No. 21-340

In the

Supreme Court of the United States

ORLANDO CARTER,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF D.C. ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The D.C. Association of Criminal Defense Lawyers (DCACDL) is an organization formed of criminal defense lawyers in the District of Columbia, dedicated to providing a unified voice on matters of criminal defense law in the District. In accordance with its Mission, DCACDL seeks to promote constant improvement in all aspects of the administration of criminal justice, from continuing legal education to ensuring protection of the rights of individuals in the criminal justice system.

[1] The parties have received timely notice of *amicus*'s intention to file this brief and have consented in writing. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment guarantees the right to an impartial jury in criminal trials—a right that Alexander Hamilton called the "palladium of free government." THE FEDERALIST NO. 83 (Alexander Hamilton). In *Groppi v. Wisconsin*, 400 U.S. 505 (1971), this Court held that, in some cases, "only a change of venue [is] constitutionally sufficient to assure … [an] impartial jury." *Id.* at 510. Therefore, "categorically prevent[ing] a change of venue for a criminal jury trial" is unconstitutional. *Id.* 507–08.

But in the decision below, the D.C. Court of Appeals rejected *Groppi*'s unequivocal holding and insisted that criminal defendants in D.C. Superior Court—unlike criminal defendants in literally every other trial court in the country—are categorically barred from even *seeking* a change of venue, no matter the level of pre-trial publicity. An inferior court can never overrule or disregard this Court's decisions, *see* Pet. 7, and that alone provides a sufficient basis for granting the petition for a writ of *certiorari* and reversing. But, as *amicus* demonstrates below, the D.C. Court of Appeals' proffered justifications for disregarding *Groppi* are especially weak.

The court first concluded that although there is a constitutional right to seek a transfer in Wisconsin (where *Groppi* arose), that is merely because Wisconsin "is a large state," whereas the District of Columbia is too small to have to comply with the constitutional right to seek transfer. Pet.App.19a–20a n.14. The court next claimed that there is no mechanism to transfer the case to another court that could hear it. *Id.*

Neither of these justifications is correct. *First*, this Court has unequivocally stated that constitutional rights cannot "differ from locality to locality." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010). The "provisions of the Bill of Rights apply with full force to both the Federal Government and the States." *Id.* at 750. And even more specifically, this Court has held for over 130 years that criminal defendants in the District of Columbia are entitled to the same Sixth Amendment protections as criminal defendants elsewhere in the country. *Callan v. Wilson*, 127 U.S. 540, 549–50 (1888).

Second, there is a simple path for transferring a criminal case out of D.C. Superior Court. The D.C. Superior Court's own criminal procedure rules expressly state that U.S. District Courts outside of the District of Columbia have jurisdiction to adjudge guilt and sentence defendants for violations of the D.C. Code. This makes sense: the prosecuting authority in District Court is the same sovereign as in D.C. Superior Court (i.e., the federal government). If those courts can adjudge guilt and sentence defendants, those courts could have tried the defendants in the first instance. There are other ways to effect a transfer out of the District, as well. But the D.C. Court of Appeals did not seriously consider any of these options. Rather, it chose to take the one path directly foreclosed by this Court's precedent: "categorically prevent[ing] a change of venue for a criminal jury trial." *Groppi*, 400 U.S. at 507–08.

This Court should grant the petition for a writ of *certiorari* and confirm—again—that the District of Columbia is not exempt from complying with the Bill of Rights in full.

ARGUMENT

I. D.C. Has A Troubling History Of Claiming It Is Exempt From Fully Complying With The Bill Of Rights.

In *Groppi*, this Court recognized a bright-line rule dictated by the Sixth Amendment's guarantee of an impartial jury: "[U]nder the Constitution a defendant must be given an opportunity to show that a change of venue is required in his case." 400 U.S. at 511. Given that the Sixth Amendment "is directly applicable to the District of Columbia," *In re J.T.*, 290 A.2d 821, 822 (D.C. 1972), it is inescapable that the right to seek a transfer of venue must likewise apply in the District of Columbia.

But the D.C. Court of Appeals blinked this logic, holding that *Groppi* cannot apply in the District of Columbia because it is too small geographically. *See* Pet.App.19a–20a n. 14. This makeweight argument directly contradicts this Court's precedents and represents yet another instance where the District has improperly claimed a special exemption from complying with the Bill of Rights.

This Court has unambiguously established the principle that fundamental rights cannot vary from locale to locale. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), which incorporated the Second Amendment against the States, the Court rejected the notion that fundamental constitutional rights can "differ from locality to locality." *Id.* at 783. Indeed, that argument had already been buried at least several decades earlier. The Court noted that "[t]hroughout the era of 'selective incorporation,'" Justice John M. Harlan II in particular "fought a

determined rearguard action to preserve the two-track approach," where the extent of constitutional rights could differ between the federal government and States. *Id.* at 784. But "[t]ime and again, however, those pleas failed." *Id.* In the words of *McDonald*, then, the D.C. Court of Appeals' decision below is an attempt to "turn back the clock" to days long past, when certain jurisdictions could claim the Bill of Rights did not fully apply within their borders. *Id.* at 784–85.

The Court has applied this important principle of equal application in several cases specifically involving the District of Columbia, including one addressing the Sixth Amendment right to an impartial jury. Each time, this Court rejected the notion that the District of Columbia is somehow unique when it comes to complying with the Bill of Rights.

The first such case is *Callan v. Wilson*, 127 U.S. 540 (1888), where the petitioner was imprisoned in the District of Columbia upon conviction of conspiracy, without a jury trial. *Id.* at 547. He argued that the Sixth Amendment's jury requirement applied in the District of Columbia—and this Court agreed. The Court, in an opinion written by the first Justice Harlan, noted that the Sixth Amendment's "right to a speedy and public trial by an impartial jury" was "demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing or being in the several states." *Id.* at 549, 550.

The Court confirmed that "[t]here is nothing in the history of the constitution, or of the original

amendments, to justify the assertion that the people of this District [of Columbia] may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property; *especially of the privilege of trial by jury in criminal cases*." *Id.* at 550 (emphasis added). The Court further noted that the right to an impartial jury presumably applied even in the territories, and "[w]e cannot think that the people of this District [of Columbia] have, in that regard, less rights than those accorded to the people of the territories of the United States." *Id.*

Unfortunately, *Callan* was not the last time that the District of Columbia sought to exempt itself from providing the full protections of the Bill of Rights.

In *Bolling v. Sharpe,* 347 U.S. 497 (1954), the respondents argued that the District of Columbia—unlike the States—could operate racially segregated schools without violating due process. *Id.* at 498. But this Court unanimously disagreed, holding that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on States. *Id.* at 500.

Several decades later, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court rejected the argument—raised by the District and by four dissenting Justices—that the Second Amendment should not fully apply within the District due to its "exclusively urban character" as the "Seat of Government." *Id.* at 709, 717 (Breyer, J., dissenting); *see also id.* at 634 (majority opinion rejecting this view). The dissent raised the same point that the D.C. Court of Appeals did here: "the District consists of only 61.4 square miles of urban area," and thus should have been granted a pass from following the same

rules as "[t]he adjacent States," which have much larger areas for shooting, hunting, and target practice. *Id.* at 708 (Breyer, J., dissenting). Because that view did not command a majority in *Heller*—indeed, a majority rejected it—the D.C. Court of Appeals was forewarned that the small size of the District of Columbia would not justify narrowing fundamental rights.

Given this Court's longstanding rejection of the notion that fundamental rights can differ from locale to locale—and specifically that the District of Columbia is not exempt from having to recognize the same fundamental rights as States—the D.C. Court of Appeals was wrong to conclude that criminal defendants in D.C. Superior Court are entitled only to a "Sixth Amendment Lite" that excludes the right to seek a transfer of venue due to pre-trial publicity. Defendants in the District are entitled to no less constitutional protection than defendants in other jurisdictions. *Groppi* therefore fully applies within the District of Columbia just as it does in Wisconsin.

Nor is there any support in *Groppi* itself for the D.C. Court of Appeals' notion that small jurisdictions are exempt from its rule. If anything, the District's small size demonstrates the necessity of having an option to seek transfer of venue. In a small jurisdiction like the District (which is heavily saturated with media coverage), local pretrial publicity is *more* likely to bias potential jurors in ways that only a transfer can remedy. The facts of this case are a prime example. Despite extensive *voir dire*, the trial court was unable to find even ten jurors who were unexposed to pretrial publicity about the case. Pet.App.21a.

This Court should grant the petition for a writ of *certiorari* and hold—once again—that the District of Columbia is not exempt from complying with the Bill of Rights.

II. There Are Simple And Legal Ways To Transfer A Criminal Case Out Of D.C.

The D.C. Court of Appeals also suggested that even if transfer were constitutionally required, a motion seeking such a transfer cannot be entertained because there is no mechanism to transfer the case to another court that could hear it. Pet.App.19a–20a n.14. This is wrong.

The most obvious and expeditious avenue would be to transfer the case to a nearby U.S. District Court, such as the U.S. District Court for the Eastern District of Virginia. Because the District of Columbia is a federal jurisdiction, the sovereign pursuing charges in D.C. Superior Court is the same sovereign as in a U.S. District Court (i.e., the federal government). *See United States v. Robertson*, 810 F.2d 254, 257 (D.C. Cir. 1987) (holding that "the District most assuredly is not" a separate sovereign from the federal government). Indeed, the U.S. Department of Justice's Assistant U.S. Attorneys prosecute all D.C. Superior Court criminal cases *and* all U.S. District Court criminal cases, so a transfer would not even necessitate a change in prosecutors.

The common sovereign in these court systems eliminates any claim—like Respondent made below—that transferring a case out of D.C. Superior Court would be like transferring a criminal case from a Virginia state court to a Maryland state court. Where the sovereigns are different, there would undoubtedly

be thorny issues of jurisdiction and sovereignty. But not so here.

This solution is so obvious and permissible that the D.C. Superior Court criminal rules already allow a defendant charged with violations of the D.C. Code to plead guilty and be sentenced in any U.S. District Court. D.C. Super. Ct. R. 20. This confirms that U.S. District Courts have jurisdiction over criminal charges arising in D.C. Superior Court. As this Court held over a century ago, "[w]e assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb, the court in which he was … convicted must have had jurisdiction to try him for the offense charged." *Grafton v. United States,* 206 U.S. 333, 345 (1907).

If a U.S. District Court can adjudge a defendant guilty and sentence him to (possibly) life in prison, that same court could have tried him in the first instance.[2]

The D.C. Court of Appeals briefly acknowledged this existing procedural rule but dismissed it by saying that it does not apply to defendants arrested inside the district, as Petitioner was. Pet.App.20a n.14. That makeweight and somewhat cryptic response seems to acknowledge that a U.S. District Court would indeed have jurisdiction over criminal cases charging D.C. Code violations, but—what a shame!—there is no specific D.C. Superior Court criminal rule saying that a case can be transferred to

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[2] Nor are the defendant's vicinage rights an obstacle, as he necessarily waives those by seeking a transfer.

a U.S. District Court where the defendant was arrested within the District's confines.

But Petitioner does not need a D.C. Superior Court rule giving him permission to raise what this Court has held is a constitutional right. The Sixth Amendment itself provides Petitioner with the necessary procedural mechanism for seeking a transfer. Indeed, there was no mechanism under Wisconsin procedures in *Groppi* for seeking a transfer—but that did not stop this Court from holding that such an option must be made available. 400 U.S. at 507.

Although transferring to a U.S. District Court is by far the simplest and most obvious solution, there are other possibilities that would satisfy all legal requirements. For example, the D.C. Superior Court could sit in the District of Columbia with a D.C. Superior Court judge presiding and Assistant U.S. Attorneys prosecuting—but draw jurors from outside of the District (again, assuming the defendant waived his vicinage rights, which he necessarily would by seeking such relief), likely by using a nearby U.S. District Court's federal venire process.

Nor is there any inherent practical difficulty in a D.C. court considering a motion to transfer a criminal case. The D.C. Superior Court has the same small geographic scope as the U.S. District Court for the District of Columbia, which routinely considers motions to transfer venue due to pre-trial publicity. *See, e.g., United States v. Gooch*, 23 F. Supp. 3d 32, 43 (D.D.C. 2014); *United States v. Edelin*, 76 F. Supp. 2d 1, 3 (D.D.C. 1999); *United States v. North*, 713 F. Supp. 1444, 1444 (D.D.C. 1989); *United States v. Childress*, 746 F. Supp. 1122, 1138 (D.D.C. 1990),

aff'd, 58 F.3d 693 (D.C. Cir. 1995); *United States v. Poindexter*, 725 F. Supp. 13, 37 (D.D.C. 1989); *United States v. Mitchell*, 397 F. Supp. 166, 179 (D.D.C. 1974).

For these reasons, the D.C. Court of Appeals was wrong to suggest that transferring a criminal case out of D.C. Superior Court would be illegal, impossible, or impractical. There would be no obstacle—legal or practical—for a case to be transferred to a nearby U.S. District Court for further proceedings upon a proper showing of pretrial publicity.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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