No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 664 F.3d 1355.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2011. A petition for rehearing was denied on April 6, 2012 (Pet. App. 9a-10a). On June 26, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2012, and the petition was filed on August 3, 2012. The petition was granted on January 4, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 11(c)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

Rule 11(h) of the Federal Rules of Criminal Procedure provides:

> *Harmless error.* A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) *Harmless Error.* Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) *Plain Error.* A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Georgia, respondent was convicted of conspiring to file fraudulent tax-refund claims, in violation of 18 U.S.C. 286. Pet. App. 1a-2a. The district court sentenced respondent to 115 months of imprisonment, to be followed by three years of supervised release. J.A. 77-78. The court of appeals vacated the conviction and sentence, and remanded for further proceedings. Pet. App. 1a-5a.

1. Respondent defrauded the federal government by filing more than 130 falsified tax returns with the Internal Revenue Service (IRS). J.A. 100-107. According to an informant, respondent would identify state prisoners on the Florida Department of Corrections website, obtain the prisoners' personal information from case files at the local courthouse, and then file federal tax-refund claims in the prisoners' names to be paid into his own bank accounts. J.A. 100-102. The IRS issued refunds on 87 of the claims, and respondent banked more than $423,500 as a result of his scheme. J.A. 105.

In May 2009, a federal grand jury in the Southern District of Georgia indicted respondent on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286 and 2; 11 counts of presenting a false claim to the United States, in violation of 18 U.S.C. 287 and 2; 11 counts of mail fraud, in violation of 18 U.S.C. 1341; and 11 counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. J.A. 162-175. The district court appointed counsel to represent respondent. 09-cr-60 Docket entry No. 33 (S.D. Ga. July 20, 2009).

2. Respondent subsequently sent a letter to the court requesting different counsel. C.A. E.R. Tab B. One of respondent's complaints was that his counsel had "never mentioned a defense at all" other than "to plead guilty." *Id.* at 1-2. On February 8, 2010, a magistrate judge held an ex parte hearing with respondent and his counsel and denied respondent's request. J.A. 145-161.

At the hearing, the magistrate judge stated that "oftentimes * * * the best advice a lawyer can give his client" is to plead guilty. J.A. 152. The magistrate judge also raised the possibility that respondent's counsel might not have discussed other strategies because "there may not be a viable defense to these charges."

J.A. 155. Later in the hearing, the magistrate judge stated that

> [t]he 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. I don't know what the guidelines of this case would figure out to be but not as bad as armed bank robbery but probably pretty bad because your criminal history score would be so high. * * * [M]ake no mistake about it, that two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. In order to get the reduction for acceptance, you've got 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.

J.A. 159-161.

3. Approximately a month after the hearing, respondent filed a motion demanding a speedy trial. Docket entry No. 46 (Mar. 5, 2010). The district court found respondent competent to stand trial and set a trial date for April 2010, which was later continued at the government's request. Docket entry No. 52 (Mar. 23, 2010), No. 53 (Mar. 25, 2010), No. 56 (Apr. 2, 2010).

On May 11, 2010, more than three months after the ex parte hearing, respondent and his counsel signed a plea agreement in which respondent agreed to plead guilty to the conspiracy charge in exchange for dismissal of the other 33 charges. J.A. 126-142. Six days later, respondent entered his guilty plea before a district judge (not the magistrate judge who had presided over the ex parte hearing). J.A. 81-125. Respondent stated under oath at the hearing that no one had forced or pressured him to plead guilty. J.A. 122. The district judge found that the plea was "voluntary, knowing, and not the result of any force, pressure, threats, or promises, other than the promises made by the government in the plea agreement." J.A. 123.

4. In September 2010, the magistrate judge granted respondent permission to proceed pro se and appointed his prior counsel as stand-by counsel. See J.A. 57. Respondent then moved to vacate his plea and to dismiss the indictment, contending that the government had knowingly included false statements in the indictment and that his counsel had given him bad advice about whether to admit the factual basis for his plea. Docket entry No. 79 (Sept. 15, 2010), No. 87 (Oct. 26, 2010).

When the district judge considered the motion at the beginning of respondent's sentencing hearing, respondent explained that his guilty plea had been a "strategic decision" designed to expose the alleged government

misconduct. J.A. 58, 61. Respondent also asserted that his plea decision had been influenced by misinformation from his counsel about the effect the plea would have in a separate prosecution against him in another jurisdiction. J.A. 64. Neither respondent's written nor oral submissions in support of his plea-withdrawal request suggested that his decision to plead guilty had been influenced by the magistrate judge's remarks at the ex parte hearing (or even mentioned those remarks at all). See Docket entry Nos. 79, 80, 84, 87; J.A. 58-65.

The district judge declined to set aside the plea, finding that respondent had "failed to provide * * * any evidence of government misconduct" and finding it "clear * * * that the entry of the guilty plea * * * was knowing and voluntary." J.A. 69-72. The district judge sentenced respondent to 115 months of imprisonment. J.A. 77.

5. The court of appeals assigned respondent's trial counsel to represent him on appeal. 10-15310 Docket entry (11th Cir. Nov. 29, 2010). Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), respondent's counsel filed a motion to withdraw and a brief explaining why no nonfrivolous grounds for appeal existed. 10-15310 Docket entry (11th Cir. Apr. 4, 2011). Respondent filed his own pro se brief seeking to set aside his conviction. 10-15310 Docket entry (11th Cir. Apr. 22, 2011).

The court of appeals denied counsel's *Anders* motion and ordered further briefing on an issue that neither respondent nor his counsel had identified in their briefs. Pet. App. 6a-8a. Specifically, the court stated that its "independent review" of the record had "revealed an irregularity in the statements of a magistrate judge, made during a hearing prior to [respondent's] plea, which appeared to urge [respondent] to cooperate and

be candid about his criminal conduct to obtain favorable sentencing consequences." *Id.* at 7a. The court requested that respondent's counsel address whether this amounted to reversible error under Federal Rule of Criminal Procedure 11(c)(1), which states that a court "must not participate in [plea] discussions." See Pet. App. 7a-8a.

Respondent (through his counsel) then filed a brief requesting that his guilty plea be set aside on the ground suggested by the court. Resp. C.A. Br. 17-45. He argued that the magistrate judge's comments violated Rule 11(c)(1) and warranted relief even under the plain-error standard of review generally applicable to errors raised for the first time on appeal. *Ibid.* In response, the government conceded that the magistrate judge's comments had violated Rule 11(c)(1), but contended that respondent could not meet the plain-error standard's requirement that he show an effect on his substantial rights as a prerequisite to relief. Gov't C.A. Br. 11-26. In particular, the government contended that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 15 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)); see *id.* at 14-26. The government pointed out the three-month gap between the comments and the plea; the different judge who presided over the plea and sentencing hearings; respondent's denial at the plea hearing that anyone had pressured or coerced his plea; respondent's later explanation to the district judge that he had pleaded guilty for "strategic" reasons; and the failure of either respondent or his counsel to identify the issue before the court of appeals raised it. *Id.* at 11-12.

6. The court of appeals vacated respondent's conviction and remanded the case with instructions that it be reassigned to a different district judge. Pet. App. 5a. The court recognized that "[w]here, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error." *Id.* at 3a. And it explained that "[u]nder the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks and citation omitted).

The court of appeals nevertheless relied on circuit precedent to hold that in a case of Rule 11(c)(1) error, a defendant "need not show any individualized prejudice" to obtain relief. Pet. App. 5a. The court explained that, in its view, "Rule 11(c)(1) states a 'bright line rule': it prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" *Id.* at 3a (brackets omitted) (quoting *United States* v. *Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)). "Thus," it continued, "'judicial participation *is plain error, and the defendant need not show actual prejudice*.'" *Ibid.* (quoting *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (per curiam)) (brackets omitted). The court acknowledged that "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erroneously granted appellate relief to respondent without determining whether he was prejudiced by the magistrate judge's violation of Rule 11(c)(1)'s prohibition on judicial participation in

plea discussions. The court of appeals' judgment should be vacated and the case remanded for application of the proper plain-error standard.

Appellate relief for a violation of Rule 11(c)(1) is contingent on a determination that the error "affect[ed] substantial rights," thereby prejudicing the defendant. Fed. R. Crim. P. 52(a)-(b). Any possible doubt about the applicability of prejudice analysis to Rule 11 errors is eliminated by Rule 11(h), which expressly provides that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." This Court's decisions additionally make clear that when a defendant fails to raise a timely objection in district court, a claim of Rule 11 error on appeal is subject to the plain-error standard of Rule 52(b). *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004); *United States* v. *Vonn*, 535 U.S. 55 (2002). That standard requires the defendant to establish, as one of the prerequisites for relief, "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.

The court of appeals erred in dispensing with the prejudice inquiry in favor of automatically granting appellate relief following any degree of judicial participation in plea negotiations. Courts have no authority to disregard the plain text of the Federal Rules of Criminal Procedure, and Rule 11(h) was enacted for the precise purpose of making clear that courts should not reflexively grant relief whenever Rule 11 is violated. Violations of Rule 11(c)(1) do not qualify as "structural" errors for which relief may be appropriate even in the absence of prejudice, as the narrow class of such errors consists almost exclusively of fundamental constitutional errors and does not include violations of prophylactic proce-

dural rules with their own harmless-error provisions. Dispensing with prejudice analysis for Rule 11(c)(1) errors unjustifiably disrupts the finality of guilty pleas, provides a potential windfall for defendants who elect not to mention the error until after sentencing, and deprives the government of the benefit of untainted pleas based on judicial mistakes that the government was powerless to prevent.

Respondent could not have met his burden to show prejudice in this case. Not only did he represent to the district court that his plea was uncoerced, and not only did he fail to raise the magistrate judge's comments until the court of appeals identified them *sua sponte*, but the procedure he received in the district court following the error—the passage of time (three months) and a different judge (the district judge) at the plea and sentencing proceedings—is effectively identical to the appellate remedy that respondent and the court of appeals agree would remove any taint of Rule 11(c)(1) violation. The court of appeals erred in disregarding these facts, and the case should be remanded for application of the prejudice analysis required by both the Federal Rules and this Court's decisions.

ARGUMENT

A VIOLATION OF RULE 11(c)(1) DOES NOT REQUIRE VACATUR OF A GUILTY PLEA IF THE ERROR DID NOT PREJUDICE THE DEFENDANT

A. The Harmless-Error And Plain-Error Standards Of Review Require Prejudice As A Prerequisite To Appellate Relief For A Rule 11(c)(1) Error

1. An appellate court's authority to set aside a criminal conviction based on an error typically "is tied in some way" to whether the error prejudiced the defend-

ant. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004). Rule 52 of the Federal Rules of Criminal Procedure permits a reviewing court to grant relief only when an error has "affect[ed] substantial rights," Fed. R. Crim. P. 52(a)-(b), a phrase that this Court has long "taken to mean error with a prejudicial effect on the outcome of a judicial proceeding," *Dominguez Benitez*, 542 U.S. at 81 (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). If the defendant did not make a timely objection, then Rule 52(b)'s plain-error standard "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*; see *id.* at 732 (defendant must also demonstrate that the error was "plain" and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings") (citations omitted).

The harmless-error and plain-error prejudice standards apply with full force when the error at issue is a violation of Federal Rule of Criminal Procedure 11. Rule 11 describes the procedures for pleas in criminal cases, including the requirement that a district court, before accepting a guilty plea, advise the defendant of various rights and determine that the defendant understands important features of the case. Fed. R. Crim. P. 11(b). The Rule also authorizes the defendant and the government to "discuss and reach a plea agreement," but requires that a "court must not participate in these

discussions." Fed. R. Crim. P. 11(c)(1). Nothing in Rule 11 in general, or Rule 11(c)(1) in particular, creates an exception to Rule 52's requirement of prejudice as a prerequisite for appellate relief. See *United States* v. *Vonn*, 535 U.S. 55, 65 (2002) (observing that an implied repeal in the context of Rule 52(b) would be "sufficiently disfavored * * * as to require strong support").

2. To the contrary, Rule 11 expressly "instructs that not every violation of its terms calls for reversal of conviction by entitling the defendant to withdraw his guilty plea." *Dominguez Benitez*, 542 U.S. at 80. Subsection (h) of Rule 11 specifically provides that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Advisory Committee Notes explain that Rule 11(h) "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983); see *Vonn*, 535 U.S. at 64 n.6 (stating that advisory committee notes are a "reliable source of insight into the meaning of" Rule 11(h)).

The scope of Rule 11(h) expressly encompasses all potential variances from the "rule," which would include violations of Subsection 11(c)(1)'s prohibition against judicial participation in plea negotiations. The original 1983 version of Rule 11(h) explicitly provided that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h) (1983) (emphasis added); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The breadth of Rule 11(h) remains unchanged following a 2002 amendment that replaced "[a]ny variance" with "[a]

variance," as the alteration was "intended to be stylistic only." Fed. R. Crim. P. 11 advisory committee's note (2002); see *Dominguez Benitez*, 542 U.S. at 78 n.3 (noting that Rule 11(h) received only a "stylistic amendment").

Although Rule 11(h) specifically addresses only the applicability of harmless-error review, this Court has held that Rule 11 violations are also subject to plain-error review under Rule 52(b). In *United States* v. *Vonn*, *supra*, the Court "considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain." *Dominguez Benitez*, 542 U.S. at 80; see *Vonn*, 535 U.S. at 62-74. The Court expanded on *Vonn* in *United States* v. *Dominguez Benitez*, *supra*, explaining that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. "[R]elief on direct appeal, given the plain-error standard that will apply in many cases, will be difficult to get, as it should be." *Id.* at 83 n.9.

B. The Court Of Appeals' Automatic-Vacatur Approach To Rule 11(c)(1) Errors Is Insupportable

Under the court of appeals' approach, relief on appeal is not "difficult to get," *Dominguez Benitez*, 542 U.S. at 83 n.9, but is instead automatic, in cases where a district court is found to have participated in plea discussions in violation of Rule 11(c)(1). The court of appeals has explained that it does not "recognize harmless error in the context of judicial participation." Pet. App. 3a. Nor does it require a defendant who has forfeited his judicial-participation claim to show "any individualized prej-

udice" or "actual prejudice" to prevail on plain-error review. *Id.* at 3a-5a (internal quotation marks, citation, and emphasis omitted). Nothing justifies the court of appeals' categorical excision of the prejudice inquiry that Rules 11(h) and 52 require.

1. ***Rule 11(c)(1) errors are not necessarily prejudicial***

Respondent has defended the court of appeals' approach by characterizing it as folding the prejudice component of plain-error review into the assessment of whether a Rule 11(c)(1) violation occurred at all. See Br. in Opp. 8-14. That defense is untenable. Rule 11(c)(1) does not, and could not, incorporate the type of prejudice analysis that Rules 11(h) and 52 contemplate.

Prejudice analysis under Rules 11(h) and 52 is retrospective. This Court has made clear that in evaluating the prejudicial effect of a Rule 11 error, the reviewing court "may consult the whole record," *Vonn*, 535 U.S. at 59, including any "evidence indicating the relative significance of * * * facts that may have borne on [the defendant's] choice regardless of any Rule 11 error," *Dominguez Benitez*, 542 U.S. at 84. That whole-record review encompasses, as "relevant considerations," events that occurred only *after* the Rule 11 violation, such as a defendant's statements at sentencing. *Id.* at 85.

Rule 11(c)(1) itself, however, is forward-looking. It prescribes a procedure for courts to follow in cases involving plea negotiations, and, like many prophylactic procedural rules, its primary purpose is to prevent violations from occurring in the first place. Because a judge needs to know ahead of time whether certain comments would be permissible, the question whether comments violate Rule 11(c)(1) cannot depend on the retrospective inquiry into whether a defendant could "satisfy the

judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Dominguez Benitez*, 542 U.S. at 83 (internal quotation marks and citation omitted).

The court of appeals appreciated the difference between the focused inquiry into whether a district court participated in plea negotiations (the province of Rule 11(c)(1)) and the whole-record inquiry into whether such participation affected the outcome of the proceeding so as to warrant appellate relief (the province of Rule 52). It consciously dispensed with the latter inquiry. While the decision below expressly analyzed whether the magistrate judge's comments violated Rule 11(c)(1), Pet. App. 3a-4a, it deliberately excused respondent from having to "show any individualized prejudice" to obtain appellate relief, *id.* at 5a; see *id.* at 3a.

Nowhere did the decision address the government's argument—made at length in its appellate brief—that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea" because (1) three months elapsed between the magistrate judge's comments and the plea (during which respondent expressly requested a speedy trial); (2) a different judge presided over the plea and sentencing; and (3) respondent expressly denied any coercion or pressure to plead, represented that he had pleaded for strategic reasons, and did not raise the magistrate judge's comments (either on his own or through counsel) until the court of appeals uncovered them. Gov't C.A. Br. 15 (quoting *Dominguez Benitez*, 542 U.S. at 83); see *id.* at 11-12, 15-19. Instead, all that mattered to the court of appeals was that "the magistrate judge's comments * * * amounted to judicial participation in plea

discussions" and respondent "pled guilty after these comments were made." Pet. App. 5a. That narrow inquiry was an inappropriate substitute for the broad-based prejudice analysis that Rule 11(h), Rule 52, *Vonn*, and *Dominguez Benitez* all demand.

2. *Courts lack authority to disregard Rules 11(h) and 52*

a. The court of appeals' automatic-vacatur approach appears to be premised on the erroneous belief that it has authority to substitute its own judgment in place of the text of the Federal Rules of Criminal Procedure. The court of appeals supported its approach by citing two prior circuit decisions, *United States* v. *Casallas*, 59 F.3d 1173 (11th Cir. 1995), and *United States* v. *Corbitt*, 996 F.2d 1132 (11th Cir. 1993) (per curiam). Pet. App. 3a. Those decisions, in turn, cite *United States* v. *Adams*, 634 F.2d 830 (5th Cir. Unit A Jan. 1981), a precedent from the court's origins as part of the Fifth Circuit. See *Casallas*, 59 F.3d at 1177 & n.8; *Corbitt*, 996 F.2d at 1134-1135; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit cases decided before October 1, 1981, as binding precedent).

In *Adams*, the Fifth Circuit relied on its "supervisory power over the district courts" to hold that a defendant was entitled to automatic appellate relief when a district court had participated in plea discussions. 634 F.2d at 835-843. The decision's reasoning drew heavily on *McCarthy* v. *United States*, 394 U.S. 459 (1969), in which this Court had used its supervisory authority to vacate a plea following a plea-colloquy omission that violated a very early version of Rule 11. *Id.* at 464, 468-472; see *Adams*, 634 F.2d at 836-842. The reasoning and result in *Adams* were consistent with other contemporaneous decisions in which some circuits "felt bound to treat all

Rule 11 lapses as equal and to read *McCarthy* as mandating automatic reversal for any one of them." *Vonn*, 535 U.S. at 70.

Those circuit decisions, however, "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified, and by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11." *Vonn*, 535 U.S. at 70. That revision was Rule 11(h), which expressly prohibits reviewing courts from granting relief for Rule 11 errors that do not affect substantial rights. *Ibid.*; see Fed. R. Crim. P. 11 advisory committee's note (1983). "[T]he one clearly expressed objective of Rule 11(h) was to end the practice * * * of reversing automatically for any Rule 11 error" based on an "expansive reading of *McCarthy*." *Vonn*, 535 U.S. at 66; see Fed. R. Crim. P. 11 advisory committee's note (1983) ("[A] harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings."); see also *Dominguez Benitez*, 542 U.S. at 80 n.5.

Following the enactment of Rule 11(h), the Fifth Circuit has recognized that its decision in *Adams* is no longer good law. Nearly two decades ago, the Fifth Circuit observed that, notwithstanding *Adams*, Rule 11(h) and a recent en banc decision "compel[led] harmless error review" of "a guilty plea entered after judicial participation." *United States* v. *Miles*, 10 F.3d 1135, 1140-1141 (1993) (citing *United States* v. *Johnson*, 1 F.3d 296 (5th Cir. 1993) (en banc)). The Eleventh Circuit, however, has continued to adhere to *Adams*, without attempting to reconcile its automatic-vacatur ap-

proach with Rule 11(h). Pet. App. 3a; see, *e.g.*, *Casallas*, 59 F.3d at 1177 n.8 ("[W]e are bound by *United States* v. *Adams*.").

The Eleventh Circuit appears to believe that *Adams* is still correct because, in its view, the *substantive* prohibition on judicial participation is "absolute" and "'admits of no exceptions.'" *Corbitt*, 996 F.2d at 1135 (quoting *United States* v. *Bruce*, 976 F.2d 552, 558 (9th Cir. 1992)); see, *e.g.*, *id.* at 1134-1135 (citing *Adams*, *Bruce*, and *United States* v. *Barrett*, 982 F.2d 193 (6th Cir. 1992)). But Rule 11(h) clarifies that the availability of a *remedy* for a Rule 11 error is *not* absolute and *does* admit of exceptions—in particular, when the error did not prejudice the defendant. See, *e.g.*, Rule 11 advisory committee's note (1983) ("[E]ven when it may be concluded that Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.").

b. Courts of appeals have no authority to override Rule 11(h) and continue the prior practice of reversing even in the absence of prejudice. In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), this Court squarely rejected the proposition that a federal court can "invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Id.* at 254. The Court explained that, pursuant to the relevant statutes governing the promulgation of federal criminal rules, Rule 52(a) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do

to disregard constitutional or statutory provisions." *Id.* at 255.

The same logic necessarily applies to Rule 11(h), which simply "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983). The logic likewise applies to the plain-error requirements of Rule 52(b). This Court has specifically recognized that it has "no authority" to "creat[e] out of whole cloth an exception" to the plain-error rule. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997).

Respondent has nonetheless argued (Br. in Opp. 31), citing *Nguyen* v. *United States*, 539 U.S. 69 (2003), that the court of appeals' automatic-vacatur approach can be justified on the basis of its supervisory authority. In *Nguyen*, this Court found prejudice analysis unnecessary in the context of an erroneously constituted appellate panel, explaining its departure from the *Bank of Nova Scotia* rule on the ground that the error at issue "involve[d] a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business.'" *Id.* at 81 (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)). That ground is nonexistent here. The error in this case does not involve the statutory authority of a particular decisionmaker to adjudicate a case. See *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009) (describing *Nguyen* as part of a "set of cases involv[ing] circumstances in which federal judges or tribunals lacked statutory authority to adjudicate the controversy"). It is instead a violation of a rule prescribing how a court should conduct certain proceedings. If courts were free to disregard harmless-error and plain-error principles for that latter sort of violation, then those principles would have little (if any)

application. Cf. *Nguyen*, 539 U.S. at 81 n.12 (noting that the error in *Nguyen* was "an isolated, one-time mistake") (citation omitted). Any extension of *Nguyen*, moreover, should certainly have no application to Rules, like Rule 11, that contain their own specific harmless-error provisions. See Fed. R. Crim. P. 11(h).

3. Rule 11(c)(1) errors are not structural

a. This Court has explained that "[i]t is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that * * * error requires reversal without regard to the mistake's effect on the proceeding." *Dominguez Benitez*, 542 U.S. at 81. The Court has found only "a very limited class of errors" to be structural. *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks and citation omitted). That limited class—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include Rule 11(c)(1) errors or any other type of Rule 11 error. Indeed, the Court has expressly observed that the erroneous omission of one of Rule 11's required plea-colloquy warnings is not even "colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6.

Almost invariably, structural errors are (1) "fundamental constitutional errors" that (2) "defy analysis by harmless error standards" because they "affect[] the framework within which the trial proceeds." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (internal quotation marks and citations omitted). Rule 11 errors satisfy neither condition. First, Rule 11 is not "constitutionally mandated," but is instead a prophylactic rule "designed to assist" in assuring "that a defendant's guilty plea is

truly voluntary." *McCarthy*, 394 U.S. at 465; see *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Before the Rule was amended in 1974 to preclude judicial participation in plea discussions, some commentators described such participation as "common practice," and the amendment reflected a policy choice rather than a constitutional imperative. Fed. R. Crim. P. 11 advisory committee's note (1974). Because Rule 11's requirements lack constitutional dimension, a "formal violation" of the Rule is not constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not "fundamental constitutional error[ ]," *Neder*, 527 U.S. at 7.

Second, Rule 11 error does not "infect" the entire guilty-plea process, but is simply an error in the plea process itself. See *Neder*, 527 U.S. at 8 (citation omitted) (jury instruction error). "[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784 (citation omitted). Case-specific prejudice analysis, rather than an irrebuttable presumption of prejudice, is the best way to address concerns (see Pet. App. 3a-4a; Br. in Opp. 30) that judicial commentary on plea discussions may coerce a defendant to plead or cast doubt on the judge's impartiality. Such analysis permits the reviewing court to go beyond the bare fact of judicial participation and to examine both the specific comments made by the judge and any other individualized circumstances that might show how those comments did or did not affect the particular proceedings. See *Dominguez Benitez*, 542 U.S. at 84-85; *Vonn*, 535 U.S. at 74-75. The

reviewing court may find, for example, that the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading. Or, as in this case, any taint of the error could have been removed by the passage of time and a change of judges. See Part C, *infra*.

b. Respondent has nevertheless suggested (Br. in Opp. 29) that a Rule 11(c)(1) error should "qualify as structural." In his view, the only prerequisites to classifying an error as structural are the "difficulty of assessing the effect of the error" and the "irrelevance of harmlessness," and he asserts that Rule 11(c)(1) errors satisfy both of them. *Ibid.* (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

As a threshold matter, respondent draws those criteria from a discussion of the criteria for finding a *constitutional* error to be structural. See *Gonzalez-Lopez*, 548 U.S. at 148-149 & n.4 (discussing the Court's division of "constitutional errors into two classes," namely, "trial error" and "structural error"). This Court has occasionally found certain errors to be structural without specifically addressing whether those errors have constitutional dimension. See *Gomez* v. *United States*, 490 U.S. 858, 859-860, 876 (1989) (violation of statutory prohibition against assigning a magistrate judge to "duties * * * inconsistent with the Constitution and laws of the United States," where magistrate presided over voir dire of a felony jury trial without the parties' consent) (citation omitted); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 & n.21 (1987) (plurality opinion) (court appointment of interested party as prosecutor for contempt). But to the government's knowledge, this Court has never treated the

violation of a prophylactic rule of criminal procedure—let alone one with its own built-in harmless-error provision—as structural error warranting per se reversal.

To the extent that such treatment would even be conceivable, it is far from clear that the criteria identified by respondent would be the only relevant considerations. Text and legislative intent, for example, would also logically play a role, and those considerations would foreclose any conclusion that Rule 11(c)(1) errors are structural. Fed. R. Crim. P. 11(h); Rule 11 advisory committee's note (1983); pp. 12-13, 17, *supra*. But even accepting respondent's premise that the text and legislative history can be ignored, a Rule 11(c)(1) error does not satisfy the criteria he identifies.

First, the prejudice inquiry into Rule 11(c)(1) errors is not so difficult as to justify dispensing with the inquiry entirely. Prejudice analysis of judicial participation in plea negotiations generally requires determining the effect of a discrete event or set of events (the judge's comments) on a later decision (to plead guilty). That sort of prejudice analysis is similar to the prejudice analysis required in a number of other contexts, including determining the effect of other types of Rule 11 violations on a defendant's guilty-plea decision, see *Dominguez Benitez*, 542 U.S. at 83; the effect of a lawyer's deficient advice on a guilty-plea decision, see *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985); or the effect of improper prosecutorial comments on a jury's decision to convict, *United States* v. *Young*, 470 U.S. 1, 20 (1985). The government is unaware of any special difficulties experienced by the courts of appeals that do apply prejudice analysis to Rule 11(c)(1) errors. Although some courts have expressed the view that judicial-participation errors are likely to be prejudicial, see, *e.g.*,

United States v. *Bradley*, 455 F.3d 453, 463 (4th Cir. 2006), they nonetheless undertake the analysis, and courts sometimes conclude that an error was non-prejudicial, see, *e.g.*, *United States* v. *Pagan-Ortega*, 372 F.3d 22, 28 (1st Cir. 2004) (finding no prejudice under plain-error standard); *United States* v. *Ebel*, 299 F.3d 187, 191-192 (3d Cir. 2002) (finding no prejudice under harmless-error standard).

Second, respondent errs in asserting (Br. in Opp. 30) that Rule 11(c)(1) errors "are worth correcting even if they cause no discernible harm to the defendant." Respondent offers no meaningful support for his suggestion that every technical violation of Rule 11(c)(1) should automatically be deemed to have "undermine[d] 'the integrity of the judicial process,'" even in the absence of a reasonable probability that the judicial participation caused the defendant's plea decision. Br. in Opp. 30 (quoting Pet. App. 4a). Certain types of judicial inquiries into plea negotiations are not only permissible, but beneficial. This Court has recently encouraged judges to inquire into the plea-negotiation process, including the defendant's understanding of the "advantages and disadvantages of accepting" the plea, in order to ensure that the plea is not the product of ineffective assistance of counsel. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012). The line between salutary judicial inquiry and impermissible judicial participation cannot be so razor-thin that the integrity of the proceeding is irrevocably destroyed, and vacatur of the plea is automatically required, whenever a judge inadvertently strays just a bit too far.

This Court rejected a structural-error argument similar to respondent's in *Puckett* v. *United States*, 556 U.S. 129 (2009). The defendant in that case unsuccess-

fully sought an exception to plain-error review for government breaches of plea agreements. *Id.* at 134-143. This Court concluded that such errors were not structural, see *id.* at 140-143, specifically rejecting (among other things) the contention that such errors necessarily "called into question" the "integrity of the system," *id.* at 142-143. The Court "emphasized that a '*per se* approach to plain-error review is flawed,'" *id.* at 142 (quoting *Young*, 470 U.S. at 17 n.14); observed that "countervailing factors in particular cases" may demonstrate that the integrity of the proceedings was unaffected, *id.* at 143; and explained that the inquiry is best "applied on a case-specific and fact-intensive basis," *id.* at 142. "[T]he seriousness of the error claimed," the Court stressed, "does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure" that require prejudice analysis. *Id.* at 143 (quoting *Johnson*, 520 U.S. at 466). If that is true for the constitutional error at issue in *Puckett*, it is surely true for the rule-based error at issue here.

4. ***The court of appeals' approach unnecessarily undermines the finality of guilty pleas***

This Court has "repeatedly cautioned that 'any unwarranted extension' of the authority granted by Rule 52(b) [to recognize forfeited errors] would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135-136 (brackets omitted) (quoting *Young*, 470 U.S. at 15). The harmless-error component of Rule 52 likewise reflects a considered "balance * * * between societal costs and the rights of the accused," *Bank of Nova Scotia*, 487 U.S. at 255, and that same balance is expressly incorporated into Rule 11 by Subsection (h). The court of appeals' automatic-vacatur approach upends these consid-

ered judgments and "impose[s]" the very sort of "cost on Rule 11 mistakes" that all of these Rules seek to avoid. *Vonn*, 535 U.S. at 70.

Automatic vacatur of a guilty plea for any Rule 11(c)(1) error fails to "respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system." *Dominguez Benitez*, 542 U.S. at 82-83. Guilty pleas account for 97% of federal criminal convictions. *Frye*, 132 S. Ct. at 1407. Because of the importance of guilty pleas to the administration of justice, this Court has warned against the creation of unjustified inroads into their finality. See *Vonn*, 535 U.S. at 72; *Timmreck*, 441 U.S. at 784. The "chief virtues" of the plea system—"speed, economy, and finality"—are undermined if an error that did not affect the outcome nevertheless results in the vacatur of a defendant's guilty plea and the remand of the case for further proceedings. *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). The disruption is particularly acute when such relief is granted even in the absence of timely objection, as it allows a defendant to reserve an objection and then strategically raise it for the first time on appeal if he is unhappy with his sentence.

Automatic vacatur for Rule 11(c)(1) errors also presents special problems for the government because the government has little, if any, way to prevent such errors from occurring. District courts can and do discuss certain aspects of the plea with the defendant. See, *e.g.*, *Frye*, 132 S. Ct. at 1406-1407 (court can assure effective assistance of counsel by establishing defendant's understanding of, *inter alia*, the "advantages and disadvantages" and "sentencing consequences" of the plea).

The government cannot predict with any precision what the court will say to a defendant, and courts will sometimes stray into commentary that violates Rule 11(c)(1). Courts may also violate Rule 11(c)(1) during proceedings from which the government is absent: in this case, for example, the colloquy that crossed the line occurred at an ex parte hearing involving only respondent and his counsel. Yet under the automatic-vacatur approach, the government in every case loses the benefit of its plea agreement and must bear the cost of further proceedings.

C. This Court Should Remand To Allow The Court Of Appeals To Apply Prejudice Analysis

1. On a correct understanding of the plain-error standard, the court of appeals erred in vacating respondent's plea. Although the government has conceded that the magistrate judge's comments violated Rule 11(c)(1) (and that the error was plain), the procedural history of this case demonstrates that those comments had no appreciable impact on respondent's decision to plead guilty. See *Dominguez Benitez*, 542 U.S. at 83 (requiring defendant to show "a reasonable probability that, but for the error, he would not have entered the plea"). Respondent filed a motion demanding a speedy trial after the magistrate judge made the comments; he never mentioned the comments when he asked the district court to set aside his plea, but instead explained that he had pleaded for "strategic" reasons; and he did not even think to argue judicial-participation error on appeal until the court of appeals, after an "independent review" of the record, specifically requested briefing on that subject. See pp. 6-7, *supra*.

Moreover, any effect the comments might have had was dissipated by the three-month interval between the

comments and the plea and by the absence of the magistrate judge from the plea and sentencing proceedings (over which the district judge presided). Gov't C.A. Br. 3-6. Even the court of appeals and respondent appear to agree that the passage of time and a new judge are sufficient to cure judicial-participation error, as that is the appellate remedy granted for such error. Pet. App. 5a. When a defendant, like respondent here, has already effectively received that remedy, an appellate-court order requiring further proceedings before yet another judge wastes resources and accomplishes nothing.

2. Nothing would formally preclude this Court from resolving the prejudice inquiry in this case in the course of answering the question presented. But the Court's typical practice in cases where a court of appeals has failed to properly apply the plain-error test is to remand for further proceedings under the correct legal standard. See *Marcus*, 130 S. Ct. at 2167; *Dominguez Benitez*, 542 U.S. at 86; *Vonn*, 535 U.S. at 76. A similar disposition would be warranted here.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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