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

REPLY BRIEF FOR THE PETITIONER

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The Government does not contest that the District of Columbia Court of Appeals imposes a rule that categorically bars all criminal defendants in the District from seeking a change of venue in any and all cases, regardless of the degree of pretrial publicity or community prejudice surrounding the case. And the Government has no meaningful answer to the fact that the D.C. Court of Appeals' categorical bar is on all fours with the Wisconsin statute this Court invalidated in *Groppi v. Wisconsin*, 400 U.S. 505 (1971), as a violation of the Sixth Amendment.

Unable to distinguish this case from *Groppi*, the Government instead attempts to make a harmless error argument, contending that any procedural deficiency inherent in the D.C. Court of Appeals' bar on seeking transfers was of no moment because the trial court supposedly conducted a careful analysis of the record to determine that Mr. Carter's "rights to a fair and impartial jury were protected through the voir dire process." BIO 8 (quoting Pet. App. 21a). But that exact approach was squarely rejected by the *Groppi* majority, which held that the voir dire process "is not always adequate to effectuate the constitutional guarantee" to an impartial jury, and therefore, "under 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 510-11 (emphasis added). The Government's position here is the same one that Justice Black advanced in dissent and the *Groppi* majority refused to adopt.

The Government fares no better with its argument that *Groppi* is outdated in light of more recent Sixth

Amendment decisions on peremptory challenges. *Groppi* remains binding Supreme Court precedent unless and until this Court declares otherwise and neither the Government nor the District of Columbia can overrule it. Absent this Court's intervention to invalidate the D.C. Court of Appeals' rule, defendants in the District of Columbia will continue to receive lesser constitutional protections than defendants charged and tried anywhere else in the United States. That is untenable and the Court should therefore grant the petition for writ of certiorari.

A. The Government Does Not Meaningfully Dispute That The Decision Below Directly Contradicts *Groppi v. Wisconsin*.

The Government's brief makes no serious attempt to differentiate the D.C. Court of Appeals' rule from the Wisconsin statute this Court struck down fifty years ago in *Groppi v. Wisconsin*, 400 U.S. 505 (1971).[1] The Wisconsin statute in *Groppi* had been interpreted by the Wisconsin Supreme Court to "categorically prohibit changes of venue for misdemeanor trials." BIO 11 (citing *Groppi*, 400 U.S. at 506-07). The D.C. Court of Appeals' rule at issue here is indistinguishable. Just as in *Groppi*, the trial court summarily denied the defendant's motion for a change of venue here during a pretrial hearing based on the court's understanding that "there is no

[1] Curiously, the Government does not even mention *Groppi* until the last four pages of its brief in opposition, despite the fact that the Question Presented in this case is "Whether the District of Columbia Court of Appeals' categorical prohibition on changes of venue deprives defendants of the right to trial by an impartial jury in violation of this Court's decision in *Groppi v. Wisconsin*, 400 U.S. 505 (1971)." Pet. i.

ability for change of venue in the District of Columbia." Pet. App. 129a; *see also* Pet. at 5. Relying on its prior precedent in *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), the D.C. Court of Appeals then affirmed that a change of venue is not available to criminal defendants in the District of Columbia. *See* Pet. App. 18a. Hence, the D.C. Court of Appeals' rule categorically bans motions to transfer for *all* criminal defendants tried in the District—not just misdemeanor defendants as was the case in *Groppi*. And it does so regardless of the degree of community prejudice or publicity surrounding the crime.

Unable to distinguish the D.C. Court of Appeals' rule from the Wisconsin statute in *Groppi*, the Government primarily argues that the "actual impaneling of an impartial jury in [Mr. Carter's] case" forecloses him from arguing that he should have been allowed the opportunity to show that community prejudice warranted a transfer of venue. BIO 8-10. But to adopt the Government's view would be to adopt an approach squarely rejected by the majority in *Groppi*.

Indeed, the Government's harmlessness rationale mirrors Justice Black's dissent in *Groppi*, in which he reasoned that the Sixth Amendment right to an impartial jury trial could be sufficiently protected by "granting a continuance until community passions subside; by challenging jurors for cause and by preemptory challenges during voir dire proceedings." 400 U.S. at 515 (Black, J. dissenting). In Justice Black's view, the Constitution did not require that a defendant be afforded the right to seek a change of venue to guarantee the Sixth Amendment right. *See id.* But the

Groppi majority unequivocally rejected Justice Black's view and instead held that "challenges to the venire" are "not always adequate" to ensure the right to an impartial jury, *id.* at 510, and as such "under the Constitution a defendant must be given an opportunity to show that a change of venue is required in his case," *id.* at 511.

The Government does not dispute that Mr. Carter was never given the opportunity to show that a change of venue was required in his case. Thus, the Government's contention that Mr. Carter does not "meaningfully contest the court of appeals' assessment that no biased juror was impaneled in his case," BIO 9, does not resolve the question of whether Mr. Carter's Sixth Amendment right to an impartial jury trial was violated under *Groppi* when the trial court foreclosed any opportunity to make any showing as to community prejudice.

Continuing with the harmlessness rationale, the Government further claims that Mr. Carter's failure to: (i) "strike any of the three jurors who reported exposure to pretrial publicity," (ii) present any evidence on appeal as to the jury's partiality, or (iii) "object to any of the impaneled jurors" before or after their selection now precludes his Sixth Amendment claim. BIO 9-10 (citing Pet. App. 21a-22a) (cleaned up). Again, the Court's holding in *Groppi* forecloses that argument. The *Groppi* Court rejected the suggestion that Father Groppi was "not in a position to attack the statute because he made an insufficient showing of community prejudice," in part because when he made a motion for a transfer of venue, his motion was summarily denied, thereby "foreclosing

any opportunity to produce evidence of a prejudiced community." 400 U.S. at 508 n.5.

In any event, Wisconsin raised the exact same argument now made by the Government here. In *Groppi*, Wisconsin argued that the record was "entirely devoid of the type of evidence commonly relied upon to show the temper of a community allegedly permeated with prejudice against a defendant." Br. of Resp't at 7, *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (No. 26), 1970 WL 136302. Wisconsin further emphasized that the record revealed that a jury was impaneled and sworn in prior to the noon recess on the first day of trial, seemingly with "no serious difficulty." *Id.* at 8. Hence in *Groppi*, no motion to strike potential jurors was in the record, nor was there substantial evidence of community prejudice. In fact, the only evidence in the record of community prejudice in *Groppi* took the form of an affidavit signed by Father Groppi himself. *Id.* at 9 (asserting that Groppi failed to even incorporate "allegedly prejudicial media reports in the affidavit"). And Groppi also failed to renew his request for a transfer after voir dire. *See id.* at 8*; see also Groppi*, 400 U.S. at 513.

That the facts here are analogous to the record on which *Groppi* was decided only further underscores that the option to seek a transfer itself provides the procedural mechanism through which a defendant may introduce evidence of community prejudice into the record. Without that mechanism to introduce evidence, Mr. Carter had no way to build the record of community prejudice below. He was only able to introduce a modicum of evidence of the widespread news coverage

in his motion for transfer, at which point the court ruled that under no circumstances would it consider a transfer. *See* Pet. App. 117a-118a. To penalize Mr. Carter for a failure to show community prejudice when he was barred from doing so is precisely what *Groppi* forbids. Indeed, the *Groppi* majority understood the bind in which such reasoning would place defendants—it was part of the reason they held that the opportunity to present evidence was constitutionally required to protect the defendant's Sixth Amendment right to an impartial jury trial. 400 U.S. at 508 n.5, 511.

The Government's only real attempt to distinguish *Groppi* is to argue that the *Groppi* court "did not order a new trial as a remedy." BIO 12. But Mr. Carter does not petition this Court to automatically order a new trial. Instead, just as in *Groppi*, he requests that his convictions be vacated, and the case remanded to the District of Columbia to hold a hearing and determine the appropriate "corrective relief" that must be afforded. 400 U.S. at 512 n.13.

In sum, the categorical bar on seeking a change of venue in the District of Columbia is no different than the categorical bar on seeking a change of venue in Wisconsin at issue in *Groppi*. Both violate a defendant's Sixth Amendment rights.[2] The Government cannot

[2] In the decision below, the D.C. Court of Appeals suggested that even if a transfer of venue 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. The petition (and *amicus* the D.C. Association of Criminal Defense Lawyers) explained why that is not true. *See* Pet. at 11-13; Br. of D.C. Association of Criminal Defense

escape that conclusion by making the very same harmlessness arguments the *Groppi* majority already rejected.

B. The Government Is Incorrect To Suggest That *Groppi* Is No Longer Good Law.

The Government argues that "[r]eading *Groppi* to allow for new-venue claims even where a defendant actually had an impartial jury would place it significantly out of step with subsequent Sixth Amendment decisions." BIO 12. And that "if the defendant is convicted by a jury on which no biased juror sat, he has not been deprived of any constitutional right," even where a trial court erroneously denied a defendant's procedural remedy. *Id.* at 13 (quotation marks and alterations omitted). The Government goes a step too far. Whether this Court's subsequent Sixth Amendment decisions cabin *Groppi* is for this Court alone to decide. The Government's brief points to no decision from this Court in the fifty years since it decided *Groppi* critical of the majority's holding in the case, nor any decision suggesting that the case be cabined to its facts. Nor is there any such decision. Indeed, the Court has cited *Groppi* 14 times since it was decided, never calling it into question. It is not for the Government or the D.C. Court of Appeals to overrule this Court's holdings.

In any event, the decisions relied on by the Government to suggest that *Groppi* is "out of step" with modern Sixth Amendment jurisprudence are inapposite

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Lawyers as Amicus Curiae at 8-11. The Government does not defend the D.C. Court of Appeals' reasoning on this point and therefore must be deemed to have waived any argument that transfer is not available as a practical or legal matter.

and concern peremptory challenges to individual jurors rather than the need for changes of venue based on widespread community prejudice. In *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988), the Court held simply that the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. Likewise, in *United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000), the Court found that a defendant's due process rights were not violated where a defendant had to use a peremptory challenge to remove a juror who should have been removed for cause. Both cases proceed from the premise that "peremptory challenges are not of constitutional dimension." *Ross*, 487 U.S. at 88; *cf. Martinez-Salazar*, 528 U.S. at 311. In contrast, the Court in *Groppi* clearly considered the opportunity to show community prejudice to be an issue of constitutional dimension. The *Groppi* Court found—as the Government itself acknowledges—that the "disallowance of any opportunity to show the kind of prejudice that would justify a venue change was inconsistent with a defendant's right to a fair trial." BIO 11 (citing *Groppi*, 400 U.S. at 509-510).

The Government also contends that Mr. Carter's case is "far afield" from *Rideau v. Louisiana*, 373 U.S. 723 (1963). BIO 10. In the Government's estimation, *Rideau*, a case in which the Court held that a change of venue was constitutionally sufficient to ensure an impartial jury, is wholly distinguishable from Mr. Carter's because it took place in a "small Louisiana town" in which the defendants' videotaped confession was televised multiple times prior to trial, whereas Mr. Carter's case took place in the metropolitan Washington D.C. area, almost two years after the murders took

place. *See id.* As discussed above, Mr. Carter was categorically barred from being able to develop the record as to community prejudice. But, even on the record Mr. Carter was able to establish below, his case for transfer is stronger than Father Groppi's was, and certainly closer to the facts of *Rideau* than the Government's brief would allow.

In its opposition papers to Mr. Carter's motion for change of venue, the Government conceded that the "South Capitol Street Massacre," as the case came to be known in the media, garnered "considerable media attention worldwide in the days following the shootings." Opp. to Mot. for Change of Venue at 1 (D.C. Super. Ct.). Mr. Carter's arrest and booking were shown on local television, Pet. App. 117a, and between March and July 2010, the *Washington Post* published 28 separate news stories that mention Mr. Carter by name. *Id.* at 2. Several national newspapers carried news of his arrest, including the *Chicago Tribune* and *USA Today*, *id.*, and local media coverage leading up to the trial was also intense—a search of the *Washington Post*'s archive showed at least 19 stories that named Mr. Carter between February and April 2012, Reply Br. of Appellant at 12 n.5 (D.C.). By contrast, the videotape in *Rideau* was televised only three times to a viewership of several thousand. *See Rideau*, 373 U.S. at 726-27.

The Government also relies on dicta from *Skilling v. United States*, 561 U.S. 358 (2010) and *Mu'Min v. Virginia*, 500 U.S. 415 (1991) to attempt to distinguish this case from *Rideau*. BIO 10. That reliance is misplaced. As the Court in *Skilling* reiterated, the ruling in *Mu'Min* was "context specific" to the precise

issue of voir dire examination facing the Court. *Skilling*, 561 U.S. at 444-45. The *Mu'Min* Court stressed that "*had* the trial court been confronted with the wave of public passion engendered by pretrial publicity," the Constitution may well have required more extensive examination of the potential jurors. 500 U.S. at 429 (emphasis added). Here, Mr. Carter raises a different issue: that the D.C. Court of Appeals' categorical bar on change of venue motions deprived him of the opportunity to present evidence of such "public passion" in his case.

C. This Court's Intervention Is The Only Means Of Bringing The District Of Columbia Into Compliance With The Constitution.

The Government's contention that the D.C. Court of Appeals' holding "does not conflict with any decision of this Court or of another court of appeals" actually counsels in support of the need for this Court's review, not against it. BIO 8. All fifty states, and the federal courts follow *Groppi* and allow criminal defendants the opportunity to seek a change of venue in cases where there is the potential for community prejudice. *See* Pet. 17. The D.C. Court of Appeals' position as an outlier means that simply because of where they are charged, criminal defendants in the District will receive lesser constitutional protections than defendants charged and tried anywhere else in the country. That cannot stand for the approximately 7,400 defendants charged with

misdemeanor and felony crimes in the District of Columbia each year.[3]

The D.C. Court of Appeals' erroneous interpretation of the impartial jury right will not be resolved absent this Court's intervention. *See* Pet. 16-17. Unfortunately, this is not the first time the District of Columbia has considered itself unbound by the Bill of Rights. As *amicus* the D.C. Association of Criminal Defense Lawyers detailed, the District of Columbia has a long and troubling history in this respect. Br. of D.C. Association of Criminal Defense Lawyers as Amicus Curiae 4-7. But this Court first held more than a century ago that criminal defendants in the District should receive the same Sixth Amendment protections as criminal defendants elsewhere in the country. *Callan v. Wilson*, 127 U.S. 540, 549–50 (1888). Unless this Court intervenes to enforce that guarantee, the D.C. Court of Appeals will continue to ignore it.

This case is also the right vehicle to address the D.C. Court of Appeals' categorical bar on permitting criminal defendants to seek a change of venue. The Government does not identify any vehicle problem here. The court's failure to follow *Groppi* was properly raised and preserved at every stage of the proceedings. Pet. App. 18a, 116a, 118a-123a. Moreover, that this case comes to the Court on direct review rather than through a habeas petition means that it presents a particularly clean vehicle for the Court to reach the issue. The Government presents no contrary arguments.

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[3] *See* District of Columbia Courts: Statistical Summary, at 12 (2020), https://www.dccourts.gov/sites/default/files/2020_Statistical_Summary.pdf.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2021