

No. 20-1279

IN THE SUPREME COURT OF THE UNITED STATES

ANGELICA CASTAÑON, ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR APPEAL TO
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF THE DISTRICT OF COLUMBIA
AFFAIRS COMMUNITY OF THE DISTRICT
OF COLUMBIA BAR, AND OTHER CON-
CERNED DISTRICT OF COLUMBIA LEGAL
ORGANIZATIONS AND PROFESSIONALS
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS AND REVERSAL**

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INTERESTS OF *AMICI CURIAE*¹

I. The Importance of Granting D.C. Residents Full and Equal Democratic Rights.

The District of Columbia Affairs Community of the District of Columbia Bar (“D.C. Affairs Community”), other concerned Legal Organizations (“Legal Organization *Amici*”), and District of Columbia Legal Professionals (“Individual *Amici*”) (collectively, the “*Amici*”)² join this case as *amici curiae* because they believe that failure of the U.S. Government to ensure that Washington, D.C. (“D.C.”) citizens have their own elected representatives in Congress who vote in their constituents’

¹ Counsel of record for all parties received notice of *Amici Curiae*’s intention to file this brief at least ten days before the due date. All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to fund this brief.

² The views expressed are those of the D.C. Affairs Community. The D.C. Bar itself made no monetary contribution to fund the preparation or submission of this brief. Moreover, the views expressed herein have been neither approved nor endorsed by the D.C. Bar, its Board of Governors, or its general membership. In addition, the views expressed of past bar presidents represent only those of such individuals and not those of any bar association to which they belong or led.

interests and work to redress constituents' concerns violates basic principles of justice.³

All individual *Amici* live, work, or are based in D.C., and all work to advance justice and the rule of law. *Amici* believe this brief will assist the Court by discussing ways that D.C.'s lack of voting representation in the U.S. House of Representatives poses potential and often real disadvantages to them as legal organizations and lawyers.

II. The Interests of the D.C. Affairs Community.

The D.C. Affairs Community has a keen interest in D.C. "Home Rule" and administration of justice in D.C. The D.C. Affairs Community conducts programs and issues public statements on issues of vital concern to lawyers practicing in D.C. and citizens of D.C. Past programs included public forums for candidates for D.C. Mayor and Council, legislation like the local family leave act and public-financing of local elections, public-safety issues, fiscal issues such as D.C.'s annual budget and budget autonomy, D.C. statehood and congressional voting rights, the initiative and referendum process, and current affairs covered by the local press. In addition to public statements, the Community has submitted testimony before Congress and D.C. Council, and filed *amicus* briefs on Home Rule matters. The Community along with most D.C. Bar

³ A list of the *Amici* is included in the accompanying Appendix 1.

former presidents were granted standing to file *amicus curiae* briefs in *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004) (regarding D.C.'s fiscal health, *id.* at 3 n.1), *aff'd*, 428 F.3d 303 (D.C. Cir. 2005), and 547 U.S. 1143 (2006) (petition for *certiorari*).

III. The Interests of Other Legal Organization *Amici*.

Legal Organization *Amici* serve members who live or work, and represent clients who reside or have significant interests, in D.C. In addition to the D.C. Affairs Community, Legal Organization *Amici* include the Bar Association of the District of Columbia; Greater Washington Area Chapter, Women Lawyers Division of the National Bar Association; Washington Bar Association; and Women's Bar Association of the District of Columbia. All Organizational *Amici* work to pursue justice, advance American ideals and equality, and support and improve the justice system. Like the individual *Amici*, many of whom are past leaders of these organizations, these groups have supported self-government for D.C. citizens and, accordingly, have a unique interest in the ability of D.C. citizens to govern themselves.

IV. The Interests of Individual *Amici*.

Individual *Amici* live or work in D.C., and either represent clients who reside or have significant interests in D.C., or support self-governance for resi-

dents of D.C. (or both). They include past presidents of D.C. bar associations and other leaders in the D.C. legal community.⁴

Individual *Amici* represent and advise clients on matters in D.C. and elsewhere. They work on issues of great concern to their clients, whether businesses or individuals, paying or pro-bono. Individual *Amici* bring an important voice to this discussion as recognized leaders in the D.C. legal community. They have sought to enhance self-government for D.C. citizens and, accordingly, have a unique interest in the ability of D.C. citizens to govern themselves. *Amici* explain disadvantages, large and small, that affect their efforts to advance their missions and to support the rule of law, administration of justice, and rights of D.C. citizens to petition Congress for a redress of grievances.

INTRODUCTION

In this case, eleven registered D.C. voters sought voting representation in Congress for all American citizens living in D.C. *Castañon v. United States*, 444 F. Supp. 3d 118, 123 (D.D.C. 2020) (Pet. Appx.

⁴ The American Bar Association, one of the world's largest voluntary professional organizations, passed a resolution in 1999, supporting "the principle that citizens of [D.C.] should not be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress, which governs them." See ABA, 2019–2020 Policy and Procedures Handbook, Resolution 99A115, at 300, https://www.americanbar.org/about_the_aba/aba-policy-and-procedures-handbook/ (last visited April 12, 2021).

B). Plaintiffs alleged the lack of voting representation in Congress infringes on the equal protection and due process rights of all adult American citizens living in D.C. *Id.* Plaintiffs sued federal officials who have substantial authority to apportion seats in the House of Representatives, in their official capacity, including the Secretary of Commerce. *Id.*

Although D.C. has a Delegate in the House of Representatives, the Delegate cannot vote. 2 U.S.C. § 25a(a). Thus, Plaintiffs sought a declaration that the Delegate must have the same powers and privileges afforded to other Members of the House of Representatives, including the power to vote on all legislation considered by the House. Pet. Appx. B at 18a. Plaintiffs sought injunctive relief to require federal officials to include D.C. residents in the Secretary of Commerce's calculations used to apportion congressional seats. *Id.*

On March 12, 2020, a three-judge panel of the U.S. District Court for the District of Columbia, dismissed Plaintiff's motion for summary judgment and, held that the Constitution foreclosed Plaintiffs' claims challenging apportionment of congressional seats. *Id.* at 149. The district-court panel therefore dismissed Plaintiffs' claims related to apportionment. *Id.*

On September 16, 2020, the district court panel denied Plaintiffs' motion for reconsideration. *Castañon v. United States*, No. CV 18-2545, 2020 WL 5569943, at *1 (D.D.C. Sept. 16, 2020) (Pet. Appx. C). Plaintiffs petitioned for appeal to this Court under 28 U.S.C. § 1253(b) and 28 U.S.C. § 2101(b).

Because the District Court's errors affect the rights of more than 700,000 citizens of D.C., *Amici* file this brief in support of Plaintiffs.

SUMMARY OF ARGUMENT

This case raises serious constitutional questions about the lack of voting representation in the U.S. Congress for Americans who live in D.C. This appeal focuses, as set forth in the Petitioners' Jurisdictional Statement, on Congress's failure to ensure voting representation in the House of Representatives for citizens of D.C. This Court should note probable jurisdiction and resolve these issues in Petitioners' favor for the following reasons.

First, D.C.'s lack of voting rights and representation contradicts the Constitution's promises of equal protection, due process, and rights of association; and sometimes may cause *Amici* to explore other ways to advocate for clients in D.C. given the lack of any voting representation in Congress and, specifically, in the House of Representatives.

Second, D.C.'s lack of voting representation negatively affects the administration of justice. Three recent examples include:

(i) the events of January 6, 2021, where a violent mob breached the U.S. Capitol in an attempt to prevent Congress from certifying results of the 2020 presidential election. It took hours for D.C.'s Mayor to gain approvals needed from the Federal Government to deploy D.C.'s National Guard to protect the U.S. Capitol;

(ii) inability of D.C. courts to function during Federal Government shutdowns; and

(iii) ongoing delay in appointing judges to serve on D.C.'s local courts.

Third, D.C. does not control budgeting and appropriation of its local tax dollars. This is the injustice that fueled the American Revolution. It was wrong then, and it is wrong now. Politicians not elected by D.C. citizens frequently grandstand and take positions contrary to D.C.'s duly enacted legislation and D.C.'s interest.

Finally, D.C. residents cannot adequately petition the Federal Government for a redress of grievances because they lack voting representation in Congress. This violation of the First Amendment should also be remedied, now.

ARGUMENT

I. D.C.'s Lack of Voting Representation May Force Lawyers to Explore Other Ways to Advocate for Clients in D.C.

A. In Taking the Lawyers' Oath, D.C. Lawyers, Like Other Lawyers Practicing in the United States, Swear to Uphold the Constitution.

D.C. Bar members swear to uphold the Constitution and "demean" themselves "uprightly and according to law."⁵ Ethics rules obligate D.C. lawyers

⁵ The oath reads: "I . . . do solemnly swear (or affirm) that as

to represent clients with diligence and competence, and “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁶ Because of D.C.’s lack of voting representation, lawyers often must explore alternative methods to advocate for D.C. clients.

B. Lawyers Must Consider Whether Their Advocacy for D.C. Clients Is Affected by the Lack of D.C. Voting Representation.

A key tenet of self-government is the ability of citizens to control state and local government matters, a prerogative enjoyed by citizens in the 50 states. Those governments enjoy local “budget autonomy”—the ability to spend locally-generated tax dollars without congressional appropriation. They also enjoy legislative autonomy—the ability to enact and implement local laws without congressional review.⁷ Lawyers participate in such matters in states and localities around the country, but

a member of the Bar of this Court, I will demean myself uprightly and according to law; and that I will support the Constitution of the United States of America.” D.C. Court of Appeals, Attorney Oath of Admission to the D.C. Bar, <https://www.dccourts.gov/sites/default/files/2017-07/DCCA%20Rule%2046%20Admission%20to%20the%20Bar.pdf>.

⁶ Rule 1.1, Competence, American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ (last visited April 1, 2021).

⁷ See, e.g., *H.R. 960 & H.R. 1045, Greater Autonomy for the Nation’s Capital: Hr’g Before H. Subcomm. on Fed. Workforce,*

must consider whether their advocacy for D.C. clients will be affected by congressional representatives who do not answer to citizens in D.C.

The D.C. Home Rule Act—signed into law on December 24, 1973 by President Nixon after decades of agitation—was intended to ensure that D.C. citizens had power over local affairs.⁸ The Home Rule Act sought “to the greatest extent possible, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters,” and grant D.C. power “to all rightful subjects of legislation.”⁹ The Home Rule Act expressly authorizes D.C.’s Council and voters to amend key provisions and amend congressional enactments directed exclusively to D.C.¹⁰

Americans living in D.C. have no voting representation in the House of Representatives and no representation at all in the Senate.¹¹ While the

Postal Serv., & D.C., 111th Cong. (2009); *Budget Autonomy for D.C.: Restoring Trust in Our Nation’s Capital: H’rg Before H. Comm. on Gov’t Reform*, 108th Cong. (2003).

⁸ *District of Columbia v. John R. Thompson Co.* found no barrier to Congress’s delegation of power to D.C., subject to Constitutional limitations and Congress’s power to revise the authority granted. 346 U.S. 100, 109 (1953).

⁹ D.C. Code § 1-201.02(a); D.C. Code § 1-203.02.

¹⁰ D.C. Code § 1-206.02(a)(3).

¹¹ D.C. residents also elect a “shadow” Representative in the House and two “shadow” Senators in the U.S. Senate. None has a vote. From time to time, D.C.’s Delegate has been allowed a vote in a committee of the House but not a vote on the floor. D.C.’s Delegate has never had a full vote in the House like other Representatives. (D.C.’s shadow Senators,

Home Rule Act makes it difficult for Congress to veto D.C. legislation,¹² Congress routinely threatens to nullify laws supported in D.C. Lawyers representing clients with interests before the D.C. government must consider whether their work on such issues may be affected later by Congress; these considerations are foreign to lawyers and clients in the 50 states. Decisions about where businesses locate (and provide jobs) are affected by D.C.'s lack of power and control as businesses may choose a jurisdiction with a voting Representative and two Senators.

D.C. clients are often subject to positions of representatives who answer only to voters outside D.C. and, as experience shows, are impervious to opinions and needs of those in D.C. Lawyers thus lack a meaningful way to petition the Government for redress of grievances for D.C. clients or to express views that could affect public policy and legislation as effectively as possible because D.C. has no vote in Congress.

by contrast, do not have any vote and cannot participate in key Senate functions like withholding unanimous consent or placing a "hold" on nominations.).

¹² D.C. legislation becomes law unless both Congress and the President overturn it during the congressional review period. Congress has disapproved D.C. legislation three times: S.J. Res. 84, 102d Cong. (1991) (height of buildings); H.R. Res. 208, 97th Cong. (1981) (decriminalizing sodomy); S. Con. Res. 63, 96th Cong. (1979) (preventing foreign chanceries in residential neighborhoods).

II. D.C.’s Lack of Representation in Congress Constrains the Administration of Justice.

Consistent with their missions, *Amici* work to advance the administration of justice and rule of law. The “Core Purpose” of the D.C. Bar, of which the D.C. Affairs Community is a part, since its creation by the District of Columbia Court of Appeals in 1972, is “[t]o enhance access to justice, improve the legal system, and empower lawyers to achieve excellence.”¹³ D.C.’s lack of representation in Congress impedes these goals in many ways.

First, Congress serves a dual role vis-à-vis D.C., as both a national legislature and as the local legislature for D.C.¹⁴ The Home Rule Act created the Council, D.C.’s local legislature. However, Congress retained the right to review all D.C. legislation. That constrains D.C. leaders’ ability to legislate for constituents and subjects them to “second-guessing” and political grandstanding by officials unresponsive to D.C.’s citizens. Under the D.C.

¹³ See, e.g., D.C. Bar, <https://www.dcbbar.org/About/Who-We-Are/Mission> (“Core Purpose” tab; last visited April 1, 2021).

¹⁴ The District Clause authorizes Congress “[t]o exercise exclusive Legislation in all Cases whatsoever” over the “Seat of the Government of the United States.” U.S. CONST. art. I, § 8, cl. 17. The Founders envisioned that “a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them.” There is no evidence that the Founders discussed disenfranchising citizens of the federal district. THE FEDERALIST NO. 43 (James Madison).

Budget Autonomy Act,¹⁵ D.C. is entitled to control the budgeting of D.C.-generated tax revenues. Congress disregards that law, regularly imposing its will on D.C. and its budget.

Second, Congress often contravenes, or threatens to contravene, the express will of D.C. voters on critical public-policy choices, which are left to state and local governments in the 50 states. D.C.'s local budget allocating D.C.-taxpayer-raised revenue (more than \$8.6 billion in recent years) cannot become law until Congress affirms it. D.C. residents have no vote on riders that Congress proposes to the D.C. budget, even if they would undo decisions made by legislators accountable to D.C. residents.¹⁶ Since D.C. was granted "Home Rule," the House of Representatives has threatened to do so even more frequently. Having votes in Congress would not in itself cure the problem, nor give D.C.'s residents equal standing with those in the 50 states as full

¹⁵ Local Budget Autonomy Amendment Act of 2012, A. 19-632, 60 D.C. Reg. 1724 (Feb. 15, 2013); (D.C. Code § 1-204.46(a)).

¹⁶ Eugene Boyd, Congressional Research Service R41772, *District of Columbia: A Brief Review of Provisions in District of Columbia Appropriations Acts Restricting the Funding of Abortion Servs.* (Aug. 27, 2015), <https://www.everycrsreport.com/reports/R41772.html>; *DC Officials Cite Gun Control Hypocrisy in Condemning Sen. Marco Rubio*, Associated Press (Apr. 3, 2018), <https://www.cbsnews.com/news/dc-officials-cite-gun-control-hypocrisy-in-condemning-sen-marco-rubio/>; P. Smith, *Feature: Congress Moves to End Ban on DC Needle Exch. Funding*, StoptheDrugWar.org (June 7, 2007), https://stopthedrugwar.org/chronicle/2007/jun/07/feature_congress_moves_end_ban_d.

and equal American citizens. However, having such representation would help to ameliorate that inequity, and eliminate the affront to that most fundamental of American ideals—no taxation without representation.

As a result of this anti-democratic structure, D.C. residents have no say in key rights and responsibilities of citizens in a democratic society.

A. Lack of Control Over D.C.’s Own Tax Dollars: Unlike State and Local Governments in the 50 States, D.C. Currently Cannot Control Expenditure and Appropriation of Its Own Tax Dollars.

D.C.’s lack of voting rights affects the most basic of issues: war and taxes. For years, D.C. has asked Congress for authority to spend its local dollars without affirmative approval from Congress to enact and implement local laws without congressional review.¹⁷ Our Founders declared independence from Great Britain and fought the Revolution over just these issues. Acting through the federal appropriations process, and even after court approval of D.C.’s Budget Autonomy Act, concern continues about Congress’s involvement in D.C.’s budget. For example:

¹⁷ See, e.g., *H.R. 960 & H.R. 1045, Greater Autonomy for the Nation’s Capital: H’rg Before H. Subcomm. on Fed. Workforce, Postal Serv., & D.C.*, 111th Cong. (2009); *Budget Autonomy for D.C.: Restoring Trust in Our Nation’s Capital: Hr’g Before H. Comm. on Gov’t Reform*, 108th Cong. (2003).

- D.C.’s more than 712,000 residents pay more federal taxes per capita than residents of any state in the country and pay more federal taxes than 22 states, but have no vote in Congress over those tax and spending decisions.¹⁸
- D.C. residents have fought in every war since the Revolution, but have no vote on whether to go to war, how to compensate veterans of those wars, or how to pay for them.
- D.C. residents have no vote in Congress on D.C.’s budget—which is larger than that of 12 states—or efforts to revise or delay D.C. laws. Federal budget impasses prevent D.C. from spending D.C. tax dollars on basic services.¹⁹

¹⁸ *E.g.*, 700,000 residents cited in H.R. 1, 116th Cong. § 2201, *Findings Relating to D.C. Statehood* (passed in the House Mar. 8, 2019) (“H.R. 1 Findings”); 705,000 residents cited in *Washington, D.C. Admission Act, Hr’g Before H. Oversight and Reform Comm. on D.C. Statehood*, H.R. 51, 117th Cong. (2021); *see also* <https://www2.census.gov/programs-surveys/popest/technical-documentation/file/layouts/2010-2020/nst-est2020.pdf> (last visited Apr. 1, 2021) (estimating 712,816 residents on July 1, 2020 (released December 2020)).

¹⁹ For example, the 2018–2019 Federal Government shutdown, the longest in history, immediately affected D.C.’s legal community. Hundreds of law graduates faced uncertainty over whether the Committee on Admissions could administer the bar exam in February. Swearing-in ceremonies for those who passed the bar exam were postponed, and issuance of D.C. bar numbers delayed. Lawyers’ applications for waiver into the D.C. Bar were “frozen,” causing concerns about jobs

- D.C. is stronger financially than most jurisdictions (even after the economic ravages of the COVID-19 pandemic), with a \$16.96 billion budget for fiscal year 2021²⁰ and a \$3.25 billion general-fund balance as of September 30, 2020.²¹ D.C. has an AAA rating, an accomplishment achieved by only ten of the U.S. largest cities, and a rate higher than 32 states.²²

and completing legal work. Karen Sloan, *Shutdown Imperils DC Bar Exam, Swearing-In Postponed*, Law.com (Jan. 24, 2019, 1:58 pm), <https://www.law.com/newyorklawjournal/2019/01/24/shutdown-imperils-dc-bar-exam-swearing-in-postponed-389-56431/>; Natalie Delgadillo, *Thanks to the Shutdown, Hundreds of Would-Be Lawyers Are Still Waiting To Get Barred in D.C.*, DCist (Feb. 21, 2019, 11:18 pm); <https://dcist.com/story/19/02/21/thanks-to-the-shutdown-hundreds-of-would-be-lawyers-are-still-waiting-to-get-barred-in-d-c/>. Because D.C.'s courts and marriage bureau were shut down, D.C. couples were unable to get married. Zoe Tillman, *This Couple Was Turned Away from Getting Their Marriage License in DC During the Government Shutdown*, BuzzFeed News (Jan. 2, 2019, 2:40 pm), <https://www.buzzfeednews.com/article/zoetillman/marriage-license-dc-government-shutdown-weddings>.

²⁰ Gov't of Dist. of Columbia Fiscal Year 2021 Approved Budget and Financial Plan (https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DC_OCFO_Budget_Vol_1-Bookmarked-9-1-2020.pdf).

²¹ Gov't of Dist. of Columbia, Ofc. of Chief Fin. Officer, 2020 Comprehensive Annual Financial Report at 48 (year ended Sept. 30, 2020) (<https://cfo.dc.gov/page/comprehensive-annual-financial-report-2020>).

²² *H'rg Before H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18.

- D.C.’s total personal income exceeds that of seven states. Its per-capita personal-consumption expenditures exceed those of any state, and its total personal-consumption expenditures exceed those of seven states.²³ Yet, D.C. must go, “hat in hand,” to Congress on appropriations.
- D.C. collects income taxes, administers workers-compensation-and-unemployment insurance, and runs its Department of Motor Vehicles. It funds and provides services, such as police, public networks, and education to residents, businesses, commuters, and visitors. Thus, in many respects, D.C. already functions as a state.²⁴

Congressional involvement creates serious governance problems. It costs D.C. millions in finance charges, disrupts budgeting, and risks government shutdowns, all causing unnecessary expenditures. The relief sought would bring D.C. voting representation at least in the House of Representatives—a right Americans in the 50 states take for granted.

²³ H.R.1 Findings § 2201, *supra* n.17; *H’rg Before the H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18.

²⁴ *H’rg Before H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18. (D.C. Mayor testified that D.C. is “treated like a state in more than 500 citations in federal law”).

B. Reduced Ability to Ensure D.C. (and National) Safety: Control Over the D.C.'s Metropolitan Police and National Guard Resides With the President.

It is fundamental to the administration of justice that local police should be accountable to residents. That is not the case in D.C. Ultimate authority is held by the President. The D.C. Self-Government and Governmental Reorganization Act permits the President to commandeer the D.C. police force for any federal purpose.²⁵ On June 2, 2020, it was revealed that the President considered using the local metropolitan police force for a photo opportunity at Lafayette Square the previous day.²⁶ The reverse situation presented itself on January 6, 2021, when local police came to the aid of Congress to quell an insurrection without being requested by the President.

²⁵ The D.C. Home Rule Act provides, “Notwithstanding any other provision of law, whenever the President of the United States determines that special conditions of an emergency nature exist which require the use of the Metropolitan Police force for federal purposes, he may direct the Mayor to provide him, and the Mayor shall provide, such services of the Metropolitan Police force as the President may deem necessary and appropriate.” D.C. Code § 1-207.40(a) (Dec. 24, 1973).

²⁶ Peter Hermann, *Trump administration considered taking control of D.C. police force to quell protests*, Wash. Post (Jun. 2, 2020, 8:15 pm), https://www.washingtonpost.com/local/public-safety/dc-police-takeover-george-floyd/2020/06/02/856a9744-a4da-11ea-bb20-ebf0921f3bbd_story.html.

While in most jurisdictions, Governors may call up the National Guard, D.C.'s Mayor has no such power, leading to substantial delay in summoning the National Guard on January 6, 2021.²⁷

Lawyers assisting clients need to be able to appeal to local public officials that oversee the police.

As shown by the aftermath of January 6, 2021, the lack of adequate policing in and around Capitol Hill led to an extensive military presence to ensure the calm, and causing further disruption to law firms and lawyers based in D.C.

C. Lack of Control Over D.C.'s Courts: D.C. Does Not Have Control Its Own Courts.

Because they are not appointed by D.C. officials, D.C. judges are not accountable to D.C. voters or their elected representatives. Although D.C. has input, the President and Senate ultimately decide who serves on D.C.'s Superior Court and Court of Appeals.²⁸ The Federal Government's role in ap-

²⁷ Mark Mazzetti & Luke Broadwater, *The Lost Hours: How Confusion and Inaction at the Capitol Delayed a Troop Deployment*, N.Y. Times (Feb. 21, 2021, 8:26 pm), <https://www.nytimes.com/2021/02/21/us/politics/capitol-riot-security-delays.html>.

²⁸ Members of the Judicial Nomination Commission ("JNC") are appointed by the Mayor, D.C. Council, D.C. Bar, Chief Judge of the U.S. District Court, and the President. <https://jnc.dc.gov/page/jnc-members>. The JNC selects three applicants for each vacancy. From those, the President sends one name to the Senate which votes for confirmation. <https://jnc.dc.gov/page/jnc-application-process>. D.C. has no

pointing local judges undermines judicial independence, a fundamental underpinning of democracy. Judges address issues of public import, great and small, and can affect citizens' most basic rights, depriving them of liberty and property.

In states, non-federal judges seated on courts of general jurisdiction are generally either elected or appointed by the jurisdiction's highest elected official and confirmed by the state/local legislature. Those judges then decide key state-law issues. Those issues should be decided in D.C. as they are in the 50 states, by a judiciary that is selected from the local community and subject to local accountability.²⁹ Instead, federal judges appointed by the

Senators and, thus no vote in either the Committee or in the full Senate on such confirmations. Voting representation in the Senate would help restore this right.

²⁹ In 21st century practice, "contact us" tabs of Representatives and Senators will not even accept petitions from people with zip codes outside the district or state that member represents. If this appeal challenged D.C.'s lack of Senate representation, we would stress the role of "unanimous consent" in the Senate and point to discrimination against D.C. residents and businesses (e.g., when confronting nominations of persons deemed hostile to their interests or incompetent to address them, or when choosing to assert a "hold" in order to force attention to grievances). See Congressional Research Service, 96-548, V. Heitshusen, *The Legislative Process on the Senate Floor: An Introduction* (updated July 22, 2019).

However, even in absence of Senate representation, Presidents and Congress would be more likely to defer to recommendations or objections of a full-fledged House Representative on nominations of U.S. District Court judges, D.C. Superior Court judges, and U.S. Attorneys than they do to D.C.'s non-voting Delegate.

President decide key D.C.-law issues with no accountability to D.C.

Due to the Senate's failure to confirm nominees, D.C.'s Court of Appeals has been without one of its eight Associate Judges since 2013, and another since 2017. Of the D.C. Superior Court's 61 judges, 10 judgeships remain vacant. These vacancies increase workload and thus cause disruptions, as confirmed by press reports.³⁰ As a result, D.C. courts cannot always resolve cases as timely or efficiently as other courts. The significance of such local control cannot be underestimated.³¹ It instills

³⁰ *E.g.*, Martin Austermuhle, *Judges Say "Unprecedented" Vacancies at D.C. Court Are Slowing the Legal System*, DCist, (Apr. 15, 2019, 10:54 am), <https://dcist.com/story/19/04/15/judges-say-unprecedented-vacancies-at-d-c-court-are-slowing-the-legal-system/> (it's "slowing down the wheels of justice," quoting C.J. Blackburne-Rigsby). Progress in civil cases "has slowed significantly," <https://www.chaikinandsherman.com/blog/2019/april/judicial-vacancies-slowing-justice-in-dc-courts/>. (last visited April 1, 2021).

³¹ Bridget Bowman, *Congressional Judicial Backlog Creates Problem for D.C. Court*, Roll Call (Dec. 3, 2015), <https://www.rollcall.com/news/senate-moves-dc-judges-amid-backlog-concerns>; Letter to U.S. Senators from Council for Court Excellence (July 30, 2018), http://www.courtexcellence.org/uploads/publications/73018_CCE_Ltr_to_Senators_re_DC_judicial_vacancies.pdf; Martin Austermuhle, *In Brief Meeting, Bowser Presses Trump on Judge Backlog and New VA Medical Facility*, WAMU 88.5 Radio (Mar. 14, 2019), <https://wamu.org/story/19/03/14/in-brief-meeting-bowser-presses-trump-on-judge-backlog-and-new-va-medical-facility/>.

confidence in the judiciary, a vital part of its credibility and a foundation of democratic government.

D. Lack of Control Over D.C. Prosecutors: Prosecutors of Felonies and Many Misdemeanors in D.C. Are Unaccountable to D.C. Voters.

In the 50 states, prosecutors elected or appointed by local officials prosecute serious local crimes. That basic democratic function is curtailed in D.C. The U.S. Attorney for D.C., selected by the President, prosecutes all felonies and most misdemeanors. Federal prosecutors present cases to federal grand juries and try cases that can lead to the most serious of penalties, loss of liberty and property, in front of federal judges without involvement of anyone accountable to D.C. residents.

In contrast, D.C.'s Attorney General, elected by D.C. voters, has authority to prosecute only a narrow set of misdemeanors.³² Though brought under the D.C. Code, those prosecutions are still brought in the name of the "United States," as crimes against the entire country.³³ Other jurisdictions enact criminal laws, and locally chosen prosecutors prosecute violations of those statutes. In D.C., final decisions on those issues are assigned to officials

³² For example, D.C.'s Attorney General is charged with prosecution of disorderly conduct and lewd, indecent, or obscene acts. D.C. Code § 23-101(a).

³³ See, e.g., *Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), (violations of D.C. Code are against a single sovereign, the United States, not against D.C. or its people).

who are not required to consult (and almost never consult) with those Americans who call D.C. home.

Local control provides an important check on prosecutorial discretion: It ensures that enforcement of criminal laws reflects concerns and values of the community. Unlike in all 50 states, where state and federal prosecutors are different entities, in D.C. local and federal prosecutors are one and the same. Therefore, the line between the two can become blurred. For example, in 2020, it was revealed that federal prosecutors had begun a targeted program whereby African American felons from certain D.C. neighborhoods who were caught illegally possessing guns were charged under federal statutes instead of D.C. laws.³⁴ The result was that defendants from three predominantly Black wards were subject to lengthier prison terms than defendants elsewhere in D.C. Prosecutors were able to hide the targeted nature and disparate impact of the program because all gun cases are handled by the U.S. Attorney's office, regardless of whether charged under federal or D.C. statutes. The federal prosecutors that implemented this discriminatory program face no accountability from D.C. officials or residents.

³⁴ Spencer S. Hsu & Keith L. Alexander, *D.C. Crackdown On Gun Crime Targeted Black Wards, Was Not Enforced Citywide as Announced*, Washington Post (Sept. 3, 2020, 8:18 pm), https://www.washingtonpost.com/local/legal-issues/dc-crackdown-on-gun-crime-targeted-black-wards-was-not-enforced-citywide-as-announced/2020/09/03/f6de0ce2-e933-11ea-970a-64c73a1c2392_story.html.

**E. Negative Effects on Penal Systems:
Lack of Local Control Over the Penal
System Impacts Client Representation.**

The right to an attorney in criminal matters is a critical foundation of the American justice system. U.S. CONST. amend. VI. D.C.’s lack of Congressional representation harms lawyers’ ability to represent and advocate for their incarcerated clients.

For example, the Revitalization Act closed the dedicated prison in (relatively close by) Lorton, Virginia.³⁵ “Since 2001, all people convicted of felonies . . . are now placed in the federal custody of the [Bureau of Prisons] and can be incarcerated in *more than 100 different federal prisons across the United States.*”³⁶ This places obvious and substantial burdens on lawyers’ ability to meet and confer with clients with ongoing appeals and to investigate complaints of prison conditions and discrimination.³⁷ Moreover, when clients are subjected to overcrowd-

³⁵ National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, H.R. 1963, 105th Cong (1997).

³⁶ District Task Force on Jails & Justice, *Jails & Justice: A Framework for Change*, (Oct. 2019) at 13, <http://www.courtexcellence.org/uploads/publications/Framework-ForChange.pdf> (emphasis added).

³⁷ See, e.g., Martin Austermuhle, *D.C. Inmates Serve Time Hundreds of Miles from Home. Is It Time to Bring Them Back?*, WAMU 88.5 Radio (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/>.

ing, inadequate health care and education, or denied other essential support due to underfunding, the purse strings are held by legislators with no political accountability to D.C. This situation further limits lawyers' ability to advocate for clients and to obtain meaningful redress.

A recent independent report suggests that, to the extent Congress permits D.C. to use its funds and change its laws, unwinding the Revitalization Act's interjection of federal prisons into the local criminal justice system may take a full decade.³⁸ The recommended plan also depends on intergovernmental cooperation of and payments from the federal Bureau of Prisons.³⁹

D.C. lawyers advocating for clients through systemic reform are uniquely burdened by the lack of accountability of federal agencies to local voters, whether through legislation, congressional oversight, or appropriations.

III. Lawyers and Citizens in D.C. Lack the Right to Meaningfully Petition the Government.

The First Amendment to the Constitution explicitly guarantees Americans the right to petition the Government for a redress of grievances: "Congress shall make no law . . . abridging the freedom

³⁸ District Task Force on Jails & Justice, *Jails & Justice: Our Transformation Starts Today*, (Feb. 2021) at 23–24, <http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf>.

³⁹ *Id.* at 60.

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. It is fundamental that Americans have the right to participate meaningfully in their governance and petition the Government for a redress of grievances.

Lawyers are often the entryway, and the last resort, for exercise of this right. For D.C. residents and their lawyers, the right to petition the Government is diminished, as they do not have voting representatives in Congress to whom they can address grievances or who can remedy them.

F. Representation of D.C. Citizens in the Parole System: D.C.’s Lack of Control Over Parole Issues Raises Serious Constitutional Concerns.

In 1997, Congress, without any voting representatives from D.C., passed the Revitalization Act.⁴⁰ That Act supplanted local control with federal control over parole and supervised release determinations for D.C.’s prison population. For those convicted after August 5, 2000, the Revitalization Act replaced the discretionary parole system with a non-discretionary supervised release system.⁴¹ This transfer of authority away from D.C.

⁴⁰ National Capital Revitalization and Self-Government Improvement Act of 1997, Pub L. No. 105-33, tit, XI, 111 stat. 251, 712–87.

⁴¹ This “truth in sentencing” supervised release system requires an inmate to serve a minimum of 85 percent of their

has adversely and uniquely impacted administration of justice for D.C. inmates who are either: (i) eligible for parole or (ii) subject to re-incarceration due to revocation of parole or supervised release.

Prior to the Revitalization Act, parole and revocation determinations were made by the D.C. Board of Parole (“DCBP”), a body consisting of five members appointed by D.C.’s Mayor subject to D.C. Council approval. The Act replaces DCBP with the U.S. Parole Commission (“USPC”)—a body currently consisting of two presidentially appointed Commissioners, one from Maryland and one from Kentucky (with several vacancies).⁴² Thus, officials who have no relationship to either the relevant community or to D.C.’s policy priorities determine the fate of affected D.C. residents.

The adverse impacts on the administration of justice are unmistakable. Due to geographic challenges noted above, inmates have difficulty accessing attorneys who specialize in parole matters—or even family and community support—to help strengthen their case for early release or against revocation. Those released on supervision have reduced due-process rights, making them more vulnerable to re-incarceration for mere technical violations of terms of release. Since the USPC took

sentence and conditions early release after that on program participation and good-time credits.

⁴² Justice Policy Institute, “Restoring Local Control of Parole to the District of Columbia” (Dec. 2019) at 21–22, <http://www.justicepolicy.org/uploads/justicepolicy/documents/DCParoleStudy.pdf>.

over in 2000, according to D.C.'s Public Defender Service,⁴³ the revocation process has been significantly less transparent with many more supervision revocations involving only minor violations.

There is no dearth of analysis regarding D.C.'s parole-related policy problems and possible policy solutions. D.C.'s lack of control over parole and supervised release raises serious due-process and equal-protection concerns for those D.C. residents in the federal prison system for having committed local, not federal, offenses. D.C.'s lack of voting representation in Congress compounds these concerns by making restoration of local control that much less likely.

CONCLUSION

In 1949, President Truman wrote, "We should take adequate steps to assure that citizens of the United States are not denied their franchise merely because they reside at the Nation's Capital."⁴⁴ *Amici* agree. For all the reasons stated here and in the Petitioners' brief, *Amici Curiae* ask this Court to note probable jurisdiction, grant the relief

⁴³ Avis E. Buchanan, *Improve D.C.'s parole practices*, The Washington Post (Aug. 14, 2015), https://www.washingtonpost.com/opinions/improve-dcs-parole-practices/2015/08/14/56b9f03c-3475-11e5-8e66-07b4603ec92a_story.html.

⁴⁴ Letter from President Truman to the Speaker of the House (July 25, 1949), <https://www.trumanlibrary.gov/library/public-papers?month=7&endyear=5&searchterm=franchise&yearstart=5&yearend=All> (last visited April 12, 2021).

sought by Petitioners, and right this ancient, festering wrong.

Respectfully submitted.

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Dated: April 14, 2021

APPENDIX

Appendix 1

This Appendix provides a list of the *Amici Curiae*:¹

Concerned District of Columbia Legal Organizations:

1. District of Columbia Affairs
Community of the District of
Columbia Bar
2. Bar Association of the District of
Columbia
3. Greater Washington Area Chapter,
Women Lawyers Division, National
Bar Association
4. Washington Bar Association
5. Women's Bar Association of the
District of Columbia

Concerned District of Columbia Legal Professionals:

1. Jessica E. Adler, Esq.

¹ All individual *Amici Curiae* sign this brief in their individual capacities and not on behalf of any firm or organization.

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2. Josephine Bahn, Esq.
3. Johnine Barnes, Esq.
4. Johnny Barnes, Esq.
5. Hon. Diane M. Brenneman
6. Dean Emerita Katherine (“Shelley”) Broderick
7. MaryEva Candon, Esq.
8. Paulette E. Chapman, Esq.
9. Karen E. Evans, Esq.
10. Andrea C. Ferster, Esq.
11. Loretta J. Garcia, Esq.
12. Janine D. Harris, Esq.
13. Yolanda Hawkins-Bautista, Esq.
14. Josephine Nelson Harriott, Esq.
15. Christopher G. Hoge, Esq.
16. Norma Hutcheson, Esq.

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17. Kevin D. Judd, Esq.
18. Kim M. Keenan, Esq.
19. Carolyn B. Lamm, Esq.
20. Jennifer Maree, Esq.
21. Martha J.P. McQuade, Esq.
22. Patrick McGlone, Esq.
23. Charles Miller, Esq.
24. Darrell G. Mottley, Esq.
25. Marianela Peralta, Esq.
26. Pauline A. Schneider, Esq.
27. Edward (“Smitty”) Smith,
Esq.
28. Gary Thompson, Esq.
29. Mark H. Tuohey, III, Esq.
30. Natalie S. Walker, Esq.
31. Melvin White, Esq.

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32. Lateefah S. Williams, Esq.
33. Paul Zukerberg, Esq.