 582 U.S. at 504 (citation omitted), by "establish[ing] the period of time within which a claimant must bring an action.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014) (citation omitted). If a claim is not brought within the limitations period, the courts are barred from providing a remedy for the violation alleged. *Kwai Fun Wong*, 575 U.S. at 409; *Young v. United States*, 535 U.S. at 47-48 (2002). As the Supreme Court discussed in *Lozano*, "[s]tatutes of limitations embody a "policy of repose, designed to protect defendants," *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965), and foster the "elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000)." *Lozano,* 572 U.S. at 20.

Section 7105 contains none of these essential characteristics. Section 7105 provides a timing requirement of one year in which to initiate appellate review with the agency of original jurisdiction (AOJ) via a Notice of Disagreement (NOD). 38 U.S.C. § 7105(b). This statute does not embody the policy of repose or encourage diligent prosecution of claims, *see Cal. Pub. Emps. Ret. Sys.,* 582 U.S. at 504 (citation omitted), by '"establish[ing] the period of time within which a claimant must bring an action."" *Lozano*, 572 U.S. at 14 (citation omitted). A veteran whose claim for benefits has been denied is free to bring the same claim again at any time if it is supported by new and material evidence, 38 U.S.C. 5108, and, if VA denies that claim, the veteran will have another opportunity to appeal to the Board.

As with any question of statutory intent, the function of a statutory time limitation must be determined by reading the words "'in their context and with a view to their place in the overall statutory scheme.'" *Nielson v. Shinseki*, 607 F.3d 802, 807 (Fed. Cir. 2010) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)); *see Burnett,* 380 U.S. at 427 n. 2 (finding that the location of a time limitation relative to other statutory provisions is not determinative). Notably, the Supreme Court recently declined to apply equitable tolling to the effective date statute, expressly concluding that those statutory time limitations "operate . . . as substantive limitations on the amount of recovery due." *Arellano v. McDonough*, 143 S. Ct. 543, 549 (2023).[1] This is key because the timing limitation in the NOD statute and the provisions of the effective date statute are inextricably linked.

To illustrate, the general effective date rule is "the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C.

[1] In both *Brockamp* and *Arellano*, the Supreme Court did not address whether the *Irwin* presumption applied, concluding instead that, even if the presumption did apply, it would be rebutted. *Brockamp*, 519 U.S. at 350; *Arellano*, 143 S. Ct. at 548 (citing *id.*). Nonetheless, at the Supreme Court recognized in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), this is a distinction without a difference because, whether the *Irwin* presumption is inapt or the *Irwin* presumption is rebutted, "[t]he bottom line is the same: Tolling is not available." *Id.* at 409. Nonetheless, the reasoning in *Brockamp*, on which the Supreme Court relied in *Arellano*, makes clear that the predicate for applying the *Irwin* presumption is absent when the time limitation functions as a "limitation on the amount of recovery." *Brockamp*, 519 U.S. at 352 (finding "no direct precedent" for this "kind of tolling").

§ 5110. The NOD statute provides, "[N]otice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. . . . If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final." 38 U.S.C. § 7105. Thus, upon the expiration of the NOD filing period, the adjudication becomes final and a subsequent claim for benefits would, by definition, be "after final adjudication." Thus, the NOD filing deadline is central to the operation of the "limitation on the amount of recovery" imposed by the effective date statute.

Permitting courts to toll the NOD filing deadline would be equivalent to permitting courts to toll the time to file a reopened claim. Thus, because the statutory scheme withholds the latter power, *see Arellano,* 143 S. Ct. at 548 (emphasizing that Congress "instructed VA to the exceptions 'specifically provided'" in the effective date statute), the statutory scheme likewise withholds the former. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).

2. Second, if the *Irwin* presumption applies and VA has equitable authority, can the Secretary rebut the presumption on grounds that there exists "good reason to believe that Congress did not want the equitable tolling doctrine to apply"? *United States v. Brockamp*, 519 U.S. 347, 350 (1997). In addressing this, the parties are requested to discuss the Secretary's assertion in *Arellano*, 598 U.S. __ n.1, that equitable tolling is a judicial doctrine that is not presumptively available to executive agencies generally absent a specific grant of equitable power from Congress.

If the Court determines that § 7105 is a limitation statute, there is "good reason to believe that Congress did not want the equitable tolling doctrine to

apply". *See Brockamp*, 519 U.S. at 349-50. Equitable tolling is inconsistent with the statutory scheme.

Congress afforded the Secretary regulatory authority to create exceptions to the time requirement consistent with § 7105. Pursuant to statutory authority, the Secretary promulgated 38 C.F.R. § 3.109(b), which permits the extension of the time limit for doing any act "required . . . to perfect a claim or challenge an adverse VA decision," if an extension is "requested" and "good cause" is shown. *Rowell v. Principi*, 4 Vet.App. 9, 15 (1993). In such a situation, "there is no legal entitlement to an extension; [instead] the regulation commits the decision to the sole discretion of the Secretary." *Corry v. Derwinski*, 3 Vet.App. 231, 235 (1992). Also, under the AMA system, 38 C.F.R. § 20.203 provides the following time limits for filing an NOD:

> (b) *Time of filing.* Except as provided in § 20.402 for simultaneously contested claims, a claimant, or his or her representative, must file a properly completed Notice of Disagreement with a decision by the agency of original jurisdiction within one year from the date that the agency mails the notice of the decision. The date of mailing the letter of notification of the decision will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.
>
> (c) *Extension of time of filing*. An extension of the period for filing a Notice of Disagreement or a request to modify a Notice of Disagreement may be granted for good cause. A request for such an extension must be in writing and must be filed with the Board. Whether good cause for an extension has been established will be determined by the Board.

For individuals, like Appellant Ferko, who request an extension after expiration of the time limit, "good cause must be shown to why the required action

could not have been taken during the original time period and could not have been taken sooner than it was." 38 C.F.R. § 3.109(b).

In contrast, "[p]rinciples of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *United States v. Ibarra*, 502 U.S. 1, 4 (1991) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)). In other words, this Court would be imposing equitable tolling in order to overcome the express regulatory requirements established by the Secretary. However, it is well established that where Congress has expressly delegated regulatory authority to an agency, a court must defer to those regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The *Irwin* presumption does not expand a court's authority. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 157 (finding the Supreme Court lacked authority to "[i]mpos[e] equitable tolling" in a manner that would "gut" a regulation because there had been no showing that the regulation was "arbitrary, capricious, or manifestly contrary to the statute.") (internal citations omitted).

Applying the Court's analysis in *Arellano*, the structure of § 7105 reinforces Congress's choice to establish a one year time period to file an NOD. *Arellano*, 143 S. Ct. at 548. Section (b)(1)(A) explicitly establishes that the exception to the prescribed one year filing deadline is "simultaneously contested claims". See 38

U.S.C. § 7105(b)(1)(A). Section 7105 functions as the mechanism that triggers or initiates appellate review before the agency. The NOD sets in motion a series of other things that are required to perfect an appeal, i.e., Statement of the Case (SOC), VA Form 9, requests for a hearing, and under the Appeal Modernization Act (AMA) system, it identifies the claimants' Board review option selection. *See* 38 U.S.C. § 7105(b)(3). The failure to file an NOD within the prescribed period also establishes finality of the AOJ's decision. However, the statute contains exceptions to finality as well. *See* 38 U.S.C. § 7105(c) (If no NOD is filed in accordance with this chapter within the prescribed period, the action or decision of the AOJ shall become final and the claim shall not thereafter be readjudicated or allowed, except—(1) in the case of a readjudication or allowance pursuant to a higher-level review that was requested in accordance with section 5104B of this title [38 USCS § 5104B]; (2) as may otherwise be provided by section 5108 of this title [38 USCS § 5108]; or (3) as may otherwise be provided in such regulations as are consistent with this title.). Congress's choice to create exceptions to the time limit and the finality of the AOJ decision strongly suggests that it accounted for equitable factors in establishing the prescribed one year deadline and addressing finality in this statute. As the Court acknowledged in *Arellano*, "[w]hen Congress has already considered equitable concerns and limited the relief available, 'additional equitable tolling would be unwarranted.'" *See Arellano*, 143 S. Ct. at 550 (citing *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998)).

Applying the analysis in *Brockamp*, reading an equitable tolling exception into § 7105(b) could create serious administrative problems by forcing the AOJ to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for equitable tolling which, upon close inspection, might turn out to lack sufficient equitable justification. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997). "VA possesses a duty not only to individual claimants, but to the effective functioning of the veterans compensation system as a whole. Moreover, because the VA possesses limited resources, these dual obligations may sometimes compel it to make necessary tradeoffs." *Veterans Just. Grp., LLC v. Sec'y of Veterans Affs.*, 818 F.3d 1336, 1354 (Fed. Cir. 2016). By giving the Secretary the authority to create exceptions to section 7105(c) by regulation, Congress empowered the Secretary to balance these concerns, rather than "delegat[ing] to the courts a generalized power to do so wherever a court concludes that equity so requires." *Id.* at 353. This is good reason to believe that Congress did not want the equitable tolling doctrine to apply to this statute.

Finally, the Secretary's assertion noted in n1 of *Arellano* is based on the Supreme Court's holding in *Auburn Reg'l Med. Ctr.* where it "h[e]ld that the presumption in favor of equitable tolling does not apply to administrative appeals of the kind here at issue." *Auburn Reg'l Med. Ctr.*, 568 U.S. at 149. In *Auburn Reg'l Med. Ctr.*, the Court stated, "[t]his Court has never applied *Irwin's* presumption to an agency's internal appeal deadline." *Id*. at 158-59. However, in footnote 1 in the Supreme Court's subsequent decision in *Boechler, P.C.*, the Court

stated, "[I]n passing, the Commissioner briefly suggests that equitable tolling might not apply outside the realm of Article III courts. We have already applied it in other non-Article III contexts, however, and the Commissioner does not ask us to reconsider those precedents. *See Young v. United States*, 535 U.S. at 47, (bankruptcy court limitations period); *Kwai Fun Wong*, 575 U.S. at 407, 420." *Boechler, P.C.*, 142 S. Ct. at 1500 n.1. The Court in *Boechler* did not explicitly address the issue, but rather noted an argument in a footnote. However, even if the subsequent caselaw demonstrates that equitable tolling can be applied in other non-Article III contexts, the analysis in *Auburn Reg'l Med. Ctr.* is applicable here.

Similar to the Court's reasoning in *Auburn Reg'l Med. Ctr.*, imposing equitable tolling to NODs is unnecessary. In *Auburn Reg'l Med. Ctr.*, the Court acknowledged that the *Irwin* presumption was adopted in part on the premise that, "[s]uch a principle is likely to be a realistic assessment of legislative intent." *Irwin*, 496 U.S. at 95. Here, just as in *Auburn Reg'l Med. Ctr.*, Congress has amended § 7105 and chosen not to change the one-year provision or the Secretary's rulemaking authority. *See Auburn Reg'l Med. Ctr.,* 568 U.S at 827-28, *citing Commodity Futures Trading Comm'n v. Schor*, 478 U. S. 833, 846, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)). The Secretary has exercised his rulemaking authority

to provide an opportunity to claimants to receive additional time to initiate the appellate process as noted above for good cause shown. Consistent with this analysis, the Court should find that the *Irwin* presumption has been rebutted.

3. Third, if the Court determines that tolling is available for the NOD deadline, would the stop-clock approach adopted by the U.S. Court of Appeals for the Federal Circuit for an NOA to this Court apply to tolling NODs as well? *See Checo v. Shinseki*, 748 F.3d 1373, 1378 (2014) (holding that a filing period may be tolled when an obstacle to timely filing arises, and it begins to run again when that obstacle is removed).

As a general matter, equitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (U.S. 2014). If the Court determines that tolling is available for the NOD deadline, the Court should adopt the three-part test adopted in *McCreary* to determine whether equitable tolling based on extraordinary circumstances is appropriate. *McCreary v. Nicholson*, 19 Vet.App. 324 (2005).

The stop-clock approach from *Checo*, should not be applied to NODs. The core of the argument in support of the stop-clock approach is that, because Congress established a one-year filing period, Congress intended for a veteran to have 365 days free from any impediment to file a NOD. *See Smith v. Davis*, 953 F.3d 582, 591 (9th Cir. 2020). However, rather than being concerned with preserving each day of the filing period, equitable tolling is only concerned with extraordinary circumstances that cause a late filing. *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011). With respect to causation, one "may conclude that such

causation is lacking where the identified extraordinary circumstances arose and concluded early within the limitations period. In such circumstances, a diligent petitioner would likely have no need for equity to intervene to file within the time remaining to him." *Id.* 137-138 (citing *Hizbullahankhamon v. Walker*, 255 F.3d 65, 76 (2d Cir.2001); *Allen v. Lewis*, 255 F.3d 798, 801 (9th Cir.2001); *Fisher v. Johnson*, 174 F.3d 710, 715–16 (5th Cir.1999)); *see Fisher*, 174 F.3d at 715–16) (finding no causation where seventeen-day period to be tolled occurred more than six months before filing deadline). Consideration of the entire appeal period ensures that equitable tolling does not swallow the appeal period set by Congress. The statute at issue in *Checo* was 38 U.S.C. § 7266, which governs the filing of a notice of appeal to the Court after a final Board decision has been issued. The question of timeliness in that instance was an issue that was raised for the first time before this Court. In contrast, the purpose of Section 7105 to initiate appellate review of the decision by the AOJ to the Board and the issue of timeliness of the NOD is appealable directly to the Board. *See* 38 U.S.C. § 7105(b)(1)(C).

As noted above, applying equitably tolling of NODs convolutes the system but to then add the extra requirement to apply the "stop-clock" further complicates the process within the agency.

4. Last, if the Court determines that tolling is available, what would a claimant need to demonstrate to warrant equitable tolling of an untimely NOD? *See, e.g.*, *Checo*, 748 F.3d at 1378 (requiring a claimant to demonstrate three elements to toll an untimely NOA: (1) extraordinary circumstance; (2) due diligence; and (3) causation) (citing *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005), adhered to on reconsideration, 20 Vet.App. 86 (2006)).

Under the *McCreary* test, a claimant must show: First, the extraordinary circumstance must be beyond the appellant's control. Second, the appellant must demonstrate that the untimely filing was a direct result of the extraordinary circumstances. *See Barrett*, 363 F.3d at 1321; *see also Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) ("If the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing."). Third, the appellant must exercise "due diligence" in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his NOD within the one year time limit.

WHEREFORE, the Secretary respectfully submits his response to the Court's Order.

Respectfully submitted,

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