No. 12-167

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY DAVILA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly set aside the guilty plea of a defendant who had been pressured to plead guilty by a magistrate judge acting in clear violation of Federal Rule of Criminal Procedure 11(c)(1), which prohibits courts from participating in plea discussions.

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STATEMENT

In May 2009, a federal grand jury returned a 34-count indictment charging respondent Anthony Davila with conspiracy to defraud the federal government, mail fraud, aggravated identity theft, and making false claims to the IRS. 09-cr-60 Docket Entry No. 1 (S.D. Ga. May 7, 2009). The indictment alleged that Mr. Davila had participated in a scheme to file false income tax returns in other people's names in order to collect improper refunds. Mr. Davila appeared before a magistrate judge in the Southern District of Georgia, received court-appointed counsel, and entered a plea of not guilty.

The government soon made a plea offer, which appointed counsel delivered to Mr. Davila in jail in July 2009. Counsel returned six weeks later to discuss the agreement but found that Mr. Davila, who suffers from schizoaffective disorder, was unable to review it. Counsel requested a competency examination and hearing. Docket Entry No. 35 (Aug. 21, 2009).

Before the competency hearing was held, Mr. Davila sent a letter to the court requesting new counsel. His appointed counsel, he wrote, had not adequately consulted with him, had failed to conduct an adequate investigation, had never "mentioned … any possible defenses," and had instead merely urged Mr. Davila "to plead guilty." C.A. E.R. Ex. B.

In response, the magistrate judge convened an ex parte hearing in February 2010 to discuss the letter with Mr. Davila and his attorney. The judge

made clear from the start that he had no intention of appointing new counsel. He told Mr. Davila that his attorney had once served as the judge's law clerk and "was one of the finest … [the judge] ever had," and that Mr. Davila had been "lucky in the [appointed counsel] draw." Docket Entry No. 127, at 3-4 (filed Jan. 18, 2011) (Ex Parte Hearing Tr.). Addressing Mr. Davila's concern that his attorney was advising him that he "ought to plead guilty," the magistrate judge told Mr. Davila that "oftentimes … that is the best advice a lawyer can give his client" and that "there may not be a viable defense to these charges." *Id*. at 8, 11. The judge continued:

> In view of whatever the Government's evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct to plead guilty and go to sentencing with the best arguments on your behalf still available for not wasting the Court's time, not causing the Government to have to spend a bunch of money empanelling a jury to try an open-and-shut case.

Id. at 8-9. Mr. Davila responded that he was concerned that his attorney was trying to get him to "sign an agreement without giving me my options." *Id*. at 10.

The magistrate judge then told Mr. Davila that he should

> try to understand [that] the Government … ha[s] all of the marbles in this situation….

> The only thing at your disposal that is entirely up to you is the two- or three-level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

Id. at 15-16.

The judge stated that he didn't know what guidelines range Mr. Davila faced but that it would "probably [be] pretty bad because your criminal history score would be so high." *Id.* at 16. The court advised that, in addition to accepting responsibility, Mr. Davila should also figure out a way to "cooperate with the Government" and try to earn their recommendation for a downward departure. *Id*. at 16. The court concluded by once again urging Mr. Davila

> to come to the cross….You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so

> give him the two-level, give him the three-level reduction.

Id. at 17.

Several weeks later, the magistrate judge conducted a competency hearing and issued a report and recommendation finding Mr. Davila competent to stand trial. The district court accepted the report and recommendation in late March 2010. Docket Entry No. 52 (Mar. 23, 2010).

Shortly thereafter, on May 11, 2010, Mr. Davila signed a plea deal in which he agreed to plead guilty to conspiracy in exchange for dismissal of the remaining charges. Docket Entry No. 62. The district court convened a change-of-plea hearing six days later. At the hearing, Mr. Davila contested part of the government's factual basis for the conspiracy count, insisting that government had overstated the conspiracy's scope. But he ultimately admitted the elements of the charge, and the district court accepted his plea. Docket Entry No. 121 (filed Jan. 11, 2011) (Plea Hearing Tr.).

Prior to sentencing, Mr. Davila filed a pro se motion seeking to terminate his appointed counsel. Docket Entry Nos. 67, 70 (July 27, 2010; Aug. 4, 2010). Following two hearings on the matter, the magistrate judge ultimately agreed to allow Mr. Davila to proceed pro se, with his appointed counsel serving as stand-by counsel. Mr. Davila then moved to vacate his plea, contending that the government, both in the indictment and at the change-of-plea hearing, had knowingly overstated the scope of the

charged conspiracy and that his attorney had acted improperly by encouraging him to plead guilty despite those factual inaccuracies. Docket Entry No. 79 (Sept. 15, 2010).

The district court denied Mr. Davila's motion from the bench at the start of his November 2010 sentencing hearing. The court proceeded to reject Mr. Davila's objections to the presentence investigative report and sentenced Mr. Davila to 115 months' imprisonment—the top of the applicable guidelines range and just under the 120-month statutory maximum. Docket Entry No. 122, at 41 (filed Jan. 11, 2011) (Sentencing Tr.).

Mr. Davila promptly filed a pro se notice of appeal. The Court of Appeals assigned his trial counsel—the same attorney Mr. Davila had previously terminated—to represent him. Mr. Davila filed a motion for new counsel, and trial counsel filed a motion to withdraw, noting that Mr. Davila had accused him of misconduct and filed a bar complaint against him. 10-15310 Docket Entries (11th Cir. Dec. 20, 2010; Jan. 28, 2011). The court denied both motions. 10-15310 Docket Entry (11th Cir. Feb. 3, 2011). Counsel then filed a brief stating that Mr. Davila had no nonfrivolous basis for appeal and moved to withdraw pursuant to *Anders v. California*, 367 U.S. 738 (2011).

The Court of Appeals denied counsel's *Anders* motion. During its "independent review" of the record, the court had come upon the statements of the magistrate judge at the February 2010 ex parte hearing, which "appeared to urge Davila to cooperate

and be candid about his criminal conduct to obtain favorable sentencing consequences." Pet. App. 7a. Counsel's *Anders* brief, the court noted, had failed to address "whether this irregularity constituted an issue of arguable merit or express an opinion as to whether judicial participation occurred." *Id.* The court instructed counsel either to "file a merits brief that challenges the magistrate's pre-plea statements under [Federal Rule of Criminal Procedure] 11(c)(1)," which prohibits courts from "participat[ing] in [plea] discussions," or to file a renewed *Anders* motion explaining why such a challenge would not have arguable merit. *Id.* at 8a.

Mr. Davila's counsel proceeded to file a brief urging the appellate court to vacate Mr. Davila's conviction on the ground that the magistrate judge had improperly participated in plea negotiations in violation of Rule 11(c)(1). 10-15310 Docket Entry (11th Cir. Aug. 19, 2011). In response, the government conceded that the magistrate judge's comments "amounted to error, and the error was plain." 10-15310 Docket Entry at 14 (11th Cir. Sept. 29, 2011). The government insisted, however, that the comments did not affect Mr. Davila's substantial rights because there was "no evidence" that they "affected Davila's decision to plead guilty." *Id.* at 15.

The Court of Appeals issued a short per curiam opinion rejecting the government's position. Pet. App. 1a-5a. Because Mr. Davila had failed to object to the magistrate judge's comments, the court reviewed the "asserted Rule 11 violation … for plain error." *Id.* at 3a. Rule 11(c)(1), the court observed, speaks in categorical terms, "prohibit[ing] 'the par-

ticipation of the judge in plea negotiations under any circumstances.'" *Id.* (quoting *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)). The court identified "[t]hree rationales" that underlie the prohibition: "'(1) judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty; (2) the prohibition protects the integrity of the judicial process; and (3) the ban preserves the judge's impartiality after the negotiations are completed.'" Pet. App. 3a-4a (quoting *Johnson*, 89 F.3d at 782-83). Consistent with these rationales, the court noted that "judicial participation is presumed" when a judge "comment[s] on the 'weight and nature of the evidence against' a defendant" or "contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial and was found guilty." Pet. App. 4a (quoting *United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998)). Agreeing with Mr. Davila and the government that the magistrate judge's comments "amounted to judicial participation in plea discussions" in violation of Rule 11(c)(1), the court found it unnecessary for Mr. Davila to make any further showing of "individualized prejudice" in order to obtain relief. Pet. App. 5a. The court vacated Mr. Davila's conviction and remanded for further proceedings.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SQUARE CONFLICT IN THE LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW

According to the petition, the Eleventh Circuit has split from the majority of its sister circuits by adopting an "inflexible" rule of automatic vacatur "following any degree of judicial participation in plea negotiations, regardless of whether the defendant was prejudiced." Pet. 9. In reality, there is no stark division among the circuits. The Eleventh Circuit's approach is less categorical and more nuanced than the petition suggests, and the Courts of Appeals have reached similar conclusions when confronted with similar facts. Any divergence among the circuits is principally semantic, not substantive, and thus does not warrant this Court's review.

A. The Eleventh Circuit Takes Account Of Prejudice When Analyzing Rule 11 Judicial Participation Claims

The petition is incorrect that the Eleventh Circuit "grant[s] appellate relief for a judicial participation error without analyzing prejudice." Pet. 18. The court does conduct a "prejudice analysis"; it simply performs it under a different heading than the petition envisions. Rather than assessing prejudice *after* identifying a judicial participation violation, the court typically considers prejudice earlier, as part of its inquiry into whether there has been a violation in the first place.

In this case, the Court of Appeals began by embracing the government's preferred standard of review. Claims of improper judicial participation in plea negotiations, the court held, are reviewable only for "plain error" when "the defendant fails to object … before the district court." Pet. App. 3a. The decision below sets out the usual four-part plain-error standard, which requires (1) error, (2) that is plain, (3) that affects the defendant's substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of the proceedings. *Id*.

Addressing the question of error, the Court of Appeals described the prohibition on judicial participation as "absolute" and noted that the court "usually refrain[s] from inquiring into the degree of judicial participation." *Id*. at 3a-4a. But the court did not hold that every comment "touching upon proposed or possible plea agreements," no matter how inconsequential, runs afoul of Rule 11(c)(1). *Id*. at 4a (internal quotation marks omitted). To the contrary, the court indicated that a judge's involvement "amount[s] to judicial participation" within the meaning of the Rule and falls within the Rule's "absolute ban" only when the judge places a thumb on the scale. *Id*. at 3a, 5a. Under the court's analysis, if "the court's statements [cannot] be read as coercive," then there is "no violation of Rule 11." *Johnson*, 89 F.3d at 783-84.[1]

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[1] *See also United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) (stating that "'Rule 11(c)(1) categorically prohibits the court from participating in plea negotiations,'" but also noting that "not all judicial observations expressed with respect to plea agreements violate the rule" (citation omitted));

Thus, to constitute forbidden participation, a judge's remarks typically must "go beyond [being] a source of information to plea negotiators." Pet. App. 4a. The court has held, for instance, that a violation of Rule 11(c)(1) may arise when, "prior to any agreement by the parties," the court makes comments that "amount to 'indications of what the judge will accept' that 'will quickly become the focal point of further discussions.'" Pet. App. 4a (quoting *Diaz*, 138 F.3d at 1363). Likewise, "judicial participation is presumed" when the district court comments on the strength of the evidence against the defendant in an effort to induce a guilty plea or "contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial." Pet. App. 4a. In contrast, a district court does not "improperly intermeddle[] in … plea negotiations" when, at the request of defense counsel, it discusses the sentencing consequences of a plea agreement that the defendant has already executed. *United States v. Telemaque*, 244 F.3d 1247, 1248-49 (11th Cir. 2001) (per curiam). In other words, consistent with the underlying purposes of the Rule, what is prohibited is conduct that "'inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty'" and that threatens "'the integrity of the judicial process.'" Pet. App. 3a-4a (quoting *Johnson*, 89 F.3d at 783); *see also United States v. Corbitt*,

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United States v. Cano-Varela, 497 F.3d 1122, 1132 (10th Cir. 2007) (while "'Rule 11 prohibits the participation of the judge in plea negotiations under *any* circumstances,'" "[n]ot all judicial comments relating to plea agreements violate the rule" (citation omitted)).

996 F.2d 1132, 1135 (11th Cir. 1993) (noting that the purpose of Rule 11 is to "eliminate judicial pressure from the plea bargaining process").

Accordingly, once the Court of Appeals assesses the specific content and context of a judge's comments and determines that they clearly "amount[] to judicial participation" in violation of Rule 11(c)(1), the court has insight into all four parts of the plain-error standard, at least where the defendant has surrendered his trial rights and pled guilty. The court knows not only that there has been error and that the error is plain (the first and second requirements), but also that the error affected the substantial rights of the defendant and the integrity of the proceedings (the third and fourth requirements). A judge's remarks amount to "judicial participation" precisely because they alter a defendant's plea calculus and subvert the court's status as an impartial referee. The error and the prejudice are essentially one and the same.

That is all the Court of Appeals meant when it said that a defendant who establishes improper judicial participation in plea negotiations "need not show any individualized prejudice." Pet. App. 5a. The court has never described judicial participation errors as "structural" or declared that they are not subject to Rule 11(h), and it has never suggested that a defendant's plea must be vacated whenever a district court happens to make a stray plea-related comment. The court's offhand remark in the decision below that it does not "recognize harmless error in the context of judicial participation" (Pet. App. 3a) simply reflects the reality that a defendant who

pleads guilty after a district court engages in conduct that amounts to a violation of Rule 11(c)(1) has experienced harm that warrants relief. If the court concludes that the district court's comments did not pressure the defendant to plead guilty, no violation has occurred and no relief is provided. *See, e.g., Johnson*, 89 F.3d at 784 ("find[ing] no violation of Rule 11" where there was "nothing coercive in the manner in which the court conducted the plea hearing"); *United States v. Casallas*, 59 F.3d 1173, 1179 (11th Cir. 1995) (holding that improper comments at a hearing where the defendant pled guilty to one charge did not require the court to vacate the defendant's later pleas to separate charges because there was no indication that the earlier comments had "infect[ed] or taint[ed] the guilty pleas at the [later] hearing").

The Eleventh Circuit's handling of judicial participation claims brought by defendants who went to trial instead of pleading guilty further demonstrates that the court has not embraced a policy of automatic vacatur even when prejudice is lacking. On several occasions, the court has declined to provide a remedy where a judge urged a defendant to plead guilty, but the defendant rejected that advice and was convicted after a jury trial. In *Diaz*, the court determined that the district court's improper participation in plea negotiations "did not prejudice" the defendant or "raise the specter of an involuntary plea." *Diaz*, 138 F.3d at 1363; *see also id.* (describing the defendant's "claim of prejudice [as] baseless"). The defendant, the court noted, did not contend that his trial had been unfair or that his sentence penalized him for exercising his trial rights. Finding no

indication that the trial outcome or "sentence would [have] be[en] different if determined by another judge," the court saw no need to vacate the conviction or remand for resentencing. *Id*. at 1364.

The Eleventh Circuit recently addressed a similar post-trial judicial participation claim in *United States v. Tobin*, 676 F.3d 1264 (11th Cir. 2012), a decision that postdates the decision below. As in *Diaz*, the court declined to vacate the defendants' convictions because the defendants "ha[d] not carried [their] burden of showing that [they were] actually prejudiced at trial." *Id*. at 1307. The court concluded, however, that one of the defendants, who had challenged his sentence on several grounds, should be resentenced before a different judge. The court distinguished *Diaz* on the ground that it had been decided at a time when district courts were still "constrained by [mandatory] sentencing guidelines." *Id*. at 1308. Now that "significant discretion has been restored to district courts in matters of sentencing," the court was "no longer confident … that a district court's participation in plea discussions will not affect the court's actual impartiality or the appearance of impartiality at sentencing, both of which are fundamental to the integrity of that process." *Id*. But the court did *not* hold that resentencing is the required remedy for all acts of improper participation, even when prejudice is absent. Significantly, the court declined to vacate the sentences of two codefendants who had made the same Rule 11 claim as the first defendant but who "ha[d] not challenged

their sentences in any way." *Id.* at 1308 n.27.[2] Because their sentences appeared to have been untainted by the asserted Rule 11(c)(1) violation, the Court of Appeals let them stand. Its ruling confirms that vacatur is by no means automatic.

B. Judicial Participation Rulings Are Largely Consistent Across The Circuits

The petition asserts that at least five circuits (the First, Third, Fourth, Fifth, and Seventh) have broken with the Eleventh and "inquired into prejudice as a prerequisite to vacating a guilty plea on grounds of judicial participation in plea negotiations," while two others (the Sixth and Ninth) have sided with the Eleventh and "granted appellate relief for a judicial-participation error without analyzing prejudice." Pet. 16, 18. In reality, there is no deep divide among the circuits in their handling of judicial participation claims. While the Courts of Appeals may differ modestly in their framing of the Rule 11(c)(1) inquiry, they "have established a familiar and generally uniform standard," and they grant and deny relief in similar circumstances. *United States v. Baker*, 489 F.3d 366, 370 (D.C. Cir. 2007).

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[2] To the extent the government objects to *Tobin*'s formulation of the standard for vacating the sentences of defendants who proceed to trial after a Rule 11(c)(1) violation, *see* Pet. 22, its proper recourse would have been to seek certiorari in that case—something it declined to do. This case concerns a defendant who pled guilty after improper judicial participation in plea negotiations, *not* a defendant who declined to plead and was convicted by a jury.

Consider the position of the Fifth Circuit. According to the petition, that court's decision in *United States v. Miles*, 10 F.3d 1135 (5th Cir. 1993), "puts the circuit conflict in particularly stark relief." Pet. 17. True, *Miles* states that judicial participation errors are subject to "harmless error review." 10 F.3d at 1141. But *Miles* also states that, as a practical matter, Rule 11(c)(1) violations are extremely unlikely to be harmless. In the court's words, "the pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to the plea suggested by the district court." *Id.* at 1141. In support of this proposition, the Fifth Circuit relied on a Sixth Circuit decision that the petition places on the other side of the alleged split. *Id.* (discussing *United States v. Barrett*, 982 F.2d 193 (6th Cir. 1992)); *see also United States v. Rodriguez*, 197 F.3d 156, 160 (5th Cir. 1999) (reiterating that "it is difficult to imagine a situation in which the court would find a judge's participation in the plea negotiation process to be harmless given the inherent pressure placed on the defendant").

The Fourth and Seventh Circuits have likewise declared that, "insofar as judicial intervention in the negotiation of a plea agreement is concerned, the possibility of harmless error may be more theoretical than real." *United States v. Kraus*, 137 F.3d 447, 457 (7th Cir. 1998); *see also United States v. Bradley*, 455 F.3d 453, 463 (4th Cir. 2006) (recognizing that "it will be rare that a clear violation of Rule 11's prohibition against judicial involvement in plea negotiations does not affect substantial rights"). Concluding in *Kraus* that the plea-related remarks of a district judge's clerk were not harmless, the Seventh Circuit

explained that there are "pressures … inherent in judicial intervention." *Kraus*, 137 F.3d at 457. When a court indicates what sort of deal it prefers, it "inevitably affect[s] the parties' own efforts to craft an agreement acceptable to them." *Id.* Along similar lines, the Fourth Circuit held in *Bradley* that, by "repeatedly encouraging [the defendants] to plead guilty," the district court committed "plain Rule 11 error [that] affected [the defendants'] substantial rights," entitling them to withdraw their pleas. 455 F.3d at 455, 464. In both cases, the Fourth and Seventh Circuits relied in part on decisions from the Sixth, Ninth, and Eleventh Circuits that purportedly stand on the other side of the circuit conflict. *See, e.g., id.* at 460 (endorsing the Sixth Circuit's statement in *Barrett*, 982 F.2d at 194, that "'a judge's participation in plea negotiation is inherently coercive'"); *see also United States v. Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) ("We agree with the Fourth and Fifth Circuits that errors such as these 'almost inevitably seriously affect the fairness and integrity of judicial proceedings' and affect substantial rights as required to prove plain error.").

The petition cites only two cases in which courts actually declined to vacate guilty pleas on the ground that an asserted judicial participation error was non-prejudicial—*United States v. Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), and *United States v. Ebel*, 299 F.3d 187 (3d Cir. 2002). Both cases are factually distinguishable from the present case, and both likely would have come out the same way in the Eleventh Circuit as they did in the First and Third. In *Pagan-Ortega*, the district court told the defendant he had gotten a "good deal" *after* the "plea

agreement had been reached" and its terms confirmed. 372 F.3d at 25-26. The First Circuit "assume[d]" that this was error and, without saying anything about whether it had affected the defendant's substantial rights, concluded that it did not affect the integrity of the proceedings. *Id*. at 27. The Eleventh Circuit has held that such "*post*-agreement remark[s]" do not amount to improper intervention under Rule 11. *Telemaque*, 244 F.3d at 1249. Thus, rather than resorting to the fourth prong of the plain-error standard (effect on the integrity of the proceedings), the Eleventh Circuit simply would have rejected the claim under the first prong for lack of error. *Cf. Cano-Varela*, 497 F.3d at 1132 ("This position [that post-agreement remarks do not violate Rule 11(c)(1)] appears to be uniform among the Courts of Appeals.").

In *Ebel*, the Third Circuit confronted a situation in which, before any improper judicial participation, the defendant unequivocally expressed a desire to plead guilty in exchange for a 36-month sentence. The court's comments induced the defendant to accept a plea deal that the parties mistakenly believed would result in a guidelines range of 37–46 months. In fact, the guidelines range was lower, and the defendant ended up with a 33-month sentence. The Third Circuit did not question the prevailing view that judicial participation in plea negotiations is "inherently coercive," but the court concluded that the defendant "was induced to do nothing beyond what he had already stated he would agree to." 299 F.3d at 191-92. Had the Eleventh Circuit been presented with these unusual facts, it likely would have held either that there had been no improper participation

because the judge's comments were not made until after the defendant declared his willingness to plead or that the participation did not warrant relief because the defendant did better than his hoped-for bargain.

On the Eleventh Circuit's side of the alleged split, the petition places the Sixth and Ninth Circuits. These courts, however, do not apply an automatic vacatur rule to provide relief even where prejudice is absent. In *Barrett*, the Sixth Circuit emphasized the prejudicial effect of the district court's actions. According to the Sixth Circuit, the district court's comments on various sentencing options and on the strength of the government's case were "coercive" and left the defendant "with the choice of pleading guilty or taking his chances at trial in front of a judge who seemed already to have made up his mind about the defendant's guilt." 982 F.2d at 195. Because the district court had placed "pressure" on the defendant to plead guilty, the Sixth Circuit explained that its conduct could not be considered "harmless error under [Rule] 11(h)," as the government contended. *Id.* at 196. For its part, the Ninth Circuit has denied relief where the district court "was not trying to shape the agreement or persuade either side to accept it," and it has emphasized that Rule 11 "does not establish a series of traps for imperfectly articulated oral remarks." *United States v. Frank*, 36 F.3d 898, 902-03 (9th Cir. 1994); *compare Anderson v. United States*, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (vacating plea where the district court's plea-related comments "effectively threw the weight of the court behind the prosecution," creating a "coercive atmosphere" in which it was "difficult to

imagine how [the defendant] could not have felt pressured"). Neither the Sixth Circuit nor the Ninth has ever declared that prejudice analysis is categorically inapplicable to judicial participation violations.

In short, any split is illusory. The circuits all consider judicial participation claims in their specific contexts, and they are largely consistent in their handling of factually similar claims. When a judge's plea-related comments appear prejudicial, the circuits generally grant relief. When a judge's comments appear non-prejudicial, the circuits generally deny relief, usually on the ground that the comments do not amount to a violation of Rule 11's prohibition on judicial participation and occasionally on the ground that any violation was harmless. The petition identifies no instance in which a circuit has reached a result contrary to the Eleventh Circuit in a case, like this one, in which a judicial officer implored a defendant who had just signaled a desire to exercise his trial rights to "come to the cross" and plead guilty in order to reduce his sentencing exposure. Whatever modest semantic differences may exist among the circuits simply do not justify this Court's review.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Beyond the absence of any true circuit conflict, several vehicle problems counsel against a grant of certiorari.

A. Respondent Would Prevail Even Under The Government's Preferred Approach To Judicial Participation Errors

This is not a case in which the government's proposed standard would be outcome determinative. The judicial participation at issue here falls within the heartland of the Rule 11(c)(1) prohibition, and the prejudice is palpable. Indeed, few reported judicial participation cases involve a violation as egregious as this one. However well intentioned the magistrate judge may have been, his comments sent an unmistakable message to Mr. Davila to give up his trial rights and plead guilty. The judge suggested that Mr. Davila lacked a "viable defense" and should not "wast[e] the Court's time" by requiring the government "to spend a bunch of money empanelling a jury to try an open-and-shut case." Ex Parte Hearing Tr. at 8, 11. The judge told Mr. Davila that he "need[ed]" credit for acceptance of responsibility because his guidelines range would likely be "pretty bad." *Id*. at 16. And the judge twice implored Mr. Davila to come "to the cross" and try to earn a downward departure. *Id*. at 16-17.

Appellate courts—including those courts that the government says properly inquire into prejudice—have consistently held that remarks such as these are "'inherently coercive'" and "taint[] everything that follow[s]." *Cano-Varela*, 497 F.3d at 1133-34 (citation omitted); *see also id*. at 1133 (noting that "the Courts of Appeals all appear to" agree on this point). The Courts of Appeals have granted relief not only in cases closely analogous to this one, but also in cases in which the judicial pressure was less

overt than it was here. *See, e.g., Bradley*, 455 F.3d at 462 (court "commented on the amount and weight of the Government's evidence" and encouraged defendants to plead guilty); *Rodriguez*, 197 F.3d at 159 (court second-guessed defendant's desire to go to trial and encouraged him to plead guilty); *Kraus*, 137 F.3d at 456-57 (judicial clerk advised parties about what sentence would be acceptable in plea agreement); *United States v. Daigle*, 63 F.3d 346, 349 (5th Cir. 1995) (court advised defendant of sentence he would receive if he pled guilty); *Miles*, 10 F.3d at 1141 (court told the parties how long a sentence their agreement should provide). These decisions recognize that, when a judicial official advises a defendant to take a particular course of action and suggests that a failure to do so will have negative repercussions, the "substantial rights" of the defendant are "obviously affected." *Cano-Varela*, 497 F.3d at 1134. It is simply "difficult to imagine" that such judicial pressure would not influence a defendant's plea calculus. *Rodriguez*, 197 F.3d at 160. The circumstances of the Rule 11(c)(1) violation in this case are thus "reason enough" to conclude that Mr. Davila has suffered prejudice and is entitled to relief. *Miles*, 10 F.3d at 1141; *see also Rodriguez*, 197 F.3d at 160 ("[W]e must conclude that the coercion that results from judicial participation so corrodes the plea bargaining process that no amount of corrective procedures may neutralize it.").

Even assuming that a further inquiry into the proceedings below could conceivably alter this conclusion, the petition is simply incorrect that "the procedural history of this case" suggests a lack of prejudice. Pet. 19. The petition speculates, for in-

stance, that "any effect the [magistrate judge's] comments might have had was dissipated by the three-month interval between the comments and the plea" and by the fact that the judge did not preside over Mr. Davila's plea colloquy and sentence. Pet. 19. But the three-month delay occurred in large part because the parties needed to await a determination of Mr. Davila's mental competency before entering into a plea agreement and because Mr. Davila had only limited access to his attorney. As for the magistrate judge's absence from the later proceedings, his lack of direct involvement did nothing to diminish the weight of his words, particularly since the district court never acknowledged or distanced itself from the offending remarks. The petition also suggests that the failure of Mr. Davila and his attorney to complain about the comments indicates that they had no influence. Courts, however, have rejected arguments along these lines, and they are especially misplaced here given that Mr. Davila went into the ex parte hearing seemingly unwilling to plead guilty and has repeatedly expressed dissatisfaction with the plea agreement. *See, e.g., Bradley*, 455 F.3d at 463 ("[T]he failure of defense counsel to recognize and to seek to avoid the Rule 11 error at trial, while unfortunate, does not provide a basis for finding that the error did not affect Defendants' substantial rights.").

The bottom line is that this case presents a classic example of prejudicial judicial participation in plea negotiations. Whatever objections the government might have to the Court of Appeals' articulation of the prejudice inquiry, this is emphatically not the sort of situation in which a defendant's guilty

plea should be allowed to stand. This Court should wait for a case in which the parties' dispute over the legal standard is not merely academic.

B. The Circumstances Of This Case Do Not Implicate The Government's Core Concerns

Along similar lines, the Court should deny certiorari because this case does not involve any of the problematic scenarios that the government associates with the "automatic-vacatur approach" that the Court of Appeals supposedly embraced in the decision below. Pet. 14. The government expresses concern, for example, that an "automatic-vacatur" rule will allow defendants to obtain relief even where "the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading." Pet. 14. Elsewhere, the government worries that, during the course of a plea colloquy, "a judge diligently attempting to assure that a defendant's constitutional rights were not violated in the plea-negotiation process" might inadvertently "stray[]" into prohibited commentary and thus invalidate the plea. Pet. 21. The government also speculates that defendants may attempt to game the system by "strategically rais[ing]" judicial participation errors on appeal if they are dissatisfied with their sentences. Pet. 22.

Putting aside for the moment that all of these concerns rest on a questionable reading of the decision below, the fact is that this case does not implicate a single one of them. The judicial comments at

issue here were not neutral and certainly did not discourage Mr. Davila from pleading guilty. The magistrate judge did not make his remarks during the course of a plea colloquy in which he was attempting to ensure that a guilty plea was knowing and voluntary. And this is not a case in which anyone delayed in identifying the judicial participation error in order to gain a strategic advantage. As the government points out, it was the Court of Appeals itself that identified the plainly erroneous comments when it reviewed the record after Mr. Davila's counsel filed his *Anders* motion. Pet. 19.

A far better vehicle than this case would be one in which an appellate court actually vacates a conviction even though the district court did not encourage a plea, or the court's offending comment was merely a stray remark during a plea colloquy, or the defendant intentionally withheld objection. If the government's concerns are well-founded, it should not have to wait long for such a case. If such a case does not arise, that will serve as strong evidence that the government's concerns are misplaced and that this Court's review is unwarranted.

C. This Case Raises A Difficult Preliminary Question Concerning The Appropriate Standard Of Review

The government contends that, consistent with this Court's precedents, an appellate court cannot grant relief on an unpreserved judicial participation claim unless the defendant satisfies the plain-error standard by, among other things, making a specific showing of prejudice. *See* Pet. 11. The government's

argument presupposes that such claims are, in fact, subject to plain-error review. If they are not, then any inquiry into prejudice would occur under the more forgiving harmless-error standard, under which the government would bear the "burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993).

It is by no means obvious that judicial participation claims not raised in the district court should be reviewable only for plain error. This Court's decisions, the D.C. Circuit has observed, "do[] not suggest that [plain-error review] applies to all Rule 11 violations raised for the first time on appeal." *Baker*, 489 F.3d at 372. Several appellate courts have recognized that the "unique situation that occurs when a district court has allegedly violated Rule 11 by participating in plea negotiations" may warrant a "lesser standard of review." *United States v. Nesgoda*, 559 F.3d 867, 869 n.1 (8th Cir. 2009) (describing the arguments in favor of a "less rigorous standard" as "somewhat compelling," but declining to adopt them because the case was on collateral rather than direct review). Where, as here, a judge's comments essentially serve "to assist defense counsel in persuading the defendant to follow counsel's advice …, it is understandable that counsel would not object." *Cano-Varela*, 497 F.3d at 1132.[3] The application of a more

[3] Even though Eleventh Circuit precedent dictated plain-error review, Mr. Davila preserved the argument for an alternative standard by quoting this passage from *Cano-Varela* in his appellate brief. *See* 10-15310 Docket Entry at 19 n.7 (Aug. 19, 2011).

forgiving standard could provide an alternative basis for affirming the Court of Appeals.

It is conceivable that the Court could avoid this question by holding that Mr. Davila is entitled to relief under any of the potential standards of review (or by holding that the government prevails even if it bears the burden of showing harmlessness). *See, e.g., id.*; *Baker*, 489 F.3d at 373. It would be far more straightforward, however, for the Court to await a vehicle in which the parties agree on the applicable error-assessment framework.

III. THE DECISION BELOW IS CONSISTENT WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THIS COURT'S CASES

The petition maintains that the Eleventh Circuit's approach to claims of improper judicial participation "cannot be squared with the text of Rule 11 or this Court's cases interpreting that Rule." Pet. 9. Specifically, the petition faults the Court of Appeals for supposedly disregarding Rule 11(h), which declares that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights," and for ignoring this Court's decisions in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004), which describe how plain-error review should be conducted when a judge fails to give a required notice during a Rule 11 plea colloquy. The petition's criticisms are misplaced. The decision below stands on sound doctrinal footing.

As previously explained, the Court of Appeals has not said that a defendant's conviction must be vacated whenever a judge makes a plea-related remark, even if it is apparent that the remark had no prejudicial effect. Instead, the best reading of Eleventh Circuit precedent is that the court has essentially folded the prejudice inquiry into the determination of whether there has been a violation of Rule 11(c)(1)'s prohibition on judicial participation. A Rule 11(c)(1) violation occurs when a judge makes statements that, taken in context, pressure the defendant to plead guilty rather than exercise his right to stand trial. Such pressure necessarily "affects substantial rights" and thus cannot qualify as "harmless error" under Rule 11(h), at least where the defendant later enters a guilty plea.

There is nothing novel about the notion that a finding of error can also constitute a finding of harm. In a variety of contexts, reviewing courts consider whether an act or omission is material or prejudicial before classifying it as an error. *See, e.g., United States v. Bagley*, 473 U.S. 667, 681-82 (1985) (due process is violated only if evidence withheld by prosecutors is material). Once the court finds error, "there is no need for further harmless-error review." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The error is, by definition, "sufficient to undermine confidence in the outcome of the proceeding." *Dominguez-Benitez*, 542 U.S. at 83 (internal quotation marks omitted); *see also Bagley*, 473 U.S. at 679-80 (observing that a harmless-error inquiry "may as easily be stated as a materiality standard"); *cf. Dominguez-Benitez*, 542 U.S. at 82 (describing *Bagley* as "a sensible model to follow" in the Rule 11 context).

Focusing the inquiry on the materiality of a judge's comments is sensible. Rather than encouraging a reviewing court to engage in freewheeling speculation about whether a defendant would have pled guilty on the same terms in an alternate universe in which improper judicial participation had not occurred, it pushes the court toward a more objective analysis. The court examines the disputed judicial comments and the specific context in which they were made and considers their likely effect on a rational defendant. This Court has frequently expressed its preference for objective inquiries over subjective ones. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) (whether police interrogation is "custodial" "is an objective inquiry" that "involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning"); *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 n.7 (2011) (noting this Court's repeated "rejection of subjective inquiries in [various] areas of criminal law").

Neither *Vonn* nor *Dominguez-Benitez* precludes this sort of approach. Those cases dealt with a particular type of Rule 11 violation—a judge's erroneous omission of a discrete piece of information from a plea colloquy. The Court did not purport to hold that the stand-alone prejudice inquiry required in that context is required for all Rule 11 violations. *See Baker*, 489 F.3d at 372 ("Obviously, not all Rule 11 violations are created equal."). Judicial participation errors are "qualitatively different" from the errors at issue in *Vonn* and *Dominguez-Benitez*, and it is entirely appropriate for a court to approach them differently. *Id*.

None of this is to suggest that this Court could not choose to classify judicial participation violations as "structural errors" (although, to reiterate, the Eleventh Circuit has never described them that way). The petition's contrary arguments are unavailing. This Court has rejected the view that the only errors that may be deemed structural are "'fundamental constitutional errors.'" Pet. 13 (quoting *Neder v. United States*, 527 U.S. 1, 7-8 (1999)); *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (describing it as "inconsistent with the reasoning of our precedents … that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural"). It is the character of the error, not the source of the underlying right, that determines the error's status. Specifically, this Court has looked to "the difficulty of assessing the effect of the error" and "the "irrelevance of harmlessness." *Id.* Both of those criteria support the view that judicial participation errors qualify as structural.

First, it is unusually difficult to determine the precise effect of a Rule 11(c)(1) violation. When judges insert themselves into the plea negotiation process, they alter the course of the proceedings. A reviewing court cannot reliably draw conclusions about what the parties might have done absent the improper intervention when the intervention taints everything that comes after. In this respect, a judicial participation error bears a much closer resemblance to structural errors such as the denial of a defendant's right to self-representation, counsel of choice, or a public trial than it does to the typical "trial error." *Compare, e.g., Gonzalez-Lopez*, 548

U.S. 140 (counsel of choice); *Waller v. Georgia*, 467 U.S. 39 (1984) (public trial); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (self-representation), *with Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991) (defining "trial error" as "error which occurred during the presentation of the case to the jury, and … may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt").

Second, judicial participation errors are worth correcting even if they cause no discernible harm to the defendant. As numerous courts have pointed out, the judicial participation prohibition serves not only to "diminish[] the possibility of judicial coercion of a guilty plea," but also to preserve "the judge's impartiality" and to avoid "creat[ing] a misleading impression of [the judge's] role in the proceedings." *Rodriguez*, 197 F.3d at 158-59. Even if there are strong indications that a particular defendant did not change his behavior as a result of a judge's improper comments, allowing his guilty plea to stand may nevertheless undermine "the integrity of the judicial process." Pet. App. 4a; *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality) ("An error is fundamental if it undermines confidence in the integrity of the criminal proceeding.").

Separate from the question of structural error, this Court could also hold that reviewing courts are entitled to remedy judicial participation violations without inquiring into prejudice pursuant to their supervisory powers (although, again, this is not

something the Court of Appeals purported to do here). The petition disputes this, asserting that courts may not use their supervisory authority to circumvent Rule 11(h), which requires harmless errors to be disregarded. Pet. 16.[4] But the sole case the petition offers in support of this proposition, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), addressed the authority of a district court to supervise prosecutors, not the authority of an appellate court to supervise district courts. In *Nguyen v. United States*, 538 U.S. 69 (2003), the Court indicated that the *Bank of Nova Scotia* limitation does not apply when an error threatens "the proper administration of judicial business." *Id.* at 81 (internal quotation marks omitted).

The government, moreover, has at least implicitly recognized that an appellate court's authority to remedy a Rule 11(c)(1) violation does not depend solely on whether the error prejudiced the defendant. On several occasions, the government has successfully raised judicial participation challenges in an effort to protect its own interests. *See, e.g., In re United States*, 572 F.3d 301 (7th Cir. 2009) (granting

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[4] It is actually not apparent that Rule 11(h), which refers to "*variance[s]* from the requirements of this rule," applies to judicial participation errors. A "variance" is "[a] difference or disparity between two statements or documents that ought to agree." Black's Law Dictionary at 1692 (9th ed. 2009). That definition no doubt encompasses a situation in which a court deviates from the standard plea colloquy script, and that sort of deviation is what the Advisory Committee had in mind when it added section (h) to the Rule. In contrast, one would not typically describe a court's improper intervention into plea negotiations as a "variance."

government's petition for a writ of mandamus to disqualify judge who violated Rule 11(c)(1)); *United States v. Werker*, 535 F.2d 198, 200 (2d Cir. 1976) (exercising "supervisory power" and granting government's request to bar district court from disclosing the sentence it intended to impose if defendant accepted plea). If courts may remedy a judicial participation error that causes no apparent prejudice to a defendant when it is the government that identifies the error, then surely they may also do so when the error is identified by the defendant or by the court itself.

The Eleventh Circuit has not run afoul of any of this Court's cases and is not out of step with the other Courts of Appeals. It correctly remedied the egregious judicial participation violation in this case. Its sister circuits would have done the same. There is no need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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