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 FOR 57 CRIMINAL LAW AND PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are 57 legal academics and clinicians who teach and write about criminal law and criminal procedure. *Amici* include former public defenders and prosecutors with extensive first-hand experience with the systemic realities of the modern criminal justice system in general and the plea-bargaining process in particular. *Amici* submit this brief to offer their insight—based on scholarly research and practical experience—in hopes of informing the sound and consistent development of criminal procedure doctrine.

A complete list of *amici* is attached as the Appendix.

SUMMARY OF ARGUMENT

Federal Rule of Criminal Procedure 11(c)(1) forbids judicial interference in the plea-bargaining process. When a judge violates that Rule and pressures a defendant to plead guilty, an appellate court should reverse the conviction without requiring the defendant to make an individualized showing of prejudice.

I. Defendants experience tremendous pressure to plead guilty in the modern criminal justice system. That pressure begins with prosecutors. Because trials are much more time-consuming and resource-intensive than guilty pleas, prosecutors have strong incentives to use all of the power at their disposal to

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[1] The parties' written consents to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

induce defendants to plead guilty. Defense attorneys cannot necessarily be relied upon to counteract this pressure, as they, too, have strong incentives to prefer pleas. In some instances, those incentives are financial; in others, they are a function of crushing caseloads. And defendants themselves cannot ignore the reality that sentences after trial are significantly higher than those imposed after pleas. The combined force of these pressures is tremendous—so great that even genuinely innocent defendants may plead guilty to avoid lengthy sentences.

Judges must not further contribute to this pressure. This Court has made clear that the judge's role in the guilty-plea process is to ensure that a defendant's decision to plead guilty is truly voluntary. A judge should not abdicate that responsibility and instead become a second prosecutor by pressuring the defendant to plead guilty and waive his constitutional right to a trial. Rule 11(c)(1) codifies the judge's obligation not to interfere with the plea-bargaining process. A judge who violates that command creates the serious risk that a defendant's guilty plea will not be truly voluntary, given that a defendant may feel that he has no choice but to accept the judge's advice.

II. In light of the serious pressures defendants already face in the plea-bargaining process, a judge threatens the integrity of a guilty plea when he exacerbates those pressures by placing a thumb on the scale in favor of a guilty plea. Accordingly, this Court should conclude that judicial pressure during plea bargaining constitutes a structural error and mandates reversal without any inquiry into harmlessness. Although this Court has said that technical var-

iances from Rule 11 are not structural errors, see *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004), judicial pressure to plead guilty is an error of much greater magnitude. Such errors are appropriately classified as structural, because their effects are pervasive and difficult to measure.

And while the government suggests that only constitutional errors can be structural, that is wrong; this Court's cases make clear that whether an error is structural depends on factors such as the difficulty of assessing harmlessness and the error's relationship to the criminal proceeding as a whole—not on the source of the right in question. In any case, the error here at the very least implicates serious constitutional concerns: Judicial pressure to plead poses a serious threat to the voluntariness of a guilty plea, in violation of the Due Process Clause, as well as to the separation of powers envisioned by the Constitution.

The government contends that Rule 11(h)'s requirement that courts disregard variances that do not "affect substantial rights" precludes treating judicial-pressure errors as structural. This is wrong, as a careful analysis of the text and structure of the Federal Rules reveals. Rule 11(h)'s language is functionally identical to that of Rule 52(a), which applies to *all* errors in criminal proceedings. Because structural errors require automatic reversal, it necessarily follows that there is a class of errors that "affect substantial rights" for purposes of Rule 52(a) irrespective of whether they are harmless in the traditional sense. It thus also follows that the same phrase in Rule 11(h) does not mean that harmless-error analysis is required for all violations of Rule 11, no matter

how serious. For similar textual reasons, judicial-pressure errors necessarily satisfy the third prong of Rule 52(b)'s plain-error test.

III. Even if judicial-pressure violations are not structural errors, they should nonetheless be presumed prejudicial in the context of plain-error review. *United States v. Olano*, 507 U.S. 725, 735 (1993), contemplated that some errors should be "presumed prejudicial," and judicial-pressure errors fall within that category, both because it is exceedingly difficult for a defendant to prove individualized prejudice arising from a particular violation, and because the right in question serves to protect important process-based values.

In addition, judicial-pressure errors are especially likely to pass without objection through no fault of the defendant's. Given the potential divergence of interests between attorneys and clients in this particular context, it would be inappropriate to punish the counseled defendant for his attorney's failure to raise an objection to a violation of Rule 11(c)(1) that may be in the attorney's (but not the defendant's) interests. A presumption of prejudice, then, would appropriately reflect the realities of plea bargaining and its place in the system of criminal justice and would protect the integrity of the guilty-plea process.

ARGUMENT

I. DEFENDANTS EXPERIENCE GREAT PRESSURE TO PLEAD GUILTY, WHICH JUDGES MUST NOT EXACERBATE

A. Defendants Face Significant Pressure In The Plea-Bargaining Process

This Court recently observed that plea bargaining today " 'is not some adjunct to the criminal justice system; it *is* the criminal justice system.' " *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). Indeed, nearly all criminal charges in the United States are resolved through plea bargains. In fiscal year 2011, for example, 96.9 percent of all federal offenders pleaded guilty.[2] See U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/FigureC.pdf. Although every defendant has a constitutional right to insist on trial and require the government to prove its case beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), very few do.

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[2] Statistics from state courts are nearly identical. See Thomas H. Cohen & Tracey Kyckelhahn, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (rev. July 15, 2010), *available at* http://bjs.gov/content/pub/pdf/fdluc06.pdf (in 2006, the most recent year for which data is available, 95 percent of state court convictions in the 75 most populous counties in the United States resulted from guilty pleas).

That is because defendants face overwhelming pressure, at almost every stage of the criminal process, to plead guilty. The pressure begins with prosecutors. "Trials are much more time consuming than plea bargains." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470 (2004). Given that prosecutorial time and resources are finite, the prosecutor has a strong incentive to obtain convictions via plea and thereby "put the released resources to use in other cases." Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 309 (1983). Accordingly, prosecutors do their utmost to extract guilty pleas from defendants. In some instances, prosecutors "file more serious charges than the evidence can support" in the "hope that a defendant will be risk averse and will accept a plea to charges greater than the case's true value simply to avoid the remote chance of a conviction on far more serious charges." Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 85 (2002).

Defense attorneys cannot always be relied on to counteract prosecutorial pressure, because they themselves face powerful incentives to counsel their clients to accept plea offers. These incentives exist for all types of defense attorneys: retained attorneys paid by clients, court-appointed private attorneys, and full-time public defenders.[3] For a privately re-

[3] All three types of attorneys exist in the federal criminal justice system. For those defendants who are unable to pay for their own defense, the Criminal Justice Act provides for representa-

tained attorney, cases that result in pleas require less work and move through the system more quickly, enabling the attorney to take on more cases and make more money. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992) (noting the "sharp divergence between the economic interests of attorney and client" and "the powerful financial incentives for the attorney to settle as promptly as possible").

As for court-appointed attorneys, they often receive "cut-rate fees," which "discourag[e] careful investigation and mak[e] the bargained-for guilty plea an attractive option that counsel (perhaps more than clients) find extremely hard to refuse." Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 Colum. L. Rev. 9, 61 (1986); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 33 (1997) ("[Appointed] defense counsel sometimes press their clients to plead guilty, since taking a high percentage of cases to trial is unaffordable."); Bibas, 117 Harv. L. Rev. at 2477 ("[A]ppointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.").

And while full-time public defenders do not have a direct economic stake in plea bargains, they still have strong incentives to favor guilty pleas over trials. Public defenders face "crushing caseloads," Ber-

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tion by federal public defenders or by appointed private counsel. See 18 U.S.C. § 3006A.

ger, 86 Colum. L. Rev. at 61, and "[l]awyers who carry too many cases inevitably pressure clients to plead guilty," Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293, 308 (2002); see also Schulhofer, 101 Yale L.J. at 1989–90. In short, when it comes to plea bargaining, defense attorneys face "serious temptations to disregard their clients' interests." Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1180 (1975).

In addition to pressure from prosecutors and their own counsel, criminal defendants must also consider the reality that sentences after convictions at trial are generally much higher than those imposed after guilty pleas. See Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 Va. L. Rev. 1699, 1717–18 (1994). In federal cases, for example, the average sentence for defendants who go to trial is *three times* higher than for defendants who plead guilty to similar charges. See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005).

The combined force of these pressures is tremendous—so great that even genuinely innocent defendants may plead guilty to avoid lengthy sentences. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (observing that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

B. Judges Must Not Further Pressure Defendants To Plead Guilty

Although the plea-bargaining process raises concerns in light of the pressures it places on defendants, this Court has recognized it as "an essential component of the administration of justice," one that "is to be encouraged" when "[p]roperly administered." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Court, however, has never suggested that "[p]roperly administered" plea bargaining includes judicial involvement in the bargaining process itself. Far from it: it has instead framed plea bargaining as an exercise "in securing agreement *between an accused and a prosecutor*." *Id.* at 261 (emphasis added). The judge's role, the Court has explained, begins only *after* the defendant and the government reach a plea bargain, and is to "develop, on the record, the factual basis for the plea" and to ensure that the plea is "voluntary and knowing." *Ibid.*; see also, *e.g.*, *Kercheval v. United States*, 274 U.S. 220, 223–24 (1927).

Rule 11 codifies these judicial duties. Among Rule 11's many safeguards, Rule 11(c)(1) stands out as a stark command, strictly forbidding judicial intervention in plea bargaining. It provides that the parties "may discuss and reach a plea agreement," but "[t]he court must not participate in these discussions." Fed. R. Crim. P. 11(c)(1).

That command is critically important. In a system where both prosecutors and defense attorneys have powerful, and in some cases ill-motivated, incentives to encourage guilty pleas, it is vital that judges not attempt to tip the scales even further by pressuring defendants to plead guilty. This is espe-

cially so given the life-altering consequences of a defendant's decision to waive his constitutional right to a jury trial and enter a guilty plea. When a judge violates Rule 11(c)(1) by interfering with the plea bargaining process and pressuring a defendant to plead guilty, the risk increases that the defendant's plea will not be the product of his own voluntary choice.

At issue in this case is a particular kind of judicial "participat[ion]" in plea-bargaining in violation of Rule 11(c)(1): judicial pressure to plead guilty.[4] Such violations are particularly troubling. Given the serious pressure that defendants already face, federal courts must not compound that problem by encouraging defendants to plead guilty. As many lower courts have concluded, such pressure by a judge "may coerce the defendant into an involuntary plea that he would not otherwise enter." *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976); see also, *e.g.*, *United States v. Casallas*, 59 F.3d 1173, 1178 (11th Cir. 1995); *United States v. Bruce*, 976 F.2d 552, 556 (9th

[4] This brief uses the shorthand "judicial pressure" to encapsulate the particular species of Rule 11(c)(1) violation that requires automatic reversal. "Judicial pressure" includes any effort by a judge to encourage a defendant to plead guilty. This case does not present the question whether automatic reversal is required for violations of Rule 11(c)(1) that do not involve the judge pressuring the defendant to plead guilty. Other violations—such as, for example, a judge urging a defendant *not* to take a guilty plea, or a judge becoming involved in the negotiation of specific terms—do not necessarily raise the same concerns related to coercion and voluntariness that judicial pressure to plead does. This Court can determine the appropriate remedy for such violations in another case.

Cir. 1992); *United States v. Kraus*, 137 F.3d 447, 457–58 (7th Cir. 1998).

Judicial pressure creates a significant danger that a defendant may fear that rejecting a judge's suggested plea "will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged." *Werker*, 535 F.2d at 202; see also *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) ("When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not."), cited in Fed. R. Crim. P. 11 advisory committee's notes, 18 U.S.C. app. R. 11 (2012).

Judicial pressure may also lead a defendant to question whether he would receive a fair trial if he rejects the plea the judge endorses, as it may cause the defendant to view the judge as an adversary, rather than as "the embodiment of his guarantee of a fair trial and just sentence." Kathleen Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 Harv. C.R.-C.L. L. Rev. 29, 44 (1974).[5] And, as the Advisory Committee noted when

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[5] That is so even where, as here, the judge who pressures the defendant is not the same judge who ultimately presides over the plea hearing. A defendant who is pressured to plead guilty by a judge acting in his official capacity would have no reason to think that the judge is not speaking for the United States Judiciary as a whole; the defendant might also understandably

it adopted the Rule in question, judicial interference in the plea bargaining process "makes it difficult for the judge to objectively assess the voluntariness of the plea." Fed. R. Crim. P. 11 advisory committee's notes, 18 U.S.C. app. R. 11 (2012) (citing sources).

The facts here provide a good illustration of how the interests of appointed attorney and defendant can diverge, and how judicial pressure to plead guilty irrevocably compounds the problem. Respondent requested a new appointed attorney because his lawyer had not adequately consulted with him about the case, did not advise him of "any possible defenses," and instead urged him to "plead guilty." C.A. E.R. Ex. B. Instead of acting as an impartial judicial officer, the judge assumed the role of a second prosecutor. He told respondent that the government had "all of the marbles in this situation" and that the only option available was to "go to the cross" and admit his guilt. J.A. 159–60. The judge vouched for the defense attorney's advice when he told respondent that "there may not be a viable defense to these charges." J.A. 155. Like the defense attorney and the prosecutor, the judge believed respondent's only option was to plead guilty—and he made sure respondent knew it.

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think that the judge will convey his views about the case and the defendant to the judge who takes the guilty plea.

II. JUDICIAL PRESSURE DURING PLEA BARGAINING IS STRUCTURAL ERROR REQUIRING REVERSAL EVEN WHEN NOT PRESERVED

Certain "structural errors" "will always invalidate [a] conviction." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). A judge threatens the integrity of a guilty plea by exacerbating the serious pressures defendants already face in the plea-bargaining process. Accordingly, this Court should conclude that judicial pressure during plea bargaining constitutes a structural error. In contrast to merely technical Rule 11 variances, such judicial interference has pernicious effects that are impossible to measure; it also implicates weighty constitutional concerns. Nor is the government correct to argue that the text of Rule 11(h) shows that judicial-pressure errors are not structural. Moreover, because judicial-pressure errors are structural, they should require reversal under Federal Rule of Criminal Procedure 52(b) even when not preserved.

A. Rule 11(c)(1) Errors Are Different In Kind From Other Rule 11 Violations

This Court has never addressed whether violations of Rule 11(c)(1) constitute structural error. Although *United States v. Dominguez Benitez* concluded that "the omission of a single Rule 11 warning without more is not colorably structural," 542 U.S. 74, 81 n.6 (2004), that statement does not apply here.

At issue in *Dominguez Benitez* was a district court's failure to advise the defendant, as required by Rule 11(c)(3)(B), that he had no right to withdraw his plea if the court did not follow the government's sentencing recommendation. *Id.* at 78. As *United States v. Vonn* explained, such "trivial" or "technical" variances from Rule 11's warning requirements do "not necessarily equate to the importance of the overarching issues of knowledge and voluntariness" that Rule 11 seeks to protect. 535 U.S. 55, 70, 71, 78 (2002); see also *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (rejecting collateral challenge to "technical violation" of Rule 11).

Treating merely technical variances from Rule 11's colloquy requirements as non-structural error makes sense. During a plea colloquy, the judge acts as a backstop, repeating advice the defendant will, in virtually all cases, have already received from another judge, from the written plea agreement, or from the defense attorney. The judge merely provides second-level protection. In the rare case where the defendant has not received the required information from another source, relief is available, but there is no need to treat such errors as categorically requiring reversal.

Not all Rule 11 violations deserve the same treatment, however. Indeed, *Vonn* made this clear when it criticized certain courts of appeals for "treat[ing] all Rule 11 lapses as equal. " 535 U.S. at 70. Unlike "trivial" Rule 11 violations, judicial pressure during plea bargaining implicates "the overarching issues of knowledge and voluntariness" with which Rule 11 is concerned. *Ibid.* As explained, judi-

cial pressure to plead can undermine the defendant's own preferences, especially in light of the overwhelming pressure from other actors in the system; it can cause the defendant to question whether he will receive a fair trial; and it can make it difficult for a judge accurately to assess whether the guilty plea is in fact voluntary. For these reasons, this Court's conclusion that some Rule 11 violations are not structural does not control here.

B. Judicial Pressure During Plea Bargaining Has Effects That Are Pervasive And Impossible To Measure

This Court has made clear that whether an error is structural "rest[s] . . . upon the difficulty of assessing the effect of the error." *Gonzalez-Lopez*, 548 U.S. at 149 n.4; see also, *e.g.*, *Sullivan*, 508 U.S. at 282 (concluding that trial court's failure to give reasonable-doubt instruction "unquestionably qualifie[d] as 'structural error'" because its "consequences . . . are necessarily unquantifiable and indeterminate"). As a related point, structural errors have a pervasive impact on the entire criminal process, "affecting the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. It is hard to assess the impact of a structural error precisely because it is difficult, if not impossible, to isolate the error from the other aspects of the process.

Judicial pressure in the plea-bargaining process satisfies these criteria. Such interference affects the defendant's fundamental decision to enter a guilty plea or proceed to trial and impacts the defendant's strategic decisions in unknowable ways. Where a judge has not merely abdicated his responsibility to

"ensure that the plea is voluntary," *Gonzalez v. United States*, 553 U.S. 242, 258 (2008) (Scalia, J., concurring in the judgment), but has affirmatively interfered with the defendant's decision-making process, it is impossible to know whether and to what degree the judge's interference affected the defendant's ultimate choice to waive his rights.

It is also impossible to assess whether the defendant would have accepted the same plea agreement or would have sought a more favorable agreement absent the judicial pressure. For this reason, this Court has explained that an inquiry into harmlessness in the plea-bargaining process "would be a speculative inquiry into what might have occurred in an alternate universe," because "[i]t is impossible to know what different choices" would have been made absent the error, "and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzalez-Lopez*, 548 U.S. at 150.

Moreover, requiring Rule 11(c)(1) violations like the one here to satisfy harmless-error analysis would fundamentally misunderstand the right at stake. The Rule protects a defendant's right to make a decision to plead free from additional pressure beyond the pressure already brought to bear by the prosecutor and the defendant's own lawyer. The Rule would become a virtual nullity if it could be disregarded as long as an appellate court concludes that the defendant would have pleaded guilty anyway. Given the realities of our criminal justice system, pleading guilty rather than going to trial is almost always in a defendant's best interest. Allowing judges to speculate about what a defendant would have done absent the

coercion—based on an assessment of information that is unlikely to even be in the record after a plea, such as the strength of the evidence—would mean that defendants would have a meaningful right to plead guilty free from judicial pressure only in those rare cases in which an appellate court concludes that pleading guilty was the wrong call.

Rule 11(c)(1), as it applies to judicial-pressure situations, requires more, for it serves to protect the integrity of the process itself. Reducing the Rule to one that effectively forbids judicial pressure only where that interference can be proven to have made a difference ignores that the Rule "commands, not that a [guilty-plea proceeding] be fair, but that *a particular guarantee of fairness be provided,*" cf. *Gonzalez-Lopez*, 548 U.S. at 146 (emphasis added)—namely, that a judge not interfere with the defendant's decision-making process by further pressuring him to plead guilty. See also *id.* at 419 n.4 (rejecting argument that "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural").

C. Judicial Pressure During Plea Bargaining Also Implicates Serious Constitutional Concerns

The government asserts that the error here cannot be structural because it lacks "constitutional dimension." Gov't Br. 22. But the government concedes that this Court has never held that a constitutional violation is actually required for an error to qualify as structural. *Ibid.* That concession was wise, because it is anything but clear whether the source of law—constitution, statute, or rule—from which a

right is derived should be dispositive in the structural-error inquiry. As explained above, whether an error is structural turns on the difficulty of assessing harmlessness and on the error's relationship to the criminal proceeding as a whole—not on which book one must look in to locate the right.

In any case, the government is wrong to assert that judicial-interference errors lack "constitutional dimension." Whether or not such interference rises to the level of an independent constitutional violation in every case, violations of Rule 11(c)(1), like the one here, certainly implicate weighty constitutional concerns.

1. The Due Process Clause requires pleas to be both knowing and voluntary. See *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Given its high potential for coercion, judicial pressure in plea bargaining poses a serious threat to the voluntariness of a defendant's guilty plea. Cf. *Walker v. Johnson*, 312 U.S. 275, 286 (1941) (holding that a defendant who is "deceived or coerced by the prosecutor into entering a guilty plea . . . [is] deprived of a constitutional right"); see also *Waley v. Johnston*, 316 U.S. 101, 104 (1942).

Lower courts have recognized precisely these concerns in treating Rule 11(c)(1) errors as requiring reversal. The Ninth Circuit, for example, has noted "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." *Bruce*, 976 F.2d at 556; see also *Kraus*, 137 F.3d at 457 (stating that coercive pressure on the defendant is "inherent in judicial inter-

vention"). It is irrelevant whether the judge intends to coerce the defendant into pleading guilty; judicial pressure to plead guilty colors the defendant's understanding of his options in a way that is inherently coercive. "[I]t is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea." *Werker*, 535 F.2d at 202.

2. Judicial pressure during the plea-bargaining process also threatens important separation-of-powers values uniquely applicable in the federal context. This Court has been "vigilan[t]" of the danger inherent in allowing the judicial branch to engage in "'tasks that are more properly accomplished by [other] branches.'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988)). The role of the judiciary is to decide cases, not prosecute them. When a judge places a thumb on the scale of the defendant's guilty plea decision, he essentially becomes a second prosecutor and takes on an executive function. That the prosecution may appreciate the judge's assistance in securing a plea does not matter, for the separation of powers protects the individual, not just the encroached-upon branch. See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

The Court has also warned that separation-of-powers violations may "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Mistretta*, 488 U.S. at 383 (internal quotation marks omitted). As this Court has emphasized: "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system,

even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011). Judicial pressure to plead guilty poses a serious threat to these values as well.

D. Rule 11(h) Does Not Mandate Harmless-Error Analysis

Rule 11(h) provides that "[a] variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). The government argues that Rule 11(h) "foreclose[s] any conclusion that Rule 11(c)(1) errors are structural." Gov't Br. 23. In the government's view, concluding that judicial pressure errors require automatic reversal would grant an appellate court "authority to substitute its own judgment in place of the text of the Federal Rules of Criminal Procedure." *Id.* at 16. The government's position is that Rule 11(h) forecloses the possibility of structural error because its requirement that an error "affect substantial rights" to merit reversal means that harmless-error analysis is required in all cases.

A careful analysis of the text and structure of the Federal Rules shows this argument to be a red herring. Rule 11(h)'s language is functionally identical to that of Rule 52(a), which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a).[6]

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[6] Respondent ably explains why Rule 11(h)'s use of the word "variance" means that Rule 11(h) is inapplicable to judicial-pressure errors. See Resp. Br. 24–27. *Amici* find that analysis

The textual parallel between Rule 52(a) and Rule 11(h) creates a conundrum for the government. Although the plain language of Rule 52(a) forbids reversal if a given error does not "affect substantial rights," this Court has held that structural errors are "not subject to harmless-error analysis," *Gonzalez-Lopez*, 548 U.S. at 152, but instead "require[] automatic reversal." *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993). How can the government reconcile automatic reversal for structural errors under Rule 52(a)—which by its plain terms forbids reversal for *any* errors in a criminal proceeding that do not "affect substantial rights"—with its contention that Rule 11(h)'s requirement that an error "affect substantial rights" precludes automatic reversal for *any* Rule 11(c)(1) violation? That is, how can the language "affect substantial rights" in Rule 11(h) mandate harmless-error analysis, given that the same language in Rule 52(a) appears to permit reversal without harmless-error analysis in a limited class of cases?

The government has three possible responses if it sticks to its strict reading of the phrase "affect[s] substantial rights" in Rule 11(h). None is palatable. First, the government could argue that the phrase "affect[s] substantial rights" has a different meaning in Rule 11(h) than it does in Rule 52(a)—that it man-

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persuasive, and do not seek to duplicate it here. Instead, this brief seeks to explain why, even assuming *arguendo* that the error here is properly classified as a "variance," Rule 11(h)'s requirement that the error "affect substantial rights" is satisfied without any individualized showing of prejudice.

dates harmless-error analysis in the former provision, but not in the latter. This Court has rejected similiarly inconsistent textual interpretations. See *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give the[] same words a different meaning [in different contexts] would be to invent a statute rather than interpret one.").

Second, the government could argue that Rule 52(a)'s reference to "affect[ing] substantial rights" means "was not harmless," but that Rule 52(a) contains an implicit exception to that requirement for structural errors. That reading is hard to reconcile with the Rule's broad and unequivocal language. And it proves too much: if Rule 52(a) contains within it unknown and unstated exceptions, so too should Rule 11(h), which uses essentially identical language. The government itself has dismissed this possibility. Gov't Br. 12 ("The scope of Rule 11(h) expressly encompasses all potential variances . . . .").

Third, the government might contend that Rule 52(a), to the extent that it forbids courts from providing the proper remedy for structural errors, is unconstitutional. That possibility is, to say the least, implausible. *Cf. Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (holding that a court "can refuse to [apply a Federal Rule] only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions"); see also *Gonzalez-Lopez*, 548 U.S. at 157 (Alito, J., dissenting) ("The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions.

Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a) . . . .").

This conundrum is easily solved, however, by recognizing—contrary to the government's view—that the requirement that an error "affect substantial rights" does not mandate harmless-error review in every situation. Instead, whether and how an error "affect[s] substantial rights" turns on the nature of the right in question. Many errors will not "affect substantial rights" unless they have a "a prejudicial effect on the outcome of a judicial proceeding," thereby requiring harmless-error review. *Dominguez Benitez*, 542 U.S. at 81. Where, however, the right in question is not solely concerned with fair outcomes, but instead guarantees a certain kind of *process*, see, *e.g.*, *Gonzalez-Lopez*, 547 U.S. at 147–48, a violation of the right necessarily "affect[s]" the defendant's "substantial right[]" to the particular process in question for purposes of Rule 52(a). Cf. *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (suggesting that, for purposes of Rule 52(b), "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

So too with Rule 11(h). Most technical variances from Rule 11's provisions will not satisfy Rule 11(h) unless they can be shown to have had a prejudicial effect on the outcome. But where, as here, the type of error in question is one that should properly be classified as structural—*i.e.*, one that "affect[s] substantial rights" irrespective of any individualized proof of prejudice—an appellate court's reversal

without a separate harmless-error inquiry does not "override Rule 11(h)," Gov't Br. 18.

E. Because Judicial Interference With Plea Bargaining Is A Structural Error, The Plain-Error Test Is Also Satisfied

The plain error standard in Rule 52(b) applies to all errors that are "not timely raised in district court." *United States v. Olano*, 507 U.S. 725, 731 (1993); see also Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). "Rule 52(b) authorizes an appeals court to correct a forfeited error only if (1) there is an error, (2) the error is plain, (3) the error affect[s] substantial rights .... [and] (4) ... the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Henderson v. United States*, 133 S. Ct. 1121, 1126–27 (2013) (internal quotation marks and citations omitted; final alteration in original). Because the error here is properly classified as structural, it satisfies this test despite respondent's failure contemporaneously to object.[7]

1. This Court has left open the possibility that structural errors may "automatically satisfy the third prong of the plain-error test," *Puckett v. United States*, 556 U.S. 129, 140 (2009)—that is, the "possibility that ... 'structural errors' might 'affect sub-

[7] The government has explicitly conceded that there was "error" here that was "plain." Gov't Br. 27. Given that Rule 11(c)(1) is a firm command, it is hard to see how judicial pressure would ever fail to satisfy these first two prongs of the *Olano* analysis.

stantial rights' regardless of their actual impact on an appellant's trial," *Marcus*, 130 S. Ct. at 2164; see also *Olano*, 507 U.S. at 735 ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome . . . .").

Because the error here is structural and respondent did not lodge a contemporaneous objection below, this case squarely presents the issue left open in *Puckett* and elsewhere. The Court should resolve that question by concluding that structural errors automatically satisfy the third prong of the plain-error test and "affect substantial rights." Accordingly, respondent need not "show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 76.

That conclusion follows from the text of the Federal Rules. As explained, the text of Rule 52(a) includes no exceptions—which means that (unless the Rule is unconstitutional in some applications) it applies to all errors, even structural ones. Rule 52(b) employs "the same language [about the effect on substantial rights] employed in Rule 52(a)." *Olano*, 507 U.S. at 734. Given that a preserved structural error necessarily "affect[s] substantial rights" under Rule 52(a), see *supra* Part II.D, it necessarily follows that an unpreserved structural error also always "affect[s] substantial rights" under Rule 52(b).

2. The fourth prong of Rule 52(b)'s test requires that "the error seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The government has not contested the applicability of this fourth

prong here. See Resp. Br. 52. But in any event, the requirement is easily satisfied. A judge who pressures a defendant to plead guilty certainly harms the perception of the judiciary's impartiality in a way that seriously affects both the "integrity" and the "public reputation" of the proceedings. Because judicial pressure to plead affects the public reputation of the judiciary, the guilt or innocence of the defendant is immaterial. See *Olano*, 507 U.S. at 736 ("[W]e have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.").[8]

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[8] The government has argued that ruling for respondent would upset the finality of large numbers of guilty pleas. See Gov't Br. 25–27. That argument is problematic, because it depends on the premise that federal judges violate Rule 11(c)(1) in a large number of cases. To the extent the Court shares those concerns, however, they are best addressed under *Olano*'s fourth prong, which "is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. Although judicial-pressure errors like the one here should satisfy the fourth prong, a particular instance of judicial pressure might, because of the specific facts at issue, be found not to threaten the reputation or integrity of the judiciary. This "case-specific" approach would address some of the government's finality concerns without vitiating the force of the Rule in most instances. Because the government has not contested the applicability of the fourth prong in this case, see Resp. Br. 52, the Court does not need to resolve the issue at this time.

III. EVEN IF NOT STRUCTURAL, JUDICIAL-PRESSURE ERRORS SHOULD BE PRESUMED PREJUDICIAL UNDER PLAIN-ERROR REVIEW

If the Court disagrees that judicial pressure to plead guilty is a structural error, it should nevertheless hold that this type of Rule 11(c)(1) violation affects a defendant's "substantial rights" under the third prong of the plain-error test, without requiring the defendant to make an individualized showing of prejudice. Both precedent and the practical difficulties of proof support that result.

1. *Olano* recognized that the third prong of the plain-error test—which requires the error to "affect[] substantial rights"—"*in most cases* . . . means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." 507 U.S. at 734 (emphasis added). The Court further reasoned that the plain text of Rule 52(b) establishes that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court nevertheless contemplated situations where the defendant does not need to show individualized prejudice—and does not carry the burden of persuasion—with respect to the "substantial rights" element:

> There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. *Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.*

Id. at 735 (emphasis added). *Olano* thus clearly contemplated structural errors (which "can be corrected regardless of their effect on the outcome") *and* an additional category of errors that are not structural but that nonetheless "should be presumed prejudicial." *Ibid.*

2. Case law addressing the right of allocution under Federal Rule of Criminal Procedure 32 provides an instructive analogy. That Rule provides: "Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii); see also *Green v. United States*, 365 U.S. 301 (1961). Although courts have concluded that violations of this Rule 32 provision are not structural errors, they have nonetheless applied a presumption of prejudice to such errors. Courts have advanced two main reasons for this approach: (1) the difficulty of proving prejudice and (2) the nature of the right.

First, courts have recognized the difficulty of proving prejudice arising from violations of the right to allocute. In that context, an appellate court would be forced to consider potentialities layered on top of potentialities. The court would have to determine what statements the defendant "would have made at sentencing, and somehow show that these statements would have changed the sentence imposed by the District Court." *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001). As the en banc Fifth Circuit explained, presuming prejudice in that situation "avoids speculation" as to what the defendant might have said, and, logically, what effect such statements

might have had on a district court's sentencing decision. *United States v. Reyna*, 358 F.3d 344, 352 (5th Cir. 2004) (en banc); see also*, e.g.*, *United States v. Landeros-Lopez*, 615 F.3d 1260, 1267 (10th Cir. 2010); *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); *United States v. Prouty*, 303 F.3d 1249, 1253 (11th Cir. 2002).

Second, courts have presumed prejudice because of the precise nature of the allocution right. While the right of allocution (like the ban on judicial participation in plea bargaining) is derived from a Federal Rule rather than the Constitution, it bears directly on the integrity of the criminal process. Allocution preserves procedural integrity by allowing defendants the opportunity to be heard and to mitigate their punishment with their own words. See *Green*, 365 U.S. at 304 ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). In this way, the right of allocution serves to maintain the legitimacy of the criminal sentencing process, and by extension, of the courts in general. See, *e.g.*, *Adams*, 252 F.3d at 288.

Both rationales apply here. As with denials of the right of allocution, judicial pressure errors require defendants to make a showing on plain-error review that, absent a presumption of prejudice, would be nearly impossible: The defendant would have to prove a hypothetical negative, by showing that he would not have accepted a particular plea but for the judge's participation. Cf. *Gonzalez-Lopez*, 548 U.S. at 150. How can a defendant carry this burden

beyond pointing to the substance of the coercive comments?

Consider the facts here. Respondent pled guilty after the judge (and the defense attorney) urged him to "come to the cross" and accept responsibility. He evinced regrets about his decision to plead guilty and tried to withdraw the plea. The district judge denied the request. We cannot know, and respondent cannot possibly prove, what different agreement, if any, would have been reached, or whether he would have gone to trial, absent the judge's coercive comments. For precisely this reason, the Fifth Circuit concluded that "the pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to" the judge's pressure, as an appellate court could not "measure the harm" to the defendant because it could not know "what agreement, if any, would have been reached absent the judicial participation." *United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993).

In addition, as with the allocution rule, the ban on judicial pressure to plead preserves the legitimacy of the system. It protects the integrity of the plea-bargaining *process*, the "critical point" for defendants in nearly every criminal prosecution. *Cf. Frye*, 132 S. Ct. at 1407. That goal is independent from—but no less important than—ensuring that only the guilty are punished. By forbidding judges from interfering in plea bargaining, Rule 11(c)(1) ensures that defendants have an opportunity to make the momentous decision whether to waive their constitutional jury-trial rights in an environment that counteracts,

rather than reinforces, the tremendous pressure that the system places on defendants to plead guilty.

3. A final reason to presume judicial interference errors prejudicial is that they are especially likely to pass without objection through no fault of the defendant's. Respondent's case is again illustrative of the larger problem. In addition to interfering in the plea negotiations, the judge refused to appoint a new defense attorney despite respondent's complaints that his attorney was pressuring him to plead guilty without reviewing his options. The judge told respondent that the attorney had clerked for him and was one of his "finest" clerks. J.A. 148. After the judge commended the attorney and his advice that respondent should plead guilty, the attorney did not object to the judge's Rule 11(c)(1) violation.

Under the circumstances, it strains credulity to think that respondent's attorney ever would have objected to the judge's comments. The judge was explicitly endorsing the defense attorney's advice that respondent "ought to plead guilty." J.A. 152. Given the divergence of incentives between clients and attorneys regarding plea bargaining, see *supra* Part I.A, it is unlikely that a defense attorney will object to judicial pressure to plead guilty, because he is typically a direct beneficiary of the judge's impermissible actions. Thus, although in many cases, "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual," *Vonn*, 535 U.S. at 73 n.10, it is not fair to do so where the Rule at issue serves to protect against incentive conflicts between a defendant and his attorney.

Nor can the defendant himself be required to object. As the Court has recognized, "[i]t is perfectly true that an uncounseled defendant may not, in fact, know enough to spot a Rule 11 error." *Ibid.* The Court made that observation in the context of explaining that a defendant who chooses *self-representation* "assumes" the "perils" of "Rule 11 silence." *Ibid.* Here, however, respondent had *not* assumed the perils of self-representation at the time the judge made the improper remarks—and indeed was actively seeking to obtain new counsel, see Resp. Br. 4. It is manifestly unfair, then, to require him to prove that he was prejudiced when his own attorney failed to object to receiving the court's help in obtaining a guilty plea that the attorney *himself* desired. Moreover, few defendants would have the fortitude to object even if they had some understanding of the Rules. If "a trial court ought not to put counsel in the position of having to object to a suggestion that compromises the Federal Rules," *Olano*, 507 U.S. at 742 (Kennedy, J., concurring), then surely the trial court ought not put the *defendant* in the position of having to tell the judge that the judge's conduct, acquiesced in by his attorney, is inconsistent with the law.

For these reasons, this Court should adopt a presumption of prejudice for judicial-pressure errors arising under plain-error review. That result would appropriately reflect the realities of plea bargaining and its place in the system of criminal justice and would protect the integrity of the guilty-plea process.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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