No. 12-167

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY DAVILA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent in *United States v. Davila*, No. 12-167.[1]

NACDL, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of a crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice. In furtherance of these objectives, NACDL files approximately 50 *amicus*

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

This case presents a question of great importance to the NACDL and its clients because the vast majority of criminal prosecutions end in plea bargains. The NACDL has a particular interest in protecting the integrity of plea bargains by ensuring that a defendant's decision to plead guilty is free from the undue influence that inherently occurs when judges participate in plea negotiations.

SUMMARY OF ARGUMENT

A defendant who pleads guilty forfeits core constitutional protections. *See United States v. Ruiz*, 536 U.S. 622, 623 (2002). It is therefore critical that pleas are voluntary and free of coercion. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Federal Rule of Criminal Procedure 11(c) creates a key bulwark against coercion by barring judges from participating in plea negotiations. The rule followed by the Eleventh Circuit below, which holds that judicially influenced plea decisions are inherently prejudicial, is the proper approach for analyzing violations of Rule 11(c).

Because the NACDL and its members have extensive experience with plea negotiations, it submits this brief to address three matters implicated by the question presented in this case. First, as a matter of practice, judicial involvement in plea negotiations has a deeply disruptive effect on the course of those negotiations. The participation of a judge is inherently coercive because it places defendants in the unfair position of either speaking out at the risk of drawing the judge's ire or accepting a plea that they otherwise would have rejected.

Judicial involvement in plea negotiations also risks leaving defendants with false expectations of their sentence when accepting a plea, especially when judges intervene in the negotiations with an incomplete understanding of the case. As a result, judicial pressure asserted during plea negotiations undermines the integrity of the plea process and increases the risk that innocent defendants will plead guilty.

Second, a rule treating judicial interference in the plea process as inherently prejudicial is not disruptive of the criminal justice system. The three federal circuits that have followed this approach for the last twenty years account for nearly half of all federal criminal cases nationwide. Judges in these circuits still retain substantial latitude to oversee plea negotiations in a manner that is consistent with Rule 11(c). Indeed, notwithstanding the parade of horribles in its brief, the government has failed to identify a single instance from any of these circuits where a plea was vacated based on a stray comment by the judge. To the contrary, it is the rule advanced by the government that would be difficult to administer or apply fairly.

Third and finally, given the inherently disruptive effect that judicial participation has on plea negotiations, it makes sense to treat violations of Rule 11(c) as inherently prejudicial without conducting an individualized inquiry. Attempting to discern the impact of the judge's comments on a defendant's plea decision based on a limited, cold record necessarily invites speculation. In light of the fundamental rights implicated in plea bargains and the minimal work necessary to remedy a Rule 11(c) violation, treating judicial participation in plea

negotiations as inherently prejudicial is a better approach.

ARGUMENT

I. JUDICIAL PARTICIPATION IN PLEA NEGOTIATIONS DISRUPTS AND UNDERMINES THE PLEA BARGAIN PROCESS

There is good reason why Rule 11(c) expressly provides that "[t]he court must not participate" in plea negotiations. When a judge exhorts a criminal defendant from the bench to plead guilty, it is inherently coercive. Experience shows that defendants subjected to such coercion are more likely to accede to a guilty plea—even if they are innocent. And the involvement of the court in negotiations undermines the integrity of the proceedings.

A. Judicial Intervention in Plea Negotiations Puts Defendants in an Impossible Predicament

By participating in plea negotiations, a judge places a criminal defendant in a fundamentally unfair position. A defendant facing a federal criminal trial, and the possibility of years or decades in federal prison, is already "in a state of mental tension and great apprehension." *United States v. Tateo*, 214 F. Supp. 560, 565-66 (S.D.N.Y. 1963) (Weinfeld, J.). This uniquely difficult situation makes defendants particularly susceptible to judicial pressure to waive their constitutional right to trial in favor of the promise of a reduced sentence by accepting a plea bargain. *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865, 891 (1964). The pressure asserted by a supposedly neutral judge in plea

negotiations is "quite different" from that arising from plea negotiations with a prosecutor, whom a defendant recognizes as an adversary. *See U.S. ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 255 (S.D.N.Y. 1966) (Weinfeld, J.). A judge wields the power of overseeing the defendant's trial and, ultimately, determining his sentence if convicted.

"In facilitating a plea, a judge communicates to the defendant that he desires a plea and so raises the possibility, if only in the defendant's mind, that a refusal to accept the judge's preferred disposition would be punished." *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006) (internal quotation marks omitted). Accordingly, "[w]hen a judge suggests to a defendant, either directly or through his counsel, that he should plead guilty, the coercive effect of this suggestion is likely to be overwhelming." Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 452 (1971); *see also, e.g.*, *United States v. Baker*, 489 F.3d 366, 374 (D.C. Cir. 2007) (Brown, J.) ("It is difficult to imagine how a defendant, faced with a potential sentence of [eight years total], could fail to be powerfully influenced by the sentencing judge's" suggestion that a plea would result in a lower sentence.); *United States v. Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) (McConnell, J.) ("[T]he Courts of Appeals all appear to hold that any 'discussion of the penal consequences of a guilty plea as compared to going to trial is inherently coercive, no matter how well-intentioned.'") (quoting *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)).

Even innocent defendants are far more likely to plead guilty when subjected to that sort of coercion. *See* Richard Klein, *Due Process Denied: Judicial*

Coercion in the Plea Bargaining Process, 32 Hofstra L. Rev. 1349, 1401-02 (2004) ("When a defendant is told by a judge that if he doesn't admit his guilt he will receive many more years in prison if convicted after trial, even the innocent defendant may well be influenced."). Rule 11(c)(1)'s prohibition on judicial participation in plea negotiations was designed to eliminate the danger that defendants will be induced to plead guilty based on the perceived "risk of not going along with the disposition apparently desired by the judge . . . even if innocent." Rule 11 Advisory Committee Notes, 62 F.R.D. 271, 284 (1974).

The case reporters are stocked with examples of how a judge's involvement in plea negotiations can unduly influence the decision of a criminal defendant. Three of these examples will help illustrate the disruptive effect of judicial coercion.

1. *Marco Antonio Cano-Varela*

Marco Antonio Cano-Varela was one of thirty-four defendants charged in a drug and money-laundering conspiracy case. *See Cano-Varela*, 497 F.3d at 1124. He was indigent and did not speak English. *See id.* at 1124-25. His court-appointed attorney had repeatedly recommended to Cano-Varela that he plead guilty, but could not convince him to do so. *See id.* at 1128-29. While awaiting trial, Cano-Varela twice wrote letters to the court stating that he was concerned that his attorney was not allowing him to review the evidence against him in a way that Cano-Varela could understand. *See id.* at 1125. In his second letter, Cano-Varela asked for a new lawyer and expressly stated that he needed to understand the evidence against him to prepare for his "jury trial." *Id.*

In response, the court held a telephonic status conference with the prosecutor and Cano-Varela's attorney. *Id.* On the call, Cano-Varela's attorney stated that although he had at one point convinced Cano-Varela to accept a plea, Cano-Varela had since had a "change of heart" and now wanted to go to trial. *Id.* The judge asked the attorneys to explain the plea offer and, after discussing the terms, set a follow-up status conference with Cano-Varela present to "see what we can do" about facilitating a plea. *Id.* at 1126.

At the hearing, the judge asked the prosecutor to lay out the terms of the proposed plea agreement. *Id.* at 1128. The judge then called Cano-Varela and his attorney up to the bench and encouraged Cano-Varela to follow his lawyer's advice to accept the government's plea offer. The judge warned Cano-Varela that "if the government's case is as compelling as the United States says it is," then "you have very few options." *Id.* In doing so, the judge told Cano-Varela that his attorney "apparently is of the opinion that [going to trial] is a high-risk approach and it is not likely to be successful." *Id.* According to the judge, accepting a plea "would allow [Cano-Varela] *to perhaps get a much better, much lesser sentence*" than the ten-year mandatory minimum he faced if he were found guilty after trial. *Id.* (emphasis in original).

Shortly thereafter, Cano-Varela abandoned his decision to proceed to trial and accepted the government's plea offer. On appeal, the appellate court vacated the plea based on the district judge's violation of Rule 11(c)(1) by advising Cano-Varela that he faced a harsher sentence if he did not plead guilty and was convicted. *Id.* at 1134. As the appellate court observed, the judge's comments "may have coerced the defendant into entering the plea

when he otherwise would not have," which "obviously affected [Cano-Varela's] substantial rights." *Id.*

2. *Solomon Jones*

Solomon Jones was charged with participating in a conspiracy orchestrated by his co-defendant. *See Bradley*, 455 F.3d at 455. He also faced charges in a multi-count federal indictment, as well as related charges in state court, that could have put him in prison for life. *See id*. at 456. Jones had indicated that he was willing to accept a plea that would result in 10-15 years imprisonment, but refused to accept the government's condition that he serve as a cooperating witness. *See id.* at 456-57.

The case went to trial. Throughout the trial, the judge repeatedly exhorted the defendants to plead guilty. On the morning before the second day of trial, the judge took the defendants and their counsel aside and told them how strong the government's case was. The judge said that the government's opening statement had been "excellent" and that the first day of testimony had been "extraordinarily incriminatory of all the defendants." *Id.* at 457. The judge told Jones and his co-defendants that if the trial continued, "the likelihood of a life sentence is very real and very substantial." *Id.* The judge emphasized that, unlike in state court, "a life sentence in federal court is truly a life sentence." *Id.* The judge then declared a three-hour recess to allow plea discussions to continue. *Id.*

The parties were unable to reach an agreement, and the trial continued. Two weeks later, the judge again exhorted Jones and his co-defendants to plead guilty. The judge described the government's case as "one of the strongest cases ever to be brought in this courthouse" and stated that he could not believe that

the defendants had rejected the "very, very favorable, I would even say extraordinarily favorable, plea offers that had been made." *Id.* at 458.

In response, Jones told the judge that he objected to "the way you keep judging us." He noted:

> "You keep telling us to cop out, like we are already guilty."
>
> The court replied "I keep telling you that you are presumed innocent."
>
> Jones then stated "It don't seem like it."

Id. at 459. A week later, Jones and his co-defendants pleaded guilty. *Id.* The appellate court concluded that the judge's involvement in the plea negotiations "unacceptably influenced the Defendants' decision to plead guilty." *Id.* at 464. By participating in the plea negotiations, the judge "repeatedly appeared to be an advocate for the pleas rather than as a neutral arbiter, and any fair reading of the record reveals the substantial risk of coerced guilty pleas." *Id.* Accordingly, the appellate court held that Jones must be allowed to withdraw his plea. *See id.* at 465.

3. *Ana Maria Mendoza*

Ana Maria Mendoza's case illustrates how a judge's use of religious imagery amplifies the already immense pressure on a defendant to plead guilty. *See United States v. Mendoza*, 20 F. App'x 730, 731 (9th Cir. 2001). There, the judge presiding over a pre-trial motions hearing quoted from the gospel of Matthew to encourage Mendoza to plead guilty. Two days later, Mendoza did so. *Id.* The court of appeals recognized that the judge's reference to the Bible "exacerbate[ed]" the coercive effect of his participation in the plea negotiations. *Id.* Even

though a different judge actually took Mendoza's guilty plea and observed that the first judge's comments were improper, the use of religious imagery to pressure the defendant to plead guilty could not be viewed as harmless. *Id.* at 732-33.

B. Judicial Participation in Plea Negotiations Can Create a Misperception of the Sentencing Terms

Judicial participation in plea negotiations can also mislead the defendant regarding the sentence he will ultimately receive. This problem arises most commonly when a judge participates in plea negotiations without a full understanding of the facts and circumstances of the case. In those situations, when the judge opines about the potential sentences the defendant can expect with a plea, he risks creating false expectations for the defendant and undermining the integrity of the process as a result.

Kenneth Baker provides a telling example. Baker was a first time offender facing fraud charges. *Baker*, 489 F.3d at 368-69. Shortly before trial, the judge asked the government whether it had offered Baker a plea. The government responded that Baker had been offered a plea providing a sentencing range of 21 to 27 months imprisonment. *Baker*, 489 F.3d at 368. At that time, the judge had not yet reviewed the critical evidence in the case. *See id.* at 370 n.2. Despite an incomplete understanding of the facts, the judge opined that this case appeared similar to another first-offender fraud case that he had recently handled, where the judge sentenced the defendant to one year and one day because he "pled guilty early on and assumed responsibility." *Id.* at 369. The judge repeatedly stated that he would "probably be just as consistent here" with Baker's sentence. *Id.* The judge

even made a point to tell Baker that he had rejected the guideline range in that case. *Id.*

The next day, Baker pleaded guilty. In doing so, his attorney informed the court that although they had not reached a "typical plea agreement" with the prosecutor, "given the situation we'll enter a plea to the indictment." *Id.* at 369. At the sentencing hearing, Baker confirmed that his decision to plead guilty was based on the "case that [the judge] had referenced prior to my making my guilty plea of an individual who, I think you said he took a hundred and some odd thousand dollars and you gave him like a year and a day." *Id.* at 370.

The sentencing hearing went far differently from what Baker expected based on the judge's prior statements. In the meantime, the judge had reviewed the testimony of the fraud victim, an elderly woman. After Baker entered his plea, the judge commented that it was "pretty outrageous what happened. She's a vulnerable victim." *Id.* at 370 n.2. The guideline range for Baker's charges was 33 to 41 months and, not being bound by any plea agreement, the prosecutor recommended a sentence at the top of the range. The judge sentenced Baker to the guideline maximum, plus an additional 10 months for a related District of Columbia Code offense. *Id.*

In vacating the plea for violation of Rule 11(c)(1), the D.C. Circuit recognized that when the judge injected himself into the plea process, he put Baker "in a unique predicament-with no good options." *Id.* at 372. The judge in *Baker* compounded the problem by entering the fray of plea negotiations with an incomplete understanding of the case. In doing so, not only did the judge pressure Baker into pleading guilty, but Baker ultimately found himself facing a

sentence that was six times longer than he had been lead to believe and over twice as severe as the plea offered by the government. *Id.*

Kenneth Baker's experience is a particularly stark example, but it is certainly not the only one. In *Bradley*, discussed above, the judge repeatedly encouraged Solomon Jones and his co-defendants to plead guilty in the context of 10 to 20 year sentences, contrasted against the risk of facing life in prison if (or, as the judge implied, when) they were convicted. Jones ultimately "fared no better" than he would have if he had been convicted: his sentence after pleading guilty was 60 years. 455 F.3d at 459 & n.2

In *Cano-Varela*, the judge encouraged the defendant to plead guilty by contrasting a prospective sentence under the plea with the mandatory minimum of ten years in prison if convicted. *See* 476 F.3d at 1131. After Cano-Varela pleaded guilty, however, the government concluded that he did not cooperate sufficiently to justify the "safety valve" exception to the mandatory minimum sentence. *See id.* Accordingly, the mandatory minimum applied and Cano-Varela was sentenced to ten years in prison. *Id.* The government, of course, had the right to determine that Cano-Varela had not cooperated sufficiently. When the judge invoked the safety valve to encourage Cano-Varela to plead guilty, the judge created the false expectation of a substantially lower sentence that was far from guaranteed.

C. Judicial Participation Undermines the Integrity of the Proceedings

These examples demonstrate that when a judge puts his thumb on the scales in plea negotiations, the integrity of the plea agreement is compromised. Even

if Marco Antonio Cano-Varela or Solomon Jones ultimately decided to plead guilty for some other reason, "the judge's remarks tainted everything that followed." *Cano-Varela*, 497 F.3d at 1134. Under the shadow of the judge's recent encouragement to accept the plea, any colloquy regarding voluntariness was irredeemably tarnished. As the court in *Baker* put it, "the damage was done." 489 F.3d at 375.

Moreover, the taint of a judge's participation in the plea process may spill over into the trial and post-trial proceedings. "By encouraging a particular agreement, the judge may feel personally involved, and thus, resent the defendant's rejection of his advice." *Bradley*, 455 F.3d at 460 (quoting *United States v. Cannady*, 283 F.3d 641, 644 (4th Cir. 2002)). Even assuming that a judge could preside over the ensuing trial impartially, the defendant is likely to see the judge as an "adversary or at least a compromiser rather than an embodiment of his guarantee to a fair trial and an impartial sentence" unlikely to see it that way. White, 119 U. Pa. L. Rev. at 452-53; *see also Baker*, 489 F.3d at 375 ("Baker was put by the court in a position that would be reasonably perceived by a defendant as inconsistent with the court's role as a neutral arbiter of justice.").

These examples illustrate that even judges who mean no harm cannot avoid exerting undue influence on plea negotiations. *See Bradley*, 455 F.3d at 464 ("[W]e have no doubt that the district court had the best of intentions."); *Cano-Varela*, 497 F.3d at 1133 ("We do not doubt that the district court was motivated by a sincere desire to see Mr. Cano-Varela get the best possible outcome under the circumstances."). Even when judges mean well, their participation in plea bargains fosters an environment

that "hardens and embitters both the defendant who finally took the plea deal because of judicial threats, as well as the defendant who is sentenced to a greater period of incarceration because he chose to go to trial." Klein, *Due Process Denied*, 32 Hofstra L. Rev. at 1410.

II. TREATING RULE 11(C) VIOLATIONS AS INHERENTLY PREJUDICIAL DOES NOT DISRUPT THE FEDERAL CRIMINAL JUSTICE SYSTEM

A. Judges Have Significant Latitude to Oversee the Plea Negotiations Without Violating Rule 11(c)

The rule followed by the Eleventh Circuit below is comparable to the approach adopted in the Sixth and Ninth Circuits. There is no reason to believe that these circuits have opened the floodgates for reversals by treating judicial participation in plea bargains as *per se* prejudicial.

It is important to bear in mind that "[n]ot all judicial comments relating to plea agreements violate the rule." *Cano-Varela*, 497 F.3d at 1132; *accord United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) ("[N]ot all judicial observations expressed with respect to plea agreements violate the rule."). The rule that treats Rule 11(c) error as inherently prejudicial applies only to judicial involvement in plea negotiations that tips the scales in favor of pleading guilty. Decades of federal cases construing Rule 11(c) make clear that courts have had no trouble distinguishing insignificant judicial comments regarding plea negotiations from Rule 11(c) violations. As the appellate court noted in *Baker*, "the federal courts as a whole have established a familiar

and generally uniform standard" for determining whether a judge's conduct violates Rule 11(c). 489 F.3d at 370.

The predecessor to the Eleventh Circuit long ago rejected the concern that a judge's stray comment will undermine a plea agreement, recognizing that "off-the-cuff remarks" by the judge do not violate Rule 11(c)(1)'s ban on judicial participation. *See Blackmon v. Wainwright*, 608 F.2d 183, 184-85 (5th Cir. 1979). In the years that followed, the circuits repeatedly have confirmed that "impromptu, unemphatic, and unrepeated" comments do not violate Rule 11(c). *United States v. Bierd*, 217 F.3d 15, 21 (1st Cir. 2000); *see also Bradley*, 455 F.3d at 462 ("[A] single brief remark during negotiations [has] been held not to constitute impermissible judicial participation in plea discussions."); *Johnson,* 89 F.3d at 783 (Eleventh Circuit opinion observing that statements that cannot "be read as coercive" do not violate Rule 11(c)(1)). Indeed, it is plain that Rule 11(c) "does not establish a series of traps for imperfectly articulated oral remarks." *United States v. Frank*, 36 F.3d 898, 903 (9th Cir. 1994).

Courts have recognized multiple types of comments relating to pleas that do not run afoul of Rule 11(c). First, judges are free to assure defendants of the competency of their counsel during plea negotiations. *See United States v. Hicks*, 531 F.3d 49, 53-54 (1st Cir. 2008) (holding that the court's assurances about counsel's competence did not amount to judicial participation in plea negotiations). Second, judges may inquire into the status of plea negotiations, *see United States v. Uribe-Londono*, 409 F.3d 1, 4 (1st Cir. 2005), and make case management decisions such as to set a deadline by which plea negotiations

must be completed. *See Cano-Varela*, 497 F.3d at 1132-33 ("Rule 11(c)(1) is not violated by a judge's comments made while implementing or planning docket or case-management decisions. One obvious example of this type of comment is a judge's refusal to extend a plea cut-off deadline."). Third, courts may, and often do, discuss the terms of a plea bargain after the agreement is reached. *See Bierd*, 217 F.3d at 21; *Johnson*, 89 F.3d at 783. Such discussions may begin before the plea agreement is reduced to its final written form. What matters is that the parties reached an agreement without the judge putting his thumb on the scales. *See United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998) (Rule 11(c) is designed "to avoid the danger of an involuntary guilty plea coerced by judicial intervention.").

United States v. Cano-Varela, discussed above, is one recent example. There, the Tenth Circuit considered a series of allegedly improper statements by the district court during the plea negotiations and concluded that the majority of those comments were unobjectionable. 497 F.3d at 1133. In particular, the appellate court concluded that the judge did not violate Rule 11(c)(1) by (i) stating that he would require the defendant to go to trial if the defendant insisted on a new lawyer; and (ii) inquiring into the type of plea deal the parties had been discussing. *Id.* The Tenth Circuit, however, recognized that the judge had crossed the line when he told the defendant that if he did not plead guilty and was convicted his "sentence . . . will be a harsh one." *Id.*

B. Treating Rule 11(c) Violations As Per Se Prejudicial Has Not Disrupted the Plea Bargain System in the Sixth, Ninth, and Eleventh Circuits

There is no evidence that a bright line rule treating violations of Rule 11(c)(1) as *per se* prejudicial has disrupted the judicial process. The Sixth, Ninth, and Eleventh Circuits handle approximately 40% of the criminal cases nationwide.[2] From 2010 to 2011, those circuits resolved over 30,000 cases. *Id.* Applying the national average that 88% of all criminal cases filed that year ended in a plea, these circuits oversaw approximately 27,000 plea bargains that year alone.[3] These three circuits have recognized that judicially influenced plea decisions are inherently prejudicial for at least 20 years. *See United States v. Adams*, 634 F.2d 830, 842-43 (5th Cir. 1981)[4]; *United States v. Corbitt*, 996 F.2d 1132, 1134 (11th Cir. 1993); *United States v. Anderson*, 993 F.2d 1435, 1438 (9th Cir. 1993); *United States v. Barrett*, 982 F.2d 193, 196 (6th Cir. 1992). Since that time, there have been hundreds of thousands of plea bargains in these circuits. But none of them has experienced the flood

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[2] *See United States Courts, Federal Judiciary Caseload Statistics, Table D-1* (Mar. 31, 2011), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D01CMar11.pdf.

[3] *See United States Courts, Federal Judiciary Caseload Statistics, Table D-4* (Mar. 31, 2011), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D04Mar11.pdf.

[4] Decisions of the Fifth Circuit issued before October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

of reversals of which the government's brief warns. Indeed, the government has not identified even one plea during this time that was needlessly vacated based on a stray comment by district court during plea negotiations—let alone a flood of such cases. The Eleventh Circuit's interpretation of Rule 11(c)(1) has proven to work just fine.

Indeed, the rule sought by the Respondent is modest and easy to enforce: if a judge violates the unambiguous terms of Rule 11(c)(1) (as all parties agree the judge did in this case), the defendant should be permitted to reconsider whether he wants to enter a guilty plea in the first place. So long as judges respect Rule 11(c)(1)'s proscription—and *amicus* has no doubt they will after this case—a ruling in favor of the Respondent will hardly be a disruptive one.

III. JUDICIAL PARTICIPATION SHOULD BE TREATED AS INHERENTLY PREJUDICIAL

Given the inherently coercive effect that judicial participation has in plea negotiations, it makes sense to treat violations of Rule 11(c)(1) as prejudicial without conducting an individualized inquiry.

A. Judicial Participation in Plea Negotiations Is Not a Technicality

First, as Respondent explains in his brief at 16-30, judicial participation in plea bargaining is "qualitatively different" from the technical violations of Rule 11's plea colloquy requirements that this Court considered in *United States v. Vonn*, 535 U.S. 55 (2006), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). *See Baker*, 489 F.3d at 372. The Fifth Circuit recognized this distinction over 30 years ago. *See Adams*, 634 F.2d at 839 ("The ban on judicial

participation in plea discussions is not a 'technical' amendment to the Rule, as are, for example, the detailed explanations required of the judge [in the plea colloquy].").

A failure to provide a warning in the plea colloquy is an instance of neglect, whereas judicial participation involves "the court initiating and unilaterally acting in a manner clearly proscribed by the Rule." *Baker*, 489 F.3d at 372. Even the Circuits that inquire into individualized prejudice for Rule 11(c)(1) violations properly recognize that it is rarely necessary, because judicial participation in plea bargains "almost inevitably seriously affect[s] the fairness and integrity of judicial proceeding" *Bradley*, 455 F.3d at 463. Accordingly, the concern of "reduc[ing] wasteful reversals" at issue in *Dominguez Benitez* does not apply. 542 U.S. at 82. As discussed above, the government has not identified a single instance of a "wasteful reversal" in the Sixth, Ninth or Eleventh Circuits based on judicial participation in plea negotiations. The rationale that supported an individualized prejudice inquiry in *Vonn* and *Dominguez Benitez* is therefore absent here.

B. Attempting to Assess the Prejudicial Effect of Judicial Participation Invites Speculation

Second, there are obvious practical difficulties in any attempt to assess the prejudicial effect of a judge's participation in the plea negotiations. Such a prejudice inquiry would involve only a limited pre-trial record and whatever transcripts may be available. *See Dominguez Benitez*, 542 U.S. at 83 n.9 (noting that a "significant difference" between consideration of Rule 11 claims and ineffective assistance claims is that "the latter may be raised in

postconviction proceedings," which "permit greater development of the record"). This Court has long recognized the difficulties of attempting to assess prejudice regarding a defendant's decision to plead guilty based on the "unrevealing words of the cold record." *Von Moltke v. Gillies*, 332 U.S. 708, 729, (1948) (Frankfurter, J., concurring) ("On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty was actually given.").

In the context of judicial participation, the prejudice inquiry is further complicated by the widespread recognition that judicial participation in the plea negotiations renders the subsequent plea colloquy regarding "voluntariness" inherently unreliable. *See, e.g.*, *Baker*, 489 F.3d at 375; *Tateo*, 214 F. Supp. at 565-66. In *Baker*, even though the judge "strove valiantly to remedy its earlier error" with an extended plea colloquy, after the judge interfered in the plea negotiations "the damage was done." *Baker*, 489 at 375. Indeed, an inherent problem with judges participating in plea negotiations is that it "makes it difficult for a judge to objectively assess the voluntariness of the plea." Rule 11 Advisory Committee Notes, 62 F.R.D. at 284.

In light of the inherently speculative nature of any individualized prejudice inquiry regarding the effect of judicial participation in plea negotiations, as well as the widely-recognized inherent coerciveness of judicial involvement in those proceedings, treating Rule 11(c)(1) violations as inherently prejudicial is a more reliable and manageable approach.

C. The Work Required to Remedy a Rule 11(c)(1) Violation Is Minimal

Third, considering a judicially influenced plea decision as inherently prejudicial will not flood the district courts with additional work. When a plea is vacated, the only work that is undone is the sentencing hearing. If the judge's participation in the plea negotiations was in fact harmless, the defendant "may well decide to plead guilty again, but this must be a matter of his own free will and reasoned choice." *Gilligan*, 256 F. Supp. at 249. In those instances, all that is required is resentencing, which "involves a relatively small investment in judicial resources." *Adams*, 634 F.2d at 842.

If it turns out that the defendant would prefer not to plea and, instead, take his case to trial, it is his constitutional right to do so. *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J. concurring) ("[A] criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime."). Any "disruption" caused by a defendant's decision to exercise his constitutional right to a fair trial is not a basis for excusing Rule 11(c)(1) violations.

Indeed, treating judicial participation as inherently prejudicial makes the enforcement of Rule 11(c)(1) more efficient and provides clear guidance to the court, as well as the parties, in conducting plea negotiations. Engaging in the type of case-specific prejudice inquiry urged by the government would be far less efficient than an easy-to-enforce bright line rule. This is particularly true because history has demonstrated that the government does not concede that a judge's comments were prejudicial, even when that prejudice should be apparent. In each of the cases discussed in Section I above, the government

opposed vacating the pleas and argued that defendants were not affected by the judge's coercive comments during the plea negotiations. *See Baker*, 489 F.3d at 373 (government arguing that "even assuming the court plainly erred, the error did not affect Baker's substantial rights); *Cano-Varela*, 497 F.3d at 1134; *Bradley*, 455 F.3d at 463; Brief of Appellee United States at 18-20, *United States v. Mendoza*, No. 00-50322, 2001 WL 34098572 (May 2001).

D. Treating Judicially Influenced Plea Decisions As Inherently Prejudicial Helps Preserve the Integrity of the Plea Bargain Process

Finally, treating judicial interference in plea bargains as inherently prejudicial protects the integrity that is critical to the plea bargain process. "[A] defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 623. Rule 11's prohibition on judicial participation in plea bargains spares defendants from the inherently coercive effect that a judge's comments have on a defendant's plea decision. "[A] coerced plea, of course, would violate a defendant's fundamental constitutional rights." *Bradley*, 455 F.3d at 460 (citing *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam). Plea negotiations have indeed become "indispensable in the operation of the modern criminal justice system," *Dominguez Benitez*, 542 U.S. at 82-83, and treating Rule 11(c)(1) violations as *per se* prejudicial helps ensure that the defendant's rights at stake in those plea negotiations are afforded the proper protection.

CONCLUSION

For the reasons discussed above and in the Respondent's brief, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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