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 SCHOLARS AND PRACTITIONERS OF LEGAL AND JUDICIAL ETHICS AND LEGAL ETHICS CENTERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars and practitioners of legal and judicial ethics, and legal ethics centers, affiliated with various institutions or universities throughout the United States ("Ethics Amici"). Ethics Amici have extensive experience analyzing, studying, teaching and engaging in scholarship regarding the regulation of the bench and bar, including the norms of judicial conduct and the processes for formulating, interpreting and applying standards of judicial conduct.

This case implicates the interests of Ethics Amici because it involves the standards of judicial conduct and the extent of judicial authority to formulate and apply standards of judicial conduct in criminal cases to promote the independence, integrity, and impartiality of the judicial system and the fair administration of justice. Ethics Amici submit this brief to underscore a federal appellate court's supervisory authority to regulate federal trial judges' pretrial conduct in criminal proceedings when that conduct—encouraging the criminal defendant to plead guilty and cooperate with the government—is coercive and departs from the judge's role as neutral judicial officer, thereby undermining the fairness of proceedings and the integrity of the judicial process.

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[1] Pursuant to Rule 37.3(a), *amici curiae* affirm that all parties have consented in writing to the filing of this *amici curiae* brief. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel for *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF CASE

This case involves the propriety of a magistrate judge's comments to a criminal defendant regarding the advisability of entering a guilty plea and cooperating with the Government. From the inception of the criminal proceedings in the Southern District of Georgia, Respondent Anthony Davila ("Davila") expressed displeasure about his court-appointed attorney, including his advice to plead guilty, as well as reservations and confusion about the proposed plea agreement, including its possible collateral effect on other criminal proceedings in the Middle District of Florida. *See* J.A. 154-55 (Feb. 8, 2010 *ex parte* hearing); J.A. 96-98, 114 (May 17, 2010 Rule 11/Change of Plea hearing); J.A. 59-60, 63-64 (Nov. 15, 2010 motions and sentencing hearing). Accordingly, Davila sent a letter to the court requesting different counsel. J.A. 146. He complained that his counsel had communicated that Davila's only option was "to plead guilty." J.A. 152.

Davila's letter prompted the magistrate judge to hold an *ex parte* hearing with Davila and his defense counsel. J.A. 146. At the outset, the magistrate judge informed Davila that the court would address Davila's letter requesting different counsel, but Davila should "[m]ake sure [he] underst[oo]d that" the appointed counsel, Mr. Loebl, was "the only court appointed attorney [he] [was] going to get." J.A. 148.

The magistrate judge said that Mr. Loebl "was one of the finest law clerks" the magistrate judge had ever had and that Davila was "lucky" to have him as his attorney, and communicated that his only options were to keep Mr. Loebl or proceed *pro se*. J.A. 147-48. He referred to another defendant he had

"begged" not to proceed *pro se*, who received a life sentence without parole after representing himself at trial. J.A. 148. The magistrate judge said Davila could "be just like that guy" if he chose to proceed without his court-appointed attorney. J.A. 148.

At that point in the *ex parte* hearing, the magistrate judge went beyond denying Davila's request for new counsel out of hand, and addressed the wisdom of the court-appointed attorney's advice to plead guilty and cooperate with the Government. Those comments are at the heart of the Eleventh Circuit's decision and the question presented to this Court, and are analyzed by Ethics Amici in the Argument section of this brief at I.A and I.B. As the hearing concluded, Davila said that he would proceed with his appointed counsel rather than *pro se* "because [he] [was] on medication so there [was] no way [he] could represent [himself]." J.A. 159.

Following the *ex parte* hearing, and after plea negotiations became active, Davila signed a plea agreement and subsequently entered his guilty plea before a district judge. J.A. 81-144. At the proceeding during the colloquy, Davila, although he was represented by counsel, raised "a couple of inaccuracies" as to the timing and nature of his conspiracy charge in the indictment. J.A. 96. Specifically, the indictment indicated that the conspiracy lasted from 2005 until 2007, while Davila alleged that any conduct on his part did not begin until 2006. J.A. 96. Also, the indictment alleged that Davila impersonated a law clerk to obtain public information from court files, which Davila alleged was incorrect. J.A. 96-97. At this point, Mr. Loebl stepped in and assured the court that Davila

admitted that his conduct met the elements of the crime charged. J.A. 99. The court instructed the Government to call the special agent who investigated the crime as a witness to ensure that "a factual basis exist[ed] to support [the] the guilty plea and conviction." J.A. 99-100. The agent agreed that Davila did not know the co-conspirator at issue until 2006, but alleged that the time span referred to the tax years for which false returns were submitted. J.A. 109-10. After the special agent testified, Davila again raised that while he admitted to the special agent's testimony, "there were some inaccuracies in the indictment that [we]re relevant to [his] conduct" and to his sentencing. J.A. 114. When asked, Davila testified that he was entering into the plea voluntarily, J.A. 122, and the district judge found as much on the record. J.A. 123.

After the plea, but before sentencing, the magistrate judge granted Davila permission to proceed *pro se* and appointed Mr. Loebl as stand-by counsel. J.A. 57. Davila, at that point proceeding *pro se*, moved to vacate his plea and dismiss the indictment. J.A. 56-59.

At the motions and sentencing hearing, the district judge addressed the motions to vacate the plea and dismiss the indictment. J.A. 56-57. Davila argued *pro* se—with the same Mr. Loebl assigned as standby counsel. J.A. 56-57. This left Davila effectively without a disinterested advocate to assist him at that time in articulating a basis for vacating the plea due to coercion to plead guilty that occurred at the *ex parte* hearing. Davila argued that the indictment contained erroneous facts and that these facts would affect the criminal proceedings in the

Middle District of Florida. J.A. 59. Davila explained to the district judge that he had raised this issue at the change of plea hearing before he entered his guilty plea, *see* J.A. 96-98, and various times with his attorney. J.A. 61-63 ("When I read to the Court at the Change of Plea hearing and I talked about the inaccurate timeframes, nobody said anything about it. Nobody said anything about what is going on with these timeframes. I read it to the Court at the Change of Plea hearing. I was telling the Court, at that point in time, that there was something wrong with the timeframes.").

Davila expressed that he "was misinformed by [] counsel" and that he would never have entered into the plea if he had been told the effect it would have on the pending prosecution in the Middle District of Florida. J.A. 62-64 ("I'm trying to say he assured me that everything was going to be fine. But what happened was now I'm exposed to substantive offenses in the Middle District of Florida based on those false statements.").

When the district judge asked Davila to articulate a fair and just reason for withdrawing the plea, using the language of Federal Rule of Criminal Procedure 11(d)(2)(B), the standard for vacating a guilty plea if raised after the plea is entered, but before sentencing, Davila again referred to the misunderstanding about the plea agreement. Davila referenced his counsel, not the magistrate judge, but again referred to misinformation and confusion about the plea agreement and its effect on collateral proceedings, and that he would not have entered the plea if he had understood the effect of the very cooperation that the magistrate judge appeared to be

urging. J.A. 64-65 ("Please, I urge the Court to understand that. It was based on misinformation. Had I known -- had I known that it was going to effect [sic] me substantively in the Middle District of Florida, I would have never taken that plea, your Honor.); *see also* J.A. 62-65.

The court denied Davila's *pro se* motions to vacate the plea and dismiss the indictment, finding no fair and just reason to permit Davila to withdraw his guilty plea. J.A. 72. The court then sentenced Davila to 115 months in prison. J.A. 77-78.

On appeal, Mr. Loebl was appointed to represent Davila, but filed a motion to withdraw as counsel on the basis that no nonfrivolous grounds existed. Case No. 10-1583, Nos. 26 & 27. The United States Court of Appeals for the Eleventh Circuit denied that motion, stating its "independent review ha[d] revealed an irregularity in the statements of the magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." Doc. No. 31. The Eleventh Circuit then vacated the conviction, holding that the magistrate judge's comments amounted to improper judicial participation in plea negotiations, and remanded the case with instructions that it be assigned to a different district judge. *United States v. Davila*, 664 F.3d 1355 (11th Cir. 2011). The Eleventh Circuit reasoned that the participation constituted plain error and that Davila need not show actual prejudice. *Id.* at 1358-59.

SUMMARY OF ARGUMENT

I. The magistrate judge's comments about the advisability of a guilty plea, and urging the defendant to "go to the cross" and "tell it all" to cooperate with the Government, made worse by the introduction of religious imagery, were coercive. The magistrate judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to the defendant. The coercive effect of such comments, from a judge, is likely to be overwhelming, and, if uncorrected, eliminates any assurance that a subsequent guilty plea was voluntary. Even well-intentioned judicial comments urging a plea or cooperation are inherently coercive and violate canons, rules, and standards of judicial ethics. Jurisdictions that allow judges to play some part in plea negotiations hold that judges must not abandon the judicial role and make comments that suggest a partisan attitude about the case or the defendant, nor communicate that a plea agreement should be accepted or a guilty plea entered. Irrespective of whether the magistrate judge's comments actually influenced Davila to plead guilty here, judicial exhortations to plead guilty damage the integrity of the judiciary and criminal justice system in addition to fundamentally impairing the voluntariness of a plea and a defendant's right to a fair process.

II. The Eleventh Circuit had supervisory authority to vacate the guilty plea here based on the magistrate judge's departure from the judicial role. Indeed, a federal appellate court's supervisory authority is at its zenith when exercised over the judiciary, such as to ensure the fair administration of

criminal justice. Courts may exercise supervisory authority not just to protect individual rights, but also to protect judicial integrity and to promote confidence in the just administration of justice. On this record, no additional inquiry into actual coercion or prejudice is required or desirable. Whether or not the magistrate judge's conduct also violated Federal Rule of Criminal Procedure 11(c)(1), the record is sufficient to show inherently prejudicial, coercive judicial conduct that courts may remedy.

ARGUMENT

I. THE MAGISTRATE JUDGE'S ADVICE TO PLEAD GUILTY AND COOPERATE—INCLUDING TWICE URGING DAVILA TO GO OR COME "TO THE CROSS"—WAS COERCIVE AND A DEPARTURE FROM THE NEUTRAL JUDICIAL ROLE.

A. The Comments Violated Judicial Standards Of Conduct And Undermined The Voluntariness Of The Plea And The Fairness Of The Proceedings.

Judicial exhortations to plead guilty and cooperate with the Government, such as the magistrate judge's comments here, undermine the impartiality and integrity of the judiciary and the fair administration of justice, as well as the voluntariness of a defendant's guilty plea. A judge should not through word or demeanor communicate to a criminal defendant that a plea agreement should be accepted or that a guilty plea should be entered. Such coercive judicial participation in a defendant's decision to plead guilty and cooperate—in the context of plea negotiations or outside of that context—

undermines the integrity of, and public confidence in, the judiciary and the fair administration of justice.

Here, at an *ex parte* hearing held by the magistrate judge to address concerns raised by Davila about his court-appointed attorney, the magistrate judge went far beyond ruling on the request for new counsel, and made comments urging the advisability of a guilty plea and cooperation with the Government that were coercive. Davila's attorney never objected to the magistrate judge's comments, and perhaps not surprisingly, since the magistrate judge was endorsing that attorney's advice to plead guilty. Thereafter, the magistrate judge's comments also went unaddressed and uncorrected by the magistrate judge and the district judge before Davila's guilty plea, before the motion to vacate the guilty plea, and before sentencing. Those comments—whether well-intentioned or not—undermined the voluntariness of the guilty plea and the fairness of the criminal proceedings.

Specifically, in response to Davila's expressed concerns about his counsel's failure to propose a defense apart from pleading guilty, and that his defense counsel "thinks [Davila] ought to plead guilty," the magistrate judge responded that "oftentimes" that is the "best advice" that a lawyer can give his client. J.A. 152. The magistrate judge opined that, in view of the Government's evidence, it might be "a good idea" for a defendant to plead guilty and "not wast[e] the Court's time" and "not caus[e] the Government to have to spend a bunch of money empanelling a jury to try an open and shut case." J.A. 152-53. Davila stated that "all [he] wanted was [his] options" and that his counsel had never

explained that Davila had any choice but to accept the plea agreement proposed by the Government. J.A. 154. Davila said that not one of his communications from defense counsel addressed "a viable defense at all except for pleading guilty." J.A. 155. The magistrate judge responded "[w]ell there may not be a viable defense to these charges." J.A. 155. Additionally, the magistrate judge commented that Mr. Loebl had done his best to assist Davila, "which is far better than many other attorneys would have done on your behalf." J.A. 158. Although framed, at times, as hypothetical statements, the comments were made in direct response to Davila questioning his defense counsel's advice to plead guilty in his case. They created the clear impression, taken as a whole, that the magistrate judge was endorsing that advice.

The magistrate judge further crossed the line when discussing the possibility of the Government filing a motion for downward departure pursuant to United States Sentencing Guidelines Manual § 5K.1.1. He went far beyond explaining its effect, and again urged Davila not only to plead guilty, but to provide potentially incriminating information to the Government. Those comments included strongly worded advice to Davila that the Government "ha[s] all of the marbles" and Davila had to "go to the cross" and "tell . . . everything [he] did in this case regardless of how bad it makes you appear":

> THE COURT: . . . . The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means

> you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. . . . 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. 159-61.

By encouraging Davila to plead guilty and cooperate, the court not only inserted itself into the plea negotiations, violating Rule 11(c)(1), but also abandoned its judicial role as neutral arbiter. The magistrate judge took on the role of partisan or counselor by reinforcing the advice given by Davila's defense counsel, whom Davila was challenging. It is a gross departure from the judicial role for a judge to advocate that a defendant waive his constitutional rights.

The magistrate judge's encouragement to enter a guilty plea was coercive. The magistrate judge put

the credibility and authority of the bench behind defense counsel's advice to plead guilty. At that point, a guilty plea effectively appeared to be Davila's only option to reduce his sentence, in the stated view of the court. *See* J.A. 159-60. It is natural to imagine that Davila already may have felt pressure from his defense counsel to plead guilty and cooperate with the Government. That pressure would only have been heightened by the more influential impression that the magistrate judge agreed with defense counsel. *See United States v. Tateo*, 214 F. Supp. 560, 568 (S.D.N.Y. 1963) ("The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty.").

Not only that, invoking Christian religious imagery about guilt and penitence—"you've got to come to the cross" and "tell it all"—to urge pleading guilty and cooperating with the Government contributed to the coercive nature of the comments. *See Brewer v. Williams*, 430 U.S. 387, 388 (1977) (determining that police officer's "Christian burial speech" constituted interrogation such that defendant was entitled to assistance of counsel); *see also United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (vacating sentence where sentencing judge violated due process by referencing religious beliefs at sentencing; "[o]ur Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office" but "[c]ourts, however, cannot sanction sentencing procedures that create the perception of the bench as

a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it.")[2]

The court abandoned the role of neutral again, and also exerted pressure to plead guilty, by expressing the magistrate judge's opinion that Davila had no chance of succeeding if he chose to represent himself. *See* J.A. 157 (commenting that "[i]t would be an act of sheer lunacy" for Davila to proceed *pro se*). Those comments suggested that Davila essentially had no choice but to keep his current counsel and take the court and counsel's advice to plead guilty, or he would have no chance of a successful outcome. The magistrate judge's comments about Davila's criminal history, such as that Davila is "no babe in the woods" with regard to the criminal justice system, J.A. 157-58; *see also* J.A. 160 ("and believe me, Mr. Davila, someone with your criminal history needs

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[2] In *Bakker*, the Fourth Circuit stated that "[w]hether or not the trial judge has a religion is irrelevant for purposes of sentencing," but "the apprehension that . . . a lengthy prison term [t]here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed" constituted an abuse of discretion requiring the sentence vacated and the case assigned to a different district judge. *Id.* at 740-41; *see also North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150-52 (4th Cir. 1991) (in establishment clause context, holding that judge starting each day with a prayer "inject[s] religion into the judicial process" and "destroy[s] the appearance of neutrality"); *id.* at 1151 ("[t]his principle [of government neutrality toward religion] applies with even greater force to the judicial branch because judges are sworn to be neutral arbiters and must apply the law even-handedly without letting bias or personal feeling enter into the decision") (internal citation omitted).

a three-level reduction for acceptance"), also contributed to the coercion by going beyond merely explaining the effect of criminal history categories, and instead making statements which suggested Davila would be worse off if he proceeded to trial.

Such judicial comments urging a plea and cooperation are inherently coercive, and violate canons, rules, and standards of judicial ethics. In addition, and irrespective of whether the magistrate judge's comments actually influenced Davila to plead guilty here, such judicial exhortations to plead guilty not only fundamentally impair the voluntariness of a plea and an individual defendant's rights to a fair process, but also undermine the integrity of the judiciary and the criminal justice system.

Judicial conduct that encourages a guilty plea has long been understood to undermine the voluntariness of the plea and a defendant's constitutional right to be heard. *See Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957) ("A plea of guilty interposed as the result of coercion is not consistent with due process and therefore a judgment and sentence imposed pursuant to such a plea cannot stand."); *Tateo*, 214 F. Supp. at 565 ("A conviction which rests upon a coerced plea of guilty, no less than one which rests upon a coerced confession, is inconsistent with due process of law."). The "overbearing force" of statements from the court have "a subtle but nonetheless powerful influence upon the defendant" that "can hardly be questioned." *Tateo*, 214 F. Supp. at 566; *see also United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993) ("Indeed, the pressure inherent in judicial participation would seem to be reason

enough to reverse a conviction when the defendant accedes to the plea suggested by the district court.")

Consistent with this, judicial standards of conduct recognize that a judge "should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." ABA Standards for Criminal Justice: Pleas of Guilty § 14–3.3(c) (3d ed. 1999) ("Criminal Justice Standards"); *see also* ABA Model Rules of Judicial Conduct R. 2.6(B) (2011) ("ABA Model Rules") ("[a] judge . . . shall not act in a manner that coerces any party into settlement"); Code of Conduct for United States Judges, [3] commentary to Canon 3A(4) (2011) ("Canons") ("[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the court.").[4]

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[3] Georgia has adopted its own code of judicial conduct similar to the Code of Judicial Conduct for United States Judges. *See* Georgia Code of Judicial Conduct (2004); *see id.* at commentary to Canon 3B(8) ("Judges should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by courts.").

[4] By prohibiting judges from participating in plea negotiations, Rule 11(c)(1) aims to eliminate the opportunity for a judge to overstep its bounds or be a partisan participant in negotiations. *See United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006) (quoting *United States v. Cannady*, 283 F.3d 641, 644-45 (4th Cir. 2002) (internal quotations omitted) (the prohibition of judicial participation in plea negotiations: (i) "diminishes the possibility of judicial coercion of a guilty plea" (ii) "protects against unfairness and partiality in the judicial

In addition, coercive judicial participation in plea negotiations undermines the integrity of, and public confidence in, the judiciary and the fair administration of justice. The goal of judicial ethics, as crystallized in various canons, codes, and rules governing the judiciary, is to promote the integrity of the judicial process including by avoiding the appearance that the members of the judiciary are partisan participants in the process. *See* James J. Alfini, et al., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007); *see also* Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety") and ABA Model R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"); *id.* cmt. [5] ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge"); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (in judicial disqualification

(continued…)

process" and (iii) "eliminates the misleading impression that the judge is an advocate for the agreement rather than a neutral arbiter")); *see also United States v. Bierd*, 217 F.3d 15, 18-19 (1st Cir. 2000) (same); *Miles*, 10 F.3d at 1139; *United States v. Bruce*, 976 F.2d 552, 556 (9th Cir. 1992).

context, "objective standards may also require recusal *whether or not actual bias exists or can be proved*. Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'") (emphasis added) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The fact that the magistrate judge's commentary was provided in an *ex parte* setting, outside of the presence of the Government, could contribute to the impression that the judge was Davila's trusted counselor. *See* ABA Model R. 2.6, cmt. [2] ("The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties. . . ."). Someone in Davila's shoes reasonably could conclude that the facts of the matter were decided and Davila's best option, in the court's estimation, was to plead guilty.

B. Outside Of, And Regardless Of, Rule 11, State And Federal Courts Proscribe Judicial Exhortations To Plead Guilty Or Cooperate.

Wholly apart from the requirements of Rule 11, federal and state courts have recognized that besides violating professional norms for judges, judicial exhortations to plead guilty and cooperate also violate court-established standards that federal and state courts apply to vacate guilty pleas where the record shows coercive judicial participation that implicates concerns about due process of law and a fair and neutral judiciary. Federal and state courts may exercise supervisory authority to proscribe such judicial conduct, regardless of Rule 11. Indeed, if

there had been no proposed plea agreement on the table, and no plea discussions ongoing—such that the magistrate judge's comments could not have been part of "these discussions" addressed in Rule 11(c)(1)—the comments still would have been improper.

Even in jurisdictions which have not adopted a rule of procedure analogous to Rule 11 in prohibiting all judicial participation in plea negotiations, it is well recognized that judicial exhortations to plead guilty or cooperate so impair individual rights and the judicial process that they may require that a plea be vacated. *See, e.g., State v. Bouie*, 817 So. 2d 48, 56 (La. 2002); *Standley v. Warden*, 990 P.2d 783, 785 (Nev. 1999); *People v. Sandoval*, 43 Cal. Rptr. 3d 911, 922 (Cal. Ct. App. 2006); *People v. Weaver*, 12 Cal. Rptr. 3d 742, 756 (Cal. Ct. App. 2004) (recognizing the "great risks in the trial court involving itself in the plea negotiation process" and that as "involvement increases in intensity, the risks become greater"); *see also Bruce*, 976 F.2d at 556 ("[J]udicial 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.") (citing *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976)).[5]

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[5] Many of these state court cases cite federal authority from the Rule 11 context in connection with the rationale against judicial participation in plea negotiations. *See, e.g., Weaver*, 12 Cal. Rptr. 3d at 147 (citing *Miles*, 10 F.3d at 1139; *Bruce*, 976 F.2d at 556; and Prohibition of Federal Judge's Participation in Plea Bargaining Negotiations Under Rule 11(e) of Federal Rules of Criminal Procedure, (2000), 161 A.L.R. Fed. 537, 2000 WL 376140) as well as Criminal Justice Standard § 14–3.3(c)).

This includes in situations like this one, where a judge effectively "counsels" a defendant to plead guilty. *See, e.g.*, *Standley*, 990 P.2d at 785 ("[t]he judge thereby adopted the role of counselor to a criminal defendant, foregoing his duty as a neutral arbiter of the criminal prosecution.") (internal quotations omitted);[6] *Weaver*, 12 Cal. Rptr. 3d at 149 ("The judicial change of 'hats' in this case is head spinning. At any given time he seemed to fill the role of judge, jury, defense counsel, prosecutor, psychiatrist, social worker and victims' advocate. While in some objective sense it may be that the judge, a person of long experience, did know what was best for everyone, that is beside the point.").

These courts recognize that a "lengthy exposition" by a judge espousing the virtues of a plea or cooperation, or the risks of going to trial, may inappropriately "effectively convince[]" a defendant to accept a plea agreement. *Standley*, 990 P.2d at 785. These decisions recognize that—outside of Rule 11(c)(1)'s absolute prohibition against judicial participation in plea negotiations—there is a line that judges may not cross between acceptable judicial involvement and unacceptable coercion. *See Bouie*, 817 So. 2d at 56 (recognizing that "a fine line may at times separate a trial judge's attempts to insure that the defendant understands that a guilty plea might

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[6] The Nevada Supreme Court later adopted a bright-line prohibition against judicial participation akin to Rule 11, finding that "the inherent and unacceptable risks involved in judicial participation in the plea process" could not be sufficiently mitigated by the approach in *Standley*. *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006).

serve his best interest and the overbearing of a defendant's will to reach a result the court, with the best of intentions, deems appropriate"); *Standley*, 990 P.2d at 785 (recognizing that it is not necessarily improper for a judge to "facilitate the plea negotiations or make an isolated comment about the plea offer").

For example, in *Bouie*, a trial judge's explanations of the possible outcomes the defendant faced at trial, that the judge had discretion to impose harsher penalties in the event of a conviction than for a plea bargain, and of the legal principles underlying a verdict "were not inherently coercive because the advice concerned information that an accused ought to possess to enter a knowing and intelligent guilty plea." *Bouie*, 817 So. 2d at 55. However, after properly assuring that the defendant was aware of the terms of the plea, when the judge continued, plying the defendant "with his personal view that the result of a jury trial was all but a foregone conclusion, he went beyond simply facilitating the entry of a knowing and voluntary guilty plea." *Id.* Just as in *Standley*, the judge's repeated references in *Bouie* to his time as a prosecutor—"I don't think I've ever seen more than one or two people who went to trial found not guilty"—crossed the line from neutral arbiter to "advocate." 817 So. 2d at 56; *see also id.* at 50. Similarly here, the record of the *ex parte* hearing shows the magistrate judge crossing the line from neutral arbiter to partisan or judicial

"advocate," urging a particular course of conduct to the defendant.[7]

At the heart of these decisions, even in jurisdictions that allow some judicial involvement in plea negotiations, is the recognition that judicial participation in plea negotiations carries with it great risk of exerting undue influence, and coercive judicial involvement is forbidden and requires vacating the plea. A judge may ensure that a plea is voluntarily and knowingly made, but it is something else entirely when he "brings to bear the full force and majesty of [the judicial] office" to effect an outcome he prefers. *United States v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966); *see also Standley*, 990 P.2d at 785 (finding improper judicial participation where "[i]n commenting on the offer, the judge evinced an unmistakable desire that appellant accept the offer" and that only where coercion is present "will we consider affording a defendant an opportunity to withdraw his or her plea").

[7] *See also* Resp. Br. at 21-24 & n.1 (discussing cases and commentary before, or outside of, Rule 11(c)(1)'s bright-line prohibition against judicial participation).

II. APPELLATE COURTS CAN VACATE A GUILTY PLEA WITHOUT REMANDING FOR ADDITIONAL INQUIRY WHEN THE RECORD, AS HERE, SHOWS INHERENTLY PREJUDICIAL JUDICIAL CONDUCT.

A. The Eleventh Circuit May Exercise Supervisory Authority Over The Administration of Justice To Vacate The Plea, And A Federal Appellate Court's Supervisory Authority Is At Its Zenith When Exercised Over The Conduct Of Lower Court Judges.

This Court may affirm as a proper exercise of the Eleventh Circuit's "supervisory authority over the administration of criminal justice in the federal courts." *See Offutt v. United States*, 348 U.S. 11, 17 (1954) (quoting *McNabb v. United States*, 318 U.S. 332 (1943) (superseded by statute)); *Thomas v. Arn*, 474 U.S. 140, 148 (1985).[8] A federal court may formulate and apply procedural rules not specifically required by the Constitution or Congress, so long as doing so does not conflict with constitutional or statutory provisions. *Bank of Nova Scotia v. United*

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[8] One underpinning for the Eleventh Circuit's decision is the proper exercise of its supervisory authority. *See Davila*, 664 F.3d at 1358 (citing *United States v. Diaz*, 138 F.3d 1359, 1362 (11th Cir. 1998) (recognizing that "[a] violation of Fed. R. Crim. P. 11[] is plain error and, pursuant to its supervisory power over the district courts, the court of appeals may raise such a violation *sua sponte* and order a resentencing of a defendant who pleads not guilty and demonstrates no actual prejudice in his trial or sentence.")) (citing *United States v. Adams*, 634 F.3d 830, 831-32 (5th Cir. 1981)). The Government addresses supervisory authority in recognition that it may be a basis for affirming the Eleventh Circuit's decision. *See* Pet. Br. at 16-20.

States, 487 U.S. 250, 254 (1988) (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983)); *Thomas*, 474 U.S. at 148). Here, the Eleventh Circuit enforced a well recognized prohibition against a trial judge urging a guilty plea or cooperation that is consistent, and does not conflict, with relevant constitutional and statutory provisions.

Indeed, "[t]his [supervisory] power rests on the firmest ground when used to establish rules of judicial procedure." *Thomas*, 474 U.S. at 146-47 n.5 (citing Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1465 (1984)); *id.* at 146-47 ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. . . . Indeed, this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'") (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.10 (1980); quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)) (internal citations omitted). Moreover, there is no separation of powers concern when the supervisory authority is exercised over the judiciary, rather than another branch of Government. The Constitution permits "[t]he judicial power of the United States," Art. III, § 1, to be vested in federal courts and exercised by federal judges by virtue of their Article III commissions.

A federal appellate court's ability to exercise its supervisory authority is at its zenith when

proscribing inherently prejudicial conduct by a federal district or magistrate judge that interferes with the fair administration of justice—and this includes conduct such as the magistrate judge's comments evidenced by the record here urging a guilty plea and cooperation. *See Offutt*, 348 U.S. at 17 (reversing contempt finding based on supervisory authority where judge "instead of representing the impersonal authority of law" "permitted himself to become personally embroiled" in a way that "precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury"); *id.* at 18 ("To sanction such a course of procedure would give it encouragement"); *see also Marshall v. United States*, 360 U.S. 310, 310-11 (1959) (granting a new trial based on the exercise of supervisory powers "to formulate and apply proper standards for enforcement of the criminal law in the federal courts" despite broad discretion afforded to the trial court to assess prejudice from jurors' exposure to news articles).

Courts exercise supervisory authority not just to protect individual rights, but also to protect judicial integrity and to promote public confidence in the just administration of criminal justice. In *Ballard v. United States*, 329 U.S. 187 (1946)—a case decided well before *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)—this Court "conclude[d] that the purposeful and systematic exclusion of women from the [jury] panel" authorized the Court to "exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which

permeated this proceeding." *Id.* at 193. "[R]eversible error does not depend on a showing of prejudice in an individual case"; where the "evil" lies in the exclusion of a particular class "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 195. So too here. The injury is not limited to undermining the voluntariness of Davila's plea and his right to a fair and impartial process, but also impacts public confidence in the judiciary and the fair administration of justice.

The United States gives any "supervisory authority" argument that may be underpinning the Eleventh Circuit's decision short shrift. *See* Pet. Br. at 16-20. Nothing in this Court's prior decisions, or Federal Rules of Criminal Procedure 11(h) and 52, however, eliminates a federal court's ability to exercise supervisory authority to proscribe federal judicial conduct that is inherently prejudicial like the magistrate judge's exhortations to plead guilty and cooperate illustrated on the record here.

The Government relies on *Bank of Nova Scotia*, 487 U.S. 250. *See* Pet. Br. at 18-19. In that case, the Court addressed whether prosecutorial misconduct in grand jury proceedings warranted dismissal of an indictment absent any showing of prejudice. 487 U.S. at 252. That situation is far different from a judicial officer urging a defendant to plead guilty and cooperate and waive the right to trial and other important rights. Indeed, in *Bank of Nova Scotia*, this Court addressed the distinction between errors that may or may not be prejudicial, on the one hand, and those that are inherently prejudicial, on the

other hand. The Court recognized that the rule applied in that case would not apply where "[t]he nature of the violation allow[s] a presumption that the defendant was prejudiced, and any inquiry into harmless error would require unguided speculation." *Id.* at 257. While a federal court may not invoke supervisory power to circumvent the harmless error inquiry in Federal Rule of Criminal Procedure 52 in that context, *id.* at 254-55, the holding in *Bank of Nova Scotia* would not apply to "fundamental" errors or where "structural protections" were "so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 256-57. Here a presumption of prejudice is appropriate given the nature of the magistrate judge's coercive comments and his departure from the neutral judicial role.

As the Respondent's brief illustrates, in enacting Rule 11(h) Congress did not mean to preclude the exercise of supervisory authority in a case like this one where the Rule 11 violation is accompanied by inherently prejudicial judicial conduct urging a plea and cooperation. *See* Resp. Br. at 13, 24-30. In addition, the record here illustrates judicial conduct that is not just a technical judicial error or a Rule 11(c)(1) error. Even in the Rule 11 context, as Respondent argues, Resp. Br. at 50-51, 24-30, this error is different in kind from the technical Rule 11 errors that this Court previously considered in *Dominguez Benitez*, *Vonn*, and even *McCarthy*. *See United States v. Dominguez Benitez*, 542 U.S. 74 (2004) (unobjected-to error in guilty plea colloquy did not warrant vacatur); *United States v. Vonn,* 535 U.S. 55 (2002) (same); *McCarthy v. United States*, 394 U.S. 464 (1969) (vacating guilty plea where

district court accepted guilty plea without personally addressing defendant to ensure that he understood the nature of the charges); *see also United States v. Baker*, 489 F.3d 366, 372 (D.C. Cir. 2007) ("[N]ot all Rule 11 violations are created equal."). The United States, however, urges a result that would paint all Rule 11 violations with the same broad brush and preclude the exercise of supervisory authority to proscribe judicial misconduct far more prejudicial than a Rule 11 violation.

B. No Additional Inquiry Into Actual Prejudice Is Required Or Advisable Where, As Here, The Record Is Clear That Coercive Conduct Occurred And The Magistrate Judge Departed From The Neutral Judicial Role.

When a judicial officer, as in this case, abandons all pretense of neutrality, a further inquiry, after the fact, as to whether a judge's comments actually influenced a defendant to plead guilty belies the serious and damaging nature of the conduct at issue. For that reason, courts within and outside of the Rule 11 context consistently vacate pleas without remanding for additional inquiry into prejudice where the record is clear that coercive judicial conduct preceded a guilty plea and was not corrected. *See, e.g., Bruce*, 976 F.2d at 561 (vacating plea without remanding for inquiry into prejudice in Rule 11 context in light of judicial involvement in plea negotiations); *Miles*, 10 F.3d at 1142 (same); *Tateo*, 214 F. Supp. at 568 (vacating plea without remanding for inquiry into prejudice in 28 U.S.C. § 2255 context in light of coercive judicial conduct); *Euziere*, 249 F.2d at 295 (same); *Weaver*, 12 Cal. Rptr. 3d at 757 (reversing denial of appellant's

motion to withdraw his plea without remanding for inquiry into prejudice outside of the Rule 11 context); *Bouie*, 817 So. 2d at 56 (concluding, without remanding for inquiry into prejudice and outside of the Rule 11 context, "that the defendant's guilty plea under these circumstances was not knowingly and voluntarily entered, such that the district court abused its discretion in not granting the defendant's motion to withdraw the guilty plea."). No subsequent inquiry into actual prejudice is required.[9]

This is true whether or not such conduct also happens to constitute a violation of Rule 11(c)(1).[10]

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[9] Ethics Amici have identified two less recent cases where state courts addressed some level of judicial encouragement to plead guilty and did not vacate the plea. Even in those cases, which are not dispositive here, the appellate courts ruled without remanding for further inquiry. *See People v. Davis*, 54 A.D.2d 913 (N.Y. App. Div. 1976) (determining without remanding that, based on the record there, vacatur was not warranted where defendant pled guilty on the eve of trial when faced with overwhelming evidence after conclusion of a suppression hearing, and not immediately after the judge urged him to do so); *People v. Earegood*, 173 N.W.2d 205 (Mich. 1970) (finding vacatur was not warranted, but remanding for re-sentencing, where judge warned defendant of the consequences of delay in entering a guilty plea and its affect on sentencing, and defendant later entered guilty plea).

[10] Ethics Amici submit that the Eleventh Circuit had supervisory authority to vacate on this record without a further inquiry into actual prejudice regardless of whether the conduct also violated Rule 11(c)(1). This position, however, also accords with Rule 11 concepts. Couched in the language of Rule 11, if plain error is the standard, the Court may hold, like the Eleventh Circuit, that the plain error standard is necessarily met because coercive judicial participation such as the record shows here "seriously affect[s] the fairness, integrity

As Respondent argues, an inquiry into the defendant's reasons for pleading guilty—and whether the magistrate judge's conduct was determinative and actually coerced Davila to plead guilty—would be unduly burdensome, intrusive and speculative. *See* Resp. Br. at 30-50.

More fundamentally, where a judge urges a guilty plea or cooperation, as occurred here, the plea should be vacated because the comments are damaging and inherently prejudicial to the individual defendant as well as to the judiciary and public confidence in the fair administration of justice. No additional inquiry is necessary, and no showing of actual coercion or prejudice is required, where the record is sufficient, as here, to show such improper judicial exhortation to plead guilty and cooperate occurred.

Remanding for additional inquiry into prejudice is unnecessary. Reversing the Eleventh Circuit sends the wrong message to the judiciary and to the public, as well as fails to pay due regard to the trial court's obligation to ensure, not undermine, the

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(continued…)

or public reputation of judicial proceedings," *Vonn*, 535 U.S. at 62-63 (internal citations and quotations omitted), without a showing of individualized prejudice. *See Davila*, 664 F.3d 1355. In the alternative, the Court could hold that the plain error standard does not apply, *see Baker*, 489 F.3d at 372-73, to such a fundamental and non-technical breach of Rule 11(c). *See* Resp. Br. at 31-34 (addressing errors that qualify for correction without a specific showing of prejudice); *id.* at 21-24, 50, 51-54 (distinguishing judicial exhortation errors from technical violations of Rule 11 and arguing that the plain error standard should not apply).

voluntariness of a guilty plea and the fairness of criminal proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: List Of *Amici Curiae*

Bruce Green is the Louis Stein Professor and Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law.

The Louis Stein Center for Law and Ethics at Fordham University School of Law examines the critical role of lawyers in building a more just society, and explores how ethical values inform and improve the legal profession. The Stein Center supports a wide range of conferences, publications and independent research.

James J. Alfini is Dean Emeritus and Professor of Law at South Texas College of Law.

Mark I. Harrison is a Partner at Osborn Maledon, P.A., Phoenix, Arizona and Former Chair, ABA Commission to Revise the Code of Judicial Conduct (2004-2007).

Renee Newman Knake is an Associate Professor of Law at Michigan State University College of Law, and co-director of the Kelley Institute of Ethics and the Legal Profession.

Lisa G. Lerman is a Professor of Law and Coordinator of Clinical Programs at The Catholic University of America.

Peter Margulies is a Professor of Law at Roger Williams University School of Law.

Daniel S. Medwed is a Professor of Law at Northeastern University School of Law.

Judith L. Maute is the William J. Alley Professor of Law at University of Oklahoma College of Law.

New York Law School Center for Professional Values and Practice focuses on the changing

conditions of law practice in the U.S. and abroad. Through classwork, case studies, Center events, and independent projects, students learn about the conditions of practice in a variety of settings. The goal of the Center is to provide students with a sophisticated understanding about the conditions of modern law practice and to equip students for successful careers in the next generation of practice organizations.

University of Miami School of Law's Center for Ethics & Public Service, founded in 1996, is an interdisciplinary program devoted to the values of ethical judgment, professional responsibility, and public service in law and society.

Richard W. Painter is a Professor of Law at the University of Minnesota Law School.

John P. Sahl is a Professor of Law and Faculty Director of the Miller-Becker Center for Professional Responsibility.

The Joseph G. Miller and William C. Becker Center for Professional Responsibility at University of Akron Law School was founded in 1993 as the Joseph G. Miller Institute for Professional Responsibility and rededicated in 2003 as the Joseph G. Miller and William C. Becker Center for Professional Responsibility. The Center is involved in lectures, presentations, conferences, and symposia that focus on lawyer and judicial ethics and professional responsibility.

Ellen Yaroshefsky is a Clinical Professor of Law and Director of the Jacob Burns Ethics Center in the Practice of Law at Cardozo School of Law.

The Jacob Burns Center for Ethics in the Practice of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Center helps prepare students to face with integrity the difficult and important questions that arise in all areas of legal practice.