

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OTHA RAY FLOWERS,
Petitioner

v.

UNITED STATES OF AMERICA

***APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE
A PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Otha Ray Flowers respectfully requests a 33-day extension of the time, to and including Tuesday, November 30, 2021, in which to file a petition for a writ of certiorari in this Court. The U.S. Court of Appeals for the Fifth Circuit entered judgment on July 30, 2021. A copy of the Fifth Circuit's opinion is attached as Exhibit 1. See *United States v. Flowers*, No. 20-60056, 6 F.4th 651 (5th Cir. 2021). No requests for rehearing were filed in the Fifth Circuit. Mr. Flowers' time to file a petition for certiorari in this

Court will currently expire on October 28, 2021. This application is being filed more than 10 days before that date.

To initiate an investigative stop in compliance with the Fourth Amendment, an officer must have a reasonable suspicion of criminal activity. *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). Reasonable suspicion requires the detaining officer to have a “particularized and objective basis for suspecting the particular person * * * of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). An investigatory stop must be justified by “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity” as opposed to lawful activity, *id.* at 417; a mere “hunch” that an activity is unlawful will not suffice. *Terry*, 392 U.S. at 27.

This case presents a substantial and recurring question on which the federal circuit courts and state courts of last resort are divided: whether ambiguous conduct (i.e., conduct that is consistent with lawful or unlawful behavior), in which law-abiding members of the public regularly engage, may give rise to reasonable suspicion justifying a *Terry* stop when it occurs in a high-crime area. In this case, a police officer claimed reasonable suspicion to conduct an investigatory seizure where he observed two men sitting in a parked car outside of an open convenience store for ten to fifteen seconds, in a high-crime area. A divided Fifth Circuit panel upheld the stop under *Terry*.

As Judge Elrod observed in dissent, the panel majority’s approach departs from decisions of other circuits, which have declined to find reasonable suspicion in closely

comparable circumstances. Those courts have declined to base reasonable suspicion on conduct fully consistent with either lawful or unlawful behavior, and that is widely undertaken by the general public, even when it occurs in a high-crime area. State high courts have similarly rejected a reasonable suspicion standard that would give officers leeway to detain virtually any member of the general public, merely because ambiguous conduct occurs in a high-crime areas. See, e.g., *United States v. Jones*, 606 F.3d 964, 967-968 (8th Cir. 2010) (finding no reasonable suspicion where the supposedly “suspicious” conduct, while conceivably indicating suspect was carrying a firearm, was “shared by countless, wholly innocent persons”); *United States v. Slocumb*, 804 F.3d 677, 682-684 (4th Cir. 2015) (no reasonable suspicion where officer observed defendant parked in parking lot in area known for drug activity); *Connecticut v. Edmonds*, 145 A.3d 861, 882-884 (Conn. 2016) (same, where officer observed defendant stand outside restaurant “for a few seconds”); *State v. Paro*, 54 A.3d 516, 516 (Vt. 2012) (no reasonable suspicion where officer saw a truck idling at night in the parking lot of a previously burglarized auto repair shop); see also William E. Ringel, *Searches & Seizures, Arrests & Confessions* § 13:25 (2d ed. 2021) (discussing divergent approaches taken by courts to finding reasonable suspicion in high-crime areas).

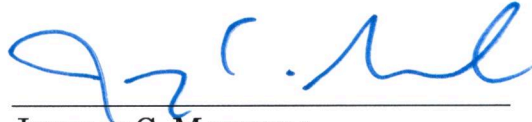
Undersigned counsel and the University of Virginia Supreme Court Litigation Clinic are working diligently, but respectfully submit that the additional time requested is necessary to complete preparation of Mr. Flowers’ petition. Undersigned counsel, who represent Mr. Flowers *pro bono*, were engaged for the first time at the

certiorari stage. Despite diligent efforts over the past two months, substantial work remains to complete review of the record of the case, conclude research on the authorities supporting this Court's review, and to finish preparing the petition and appendix for filing. Among other things, this case requires detailed inquiries into this Court's precedents involving the interpretation and application of the Fourth Amendment as applied to investigatory stops. It also requires careful review of a substantial body of case law from federal and state courts applying the Fourth Amendment to investigatory stops in high-crime areas. Additional time is also required to allow Mr. Flowers (who is currently incarcerated), as well as his existing appellate counsel, sufficient opportunity to review and comment on draft filings.

Undersigned counsel has also faced numerous overlapping deadlines in other matters during the time for preparation of a petition for writ of certiorari in this case. Among other things, undersigned counsel of record filed a petition for writ of certiorari in this Court in *Struve v. Iowa*, 21-374, on September 2, 2021; presented oral argument in the U.S. Courts of Appeals for the First and D.C. Circuits on September 14 and September 24, 2021, respectively; and has had merits briefing deadlines in U.S. Court of Appeals matters on August 9, 2021 (*Vecinos para el Bienestar de la Comunidad Costera v. FERC*, D.C. Cir. 20-1491), October 1, 2021 (*Peregrine Oil & Gas II, LLC v. FERC*, D.C. Cir. No. 21-1106), and October 18, 2021 (*Solar Energy Industries Ass'n v. FERC*, D.C. Cir. No. 21-1126 et al.).

Wherefore, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari up to and including Tuesday, November 30, 2021.

Respectfully submitted,



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October 13, 2021