

No. 26A-113

In the Supreme Court of the United States

MARSHALL GRACE,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

TO THE HONORABLE SAMUEL ALITO, AS CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Marshall Grace respectfully requests a 30-day extension of time, to and including October 2, 2026, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

The Court of Appeals issued its decision on March 27, 2026 and denied rehearing on May 5, 2026. On July 20, 2026, Marshall Grace applied for a 60-day extension of time to file a petition for a writ of certiorari, from August 3, 2026 to October 2, 2026. On July 24, 2026, Justice Alito granted a 30-day extension of the time to file a petition for a writ of certiorari. Unless extended, the time to file a petition for a writ of certiorari will expire on September 2, 2026. This application is being filed more than 10 days in advance of that date. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). A copy of the Fifth Circuit's decision is attached as Exhibit A, and a

copy of the Fifth Circuit’s denial of the petition for rehearing is attached as Exhibit B.

1. This case arises from the jury trial of Marshall Grace following a federal prosecution in the U.S. District Court for the Eastern District of Louisiana. Mr. Grace was found guilty of conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, and possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

Mr. Grace appealed to the Fifth Circuit, contending that the District Court erroneously denied Mr. Grace’s *Batson* challenge to the peremptory strike of Juror #8, Edward Davis. Mr. Grace, a black defendant, objected when the Government used a peremptory strike to remove Mr. Davis, a black man, from the jury. Defense counsel made a *Batson* challenge, and the Government’s stated, “race-neutral” explanation was that Mr. Davis had seven sons. The District Court further questioned Mr. Davis and then denied the *Batson* challenge based on the new information learned in questioning. On appeal, Mr. Grace argued that the Government’s original explanation was pretextual and that the District Court clearly erred in denying Mr. Grace’s *Batson* challenge. The Fifth Circuit agreed that the District Court strayed from Supreme Court and Fifth Circuit precedent by erroneously eliciting additional testimony from Mr. Davis, rather than considering the *prosecutor’s* asserted race-neutral explanation. Yet the Fifth Circuit nonetheless affirmed, after determining—in the first instance—that Mr. Grace’s *Batson* claim failed at the third step, because he had not shown that the prosecutor’s asserted race-neutral explanation was pretextual.

2. The Fifth Circuit’s decision is wrong, and the forthcoming petition for writ

of certiorari will show that it warrants this Court’s review. The Fifth Circuit was wrong to conduct the fact-finding inquiry required at the third step of the *Batson* framework itself, *de novo*, rather than remand for the District Court to perform that inquiry in the first instance. *Batson v. Kentucky*, 476 U.S. 79 (1986), established a three-step framework to enforce the constitutional prohibition against prosecutors striking prospective jurors on the basis of race: (1) the defendant must establish a prima facie case of purposeful discrimination (*id.* at 93-97); (2) the burden shifts to the prosecution to articulate a race-neutral reason for the strike (*id.* at 97), and (3) “the *trial court* then will have the duty to determine if the defendant has established purposeful discrimination,” a determination that “largely will turn on evaluation of credibility” (*id.* at 98 & n.21 (emphasis added)). Just last Term, this Court described *Batson*’s “essential third step” as giving “defense counsel ... an opportunity to rebut the prosecutor’s race-neutral reason as pretextual, and *the trial court* in turn decid[ing] whether the prosecutor’s race-neutral reason for striking a juror is pretextual ‘in light of all evidence with a bearing on it.’” *Pitchford v. Cain*, 146 S. Ct. 1345, 1349 (2026) (emphasis added) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005)). This Court has explained that “the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge” and “recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge’s province.” *Flowers v. Mississippi*, 588 U.S. 284, 302-303 (2019) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). The Fifth Circuit should not have arrogated the role of fact-finder.

By conducting *Batson*’s third step itself, *de novo*, the Fifth Circuit split with at least three other circuits, which have recognized that this analysis must be performed

by the district court in the first instance, subject to review for clear error. *See United States v. Kimbrel*, 532 F.3d 461, 468-469 (6th Cir. 2008) (“*Batson*’s third step ... presents factual questions that hinge on ring-side credibility determinations that no appellate court can fairly make on the basis of a non-sentient record”); *United States v. Taylor*, 509 F.3d 839, 845-846 (7th Cir. 2007) (remanding to district court to “supplement[] the record with its findings about whether the government’s stated reason for exercising a peremptory challenge ... is credible, or whether the defendants met their burden of demonstrating discrimination” and recognizing that “[t]he third step of *Batson* is a credibility determination—a question of fact” and “[o]nly the district judge, who observed the voir dire firsthand, can make that determination in the first instance”); *United States v. Joe*, 928 F.2d 99, 103-104 (4th Cir. 1991) (remanding to district court for a *Batson* violation analysis).

This issue is of critical importance. “Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.” *Flowers*, 588 U.S. at 301. *Batson* “protect[s] the rights of defendants and jurors, and ... enhance[s] public confidence in the fairness of the criminal justice system.” *Ibid.* Enforcement of the *Batson* framework is essential to “guard[] against any backsliding.” *Ibid.*

3. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel was just recently retained to represent petitioner at the U.S. Supreme Court and requires time to familiarize himself with the district court and appellate records. He has several other matters with proximate due dates, including: a reply brief in support of a mandamus petition in *In re Aya Healthcare Services, Inc.*, No. 26-3867 (9th Cir), due on August 10, 2026; an opposition

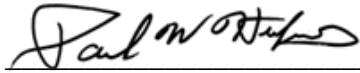
to a cross-motion for summary judgment and reply in support of a motion for summary judgment in *Vanda Pharmaceuticals Inc. v. FDA*, No. 1:23-cv-02812 (D.D.C.), due on August 17, 2026; a motion for summary judgment in *Vanda Pharmaceuticals Inc. v. FDA*, No. 1:26-cv-01443 (D.D.C.), due on August 19, 2026; a response brief in *Holmes v. Varsity EmergencHealth Holdings, LLC*, No. 15-26-00078-CV (Tex. Ct. App.), due on August 26, 2026; a response brief in *Comité International Olympique v. Xiamen Olymate Import & Export Co., Ltd.*, No. 26-4218 (9th Cir.), due on August 27, 2026; an opening brief in *O'Dell v. Aya Healthcare Services, Inc.*, No. 26-3776 (9th Cir.), due on September 2, 2026; a response brief in *District of Columbia v. Robertson*, No. 26-8001 (D.C. Cir.), due on September 9, 2026; a reply brief in *Kinch v. Aya Healthcare Services, Inc.*, No. A175566 (Cal. Ct. App.), due on September 21, 2026; oral argument in *Vanda Pharmaceuticals Inc. v. FDA*, No. 25-1105 (D.C. Cir.), on September 23, 2026; a reply brief in *Vanda Pharmaceuticals Inc. v. FDA*, No. 26-1064 (D.C. Cir.), due on September 25, 2026; and oral argument in *Vanda Pharmaceuticals Inc. v. MSN Pharmaceuticals, Inc.*, No. 25-3045 (3d Cir.), on September 29, 2026.

4. Undersigned counsel also has ongoing teaching obligations as a director of Yale Law School's Supreme Court Advocacy Clinic. A 30-day extension would allow members of the clinic to assist Mr. Grace in researching and preparing the petition.

For the foregoing reasons, the application for a further 30-day extension of time, to and including October 2, 2026, within which to file a petition for a writ of certiorari in this case should be granted.

August 07, 2026

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Paul W. Hughes", is written over a horizontal line.

Paul W. Hughes

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