No. _____

In the

Supreme Court of the United States

JAMES DAVID O'BRIEN,
Petitioner,

VS.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err in deciding that a proponent of testimony pursuant to a proffer agreement, entered into with a federal governmental agency after their issuance of a subpoena, is not later protected under that proffer agreement from providing testimony pursuant to a subsequently issued identical subpoena from the same federal agency, in the same proceeding, and seeking the same testimony as that offered pursuant to the proffer agreement?

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PETITION FOR WRIT OF CERTIORARI

James David O'Brien ("Petitioner"), by and through his counsel, John M. Hanamirian, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("the Second Circuit").

OPINIONS BELOW

The United States District Court for the Southern District of New York ("the District Court") order and opinion granting Respondent's Motion Requiring Compliance with Subpoena is reported at No. 19 MISC. 468 (KPF), 2019 WL 7207485, (S.D.N.Y. Dec. 27, 2019), and attached as Petitioner's Appendix A ("Pet. App."). Petitioner filed a timely Notice of Appeal with the Second Circuit on January 6, 2020. The Second Circuit issued a Summary Order affirming the District Court's Order on January 11, 2021. Pet. App. B. The Second Circuit issued a Mandate on March 24, 2021. The Second Circuit's Opinion is reported at United States S.E.C. v. O'Brien, 842 F. App'x 652 (2d Cir. 2021).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254, 1257. This Petition is timely filed pursuant to Supreme Court Rule 13.1 and Supreme Court Orders dated March 19, 2020, April 15, 2020, and November 13, 2020, each addressing, in part, modifications to the Supreme Court of the United States Office of the Clerk Paper Filing Requirements and Filing Deadlines.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION AND STATEMENT OF THE CASE

I. First Impression.

The District Court identified that this case likely presents an issue of first impression as follows:

> "THE COURT: . . . Mr. Hanamirian said to me in 31 years this is the first time he has seen it. I have not seen it but I have just not but that doesn't mean that it doesn't happen regularly.

> I would be interested. So, I don't think I need to decide today, the world will not end if I don't decide today, and I want to give you a correct answer rather than a timely answer but, Mr. Gizzi, how much time would it take for you to sort of ask around, see what information is out there, and to get to me information about instances in which the Commission has done exactly what is discussed here?

Pet. Appendix (Pet. App.F at 31).

II. Something Fishy.

The United States Court of Appeals for the Second Circuit stated that the facts of this case are not only unique, but that:

> "There is something uh um, I don't know if fishy is the right word or troubling with having him [Petitioner] come in under this agreement which makes certain promises, he spills his heart out and then you serve him bang with another subpoena."

III. Background.

There are no reported decisions on point in any Circuit addressing the following facts underlying this appeal:

In May 2018, the Respondent and the United States Attorneys' Office for the District of New Jersey ("United

States Attorneys' Office"), along with the Federal Bureau of Investigation, each approached the Petitioner within days of one another, each asserting they were investigating Petitioner's trading relative to American River Bankshares, Inc. The Respondent issued a subpoena to Petitioner compelling Petitioner's testimony and documents and providing a detailed listing of items sought ("the First Subpoena") (Pet. App. C).

After discussions with Petitioner's counsel, the Respondent and the United States Attorneys' Office each presented a form of proffer agreement to Petitioner ("the Proffer Agreements"). (Pet. App. D). The Respondent and the United States Attorneys' Office each executed their own form of a proffer agreement with Petitioner and conducted a joint proffer session with Petitioner on August 21, 2018 (the "Proffer Session").

In May 2019, the Respondent issued a second subpoena to Petitioner that, except for the date, was identical to the First Subpoena ("the Second Subpoena"). (Pet. App. E). The Respondent did not seek additional or different information in the Second Subpoena. Petitioner's counsel asked the Respondent if Petitioner's testimony pursuant to the Second Subpoena would be covered by the prior Proffer Agreement and the Respondent stated that the testimony would not be so covered. In response, Petitioner's counsel advised the Respondent that Petitioner would not appear for testimony, arguing that the Respondent had acted in bad faith and breached the Proffer Agreement. Specifically, Petitioner argued that the Respondent acted in bad faith and breached the Proffer Agreement by engaging in the Proffer Session resulting from the First Subpoena, but then refusing to allow Petitioner to testify in in response to the Second Subpoena pursuant to the Proffer Agreement. (Pet. App. F).

On October 18, 2019, the Commission filed an (1) Application for an Order to Show Cause why Petitioner should not comply with the Second Subpoena; and (2) an Application to Enforce the Subpoena along with a supporting Memorandum and Declaration. (Pet. App. A at 3) On that same day, the District Court issued an Order directing Petitioner to show cause why he should not be required to appear for testimony before the Commission and schedule a hearing before the District Court on the question. (Pet. App. A at 3) On November 6, 2019, Petitioner filed a Brief in Opposition to the Respondent's Application (Pet. App. A at 3), along with a supporting Declaration, and on November 18, 2019, the Respondent filed a Reply. (Pet. App. A at 3).

On November 22, 2019, the Parties appeared in person before Judge Katherine Polk Failla at the District Court for a hearing on whether the Second Subpoena should be enforced. (Pet. App. F). After argument from both sides, the District Court requested additional briefing from the Respondent on the finite issue of providing the District Court with the previous instances within the entire Securities and Exchange Commission agency where identical conduct took place to support the Respondent's assertion that their complained of conduct was consistent with a policy within the Securities and Exchange Commission, as follows:

> "I think I would like to have from the Commission, if it would be so kind, some additional information about instances in which any office has done what has happened here. Mr. Hanamirian said to me in 31 years this is the first time he has seen it. I have not seen it but I have just not but that doesn't mean that it doesn't happen regularly. I would be interested. So, I don't think I need to

> decide today, the world will not end if I don't decide today, and I want to give you a correct answer rather than a timely answer but, Mr. Gizzi, how much time would it take for you to sort of ask around, see what information is out there, and to get to me information about instances in which the Commission has done exactly what is discussed here?

Pet. App. F at 31.

On December 27, 2019, the District Court issued an Order enforcing the Second Subpoena concluding that: (1) a breach of contract analysis was appropriate for the claims presented; (2) the Respondent's complained-of behavior was not unique within the Respondent's agency; and (3) that, even if Respondent's conduct was a bad faith breach of contract, as a remedy, Petitioner is free to assert the Fifth Amendment right against self-incrimination during testimony or in response to the Second Subpoena. (Pet. App. A).

On January 6, 2020, Petitioner filed a Notice of Appeal in the Second Circuit. On June 15, 2020, Petitioner filed a "Brief of the Appellant". On September 14, 2020, the Respondent filed a "Brief of the Appellee. On October 26, 2020, Petitioner filed a Reply Brief. Virtual oral argument took place on January 7, 2021, at which time counsel for Petitioner and counsel for the Respondent appeared before the Honorable Guido Calabresi, the Honorable Reena Raggi and the Honorable Denny Chin. (Pet. App. B).

On January 11, 2021, after a *de novo* review, the Second Circuit issued a Summary Order affirming the

District Court's December 27, 2019 Order (Pet. App. B)., not based upon Petitioner's ability to rely upon an assertion of the Fifth Amendment or any other reason set forth by the District Court. Rather, the Second Circuit concluding (1) that the Proffer Agreement had an integration clause identifying that the Proffer Agreement was the only agreement between the Petitioner and the Respondent and that the Proffer Agreement therefore did not apply to protect Petitioner in any subsequent proceeding or inquiry; (2) that the Petitioner only held an implicit understanding that he would not be required to testify pursuant to any subsequent subpoena and; (3) that even assuming Respondent breached the Proffer Agreement through bad faith conduct, there was no basis upon which to provide a remedy that would quash the Second Subpoena. (Pet. App. B).

The District Court and Second Circuit's collective reasoning and conclusions allow any federal agency to issue a subpoena, negotiate a proffer agreement wherein the proponent compromises their Fifth Amendment rights, intake testimony and then, in order to obviate the proffer agreement, the federal agency may simply issue another subpoena to the proponent for the same testimony in the same proceeding. The next subpoena could be issued the next day and that behavior would not be a breach of a proffer agreement's terms providing immunity because there is an integration clause in the proffer agreement? That cannot be the correct result, and it is not. Every proffer agreement, every prosecutor, every defense attorney, every federal agency and every individual is impacted by the result in this case.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Issue of First Impression

The District Court identified that this case likely presented an issue of first impression. There are no other reported cases in any Circuit addressing the issue presented. The District Court stated:

> "THE COURT: . . . Mr. Hanamirian said to me in 31 years this is the first time he has seen it. I have not seen it but I have just not but that doesn't mean that it doesn't happen regularly. I would be interested. So, I don't think I need to decide today, the world will not end if I don't decide today, and I want to give you a correct answer rather than a timely answer but, Mr. Gizzi, how much time would it take for you to sort of ask around, see what information is out there, and to get to me information about instances in which the Commission has done exactly what is discussed here?

Pet. App. F at 31.

Absent any precedent, the District Court determined to analyze the claims presented in the context of the principles of contract law, as follows:

> In interpreting proffer agreements such as the one entered into between the

> Commission and O'Brien, the Court relies on principles of contract law. See United States v. Liranzo, 944 F.2d 73, 77 (2d Cir. 1991). "Where the language of a contract is unambiguous, the parties' intent is discerned from the four corners of the contract." Id. (citing Nicholas Labs. Ltd. v. Almay, Inc., 900 F.2d 19, 21 (2d Cir. 1990) (per curiam)); see generally United States v. Barrow, 400 F.3d 109, 117 (2d Cir. 2005).

Pet. App. A at 4 and 5.

In the foregoing analysis, the District Court proceeded to discern the intent of the parties, construing the language of the Proffer Agreement in the negative, identifying what the Proffer Agreement did not protect and relied upon that form of contract analysis to conclude that the Proffer Agreement terms provided that "any statements made by [OBrien] during the Meeting" may be used "to obtain other evidence, which may be used against O'Brien or others". A four corners of the contract analysis, however, should initially proceed to identify what the Parties overtly state before embarking to determine intent based upon what may not have been stated.

The Proffer Agreement speaks first to the affirmative of what is protected under its terms, as follows:

> 3) The Commission's staff will not use any statements provided by you during the meeting, except for the following purposes:

> (a) To obtain other evidence, which may be used against you and others;
>
> (b) In any action or proceeding brought or instituted by the Commission against you, to rebut your testimony, evidence offered, or arguments or assertions made by you or on your behalf (including in response to questions raised by a judge or jury);
>
> (c) If you are a witness in any other action or proceeding brought or instituted by the Commission, to rebut your testimony; and
>
> (d) In any referral to a criminal law enforcement agency or entity as evidence of false statements, perjury, or obstruction of justice, or as the basis for a criminal sentence adjustment for obstructing or impeding the administration of justice.

Pet. App. D at 1 and 2.

The Proffer Agreement states affirmatively that the Respondent "will not use any statements provided by you during the meeting". (Pet. App. D at 1). That string of words is the crux of the Proffer Agreement. The District Court, however, only identified when the proponent's statements might be used against him, ignoring that the purpose of the Proffer Agreement was to provide the Petitioner with immunity in exchange for testimony. (Pet. App. A).

The question presented to the District Court was whether the Respondent could compel Petitioner to testify pursuant to the Second Subpoena given the existence of the Proffer Agreement. In interpreting a contract, a reviewer must take into account the meaning of the words and their placement within the contract structure. In a string of words, that analysis begins with the affirmative words and then proceeds to what may be exceptions. The District Court, moving immediately to interpret the exceptions, dissipated the meaning of the other words in the contract and compromised the analysis of its four corners.

The witness, the proponent of testimony in a proffer agreement contractual dynamic, is providing testimony that is otherwise protected by the Fifth Amendment. The contract provides that the witness must provide truthful, unfettered testimony. The witness expects that the proffer agreement will then be honored as the witness foregoes a Constitutional right in the process. The only consideration for the contract in the eyes of the proponent is the proponent's own testimony. The proponent brings nothing else to the process that would have the proffer agreement make sense to the government. The government, in an effort to obtain the proponent's own testimony, offers use immunity; "Queen for a Day" as it is known in the vernacular. The government then has the benefit of hearing that testimony and obtaining the documents associated with that testimony. The deal then is that the government will not use that testimony against the witness, unless the witness has lied or otherwise breached the terms of the contract. That is the benefit of the bargain.

The District Court construction of the meaning of a proffer agreement to essentially state that use immunity means that you might be asked again by the same authority to provide the same testimony and that your sole and adequate remedy at that time is not the four corners of your

contract, but rather, to "assert your Fifth Amendment rights" is a conclusion that would assure that no witness would ever enter in such a contract. A person would not offer Constitutionally protected information merely to assist the government in their own prosecution of that person. There is no reason to do so. Rather, the simplest response by a witness to the issuance of a subpoena for testimony at the outset would be to assert the Fifth Amendment and avoid the entire process. No witness would provide potentially self-incriminating testimony aware that they might be compelled again to provide that same testimony without the use immunity they just traded for that testimony. The District Court's conclusion leaves the Fifth Amendment with no meaning within a proffer agreement and a proffer agreement with no meaning at all. There has to be a quid pro quo for the proponent, and it has to have meaning and any analysis of the four corners of the Proffer Agreement could not reasonably conclude that the proponent merely "start over" and assert the Fifth Amendment.

The Second Circuit, in a *de novo* review of the District Court, concluded that there was a contract formed with the Proffer Agreement, but that an integration clause, essentially a "throw-away" provision, was conclusive of the parties' obligations and intent. That analysis too ignores entirely the immunity provided in the Proffer Agreement. The Second Circuit's reasoning focused on the contract terms to support their result, but glossed over the express contract terms of the Proffer Agreement granting the proponent immunity in exchange for testimony, obviating an individual's bargained-for Constitutional rights in favor of reliance upon an integration clause?

The Proffer Agreement is an exchange of immunity from prosecution in exchange for testimony. A contract. An integration clause stating that there are no other agreements

between the parties is merely an acknowledgement that the Proffer Agreement contains the whole of the parties' agreement. An integration clause merely exists to reflect that there were no other agreements; it is not the substance of the Proffer Agreement. The existence of an integration clause does not mean that the bargained-for immunity dissipates after the Proffer Session. To the contrary, immunity is a present and future concept protecting against the present and future consequences of past behaviors and a proffer agreement term identifying the existence of immunity is just that; a term of the contract. The Respondent did not grant the immunity to the Petitioner. The Proffer Agreement merely acknowledges the Fifth Amendment right of the Petitioner and it is identified to reflect the consideration for the contract as offered by the Petitioner. The Second Circuit's reliance upon the integration clause is further mitigated by the fact that even the Respondent did not raise an integration clause argument until appearing in the Second Circuit. Instead, in all prior proceedings, the Respondent set forth multiple other and varying purported bases for the issuance of the Second Subpoena, none of which was that the Respondent relied upon an integration clause in the issuance of the Second Subpoena. For example, following the Proffer Session, the Respondent stated (1) that they continued their investigation into American River Bankshares trading, including requesting further documentation from third-parties, but provided no proof of any sources of information other than those provided by the Petitioner pursuant to the Proffer Agreement; (2) there was a need to follow-up Petitioner's testimony; (3) there was a need to explore additional areas of testimony based on Petitioner's testimony; and (4) that the Second Subpoena was issued simply "because we can". The Respondent, of course, could not and did not then rely upon the integration clause in the Proffer Agreement in issuing the Second Subpoena or they would have said as much in the earlier proceedings, well in advance

of an argument before the Second Circuit. The likely event is that the Respondent "saw the test answers and then wanted to take the test again" and began to scramble to create a backstory in support of their conduct. It does not work that way and the courts are not an appropriate avenue of relief to essentially blue pencil agreements where the government feels they may have made a bad deal.

II. Bad Faith and Immunity – District Court.

Throughout all areas of law, to be in "bad faith" necessarily implies that one is not in good faith. 129 Harvard Law Review at 890, Footnote 10.

The District Court performed its analysis of bad faith in the context of the Respondent's conduct in the issuance of the Second Subpoena based upon Pillsbury v. Conboy, 459 U.S. 248 (1983) (Pet. App. A at 6). and glossed over the requisite bad faith conduct breach of contract analysis. The Pillsbury case involved a witness' civil deposition testimony that tracked the witness' prior immunized testimony. Although both issue and factually distinguishable, the District Court concluded that Pillsbury "makes clear that while the Commission can compel O'Brien [Petitioner] to testify, it cannot compel him to answer any specific questions" and that because the Proffer Agreement does not apply to previously discussed subject matter, Petitioner is free to assert his Fifth Amendment right in response. (Pet. App. A at 6). That conclusion ignores that the Proffer Agreement is a contract and in place for a reason; that is also not what the United States Supreme Court said in Pillsbury. The government's argument in Pillsbury was that the proponent of the immunized testimony should be compelled to testify in a subsequent civil proceeding with the same or identical questions; the government there seeking to enforce the use immunity arguing that the proponent should be compelled to

testify as opposed to asserting the Fifth Amendment. This Court there stated:

> But private civil actions can only supplement, not supplant, the primary responsibility of government. Petitioners' proposed construction of 6002 sweeps further than Congress intended and could hinder governmental enforcement of its criminal laws by turning use immunity into a form of transactional immunity for subjects examined in the immunized proceeding. It also puts the deponent in some danger of criminal prosecution unless he receives an assurance of immunity or exclusion that the courts cannot properly give. Silence, on the other hand, preserves the deponent's rights and the Government's interests, as well as the judicial resources that otherwise would be required to make the many difficult judgments that petitioners' interpretation of 6002 would require.
>
> We hold that a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of 6002, and therefore [459 U.S. 248, 264] may not be compelled over a valid assertion of his Fifth Amendment privilege. Id. at 459.

This case is not that case. Petitioner entered into a contract for use immunity. The contract dialogue was generated by the issuance of the First Subpoena. The contract, the Proffer Agreement, was then entered into by the parties and each proceeded according to its terms. Thereafter, the Respondent issued an identical subpoena seeking to have Petitioner testify under oath without the benefit of the use immunity in the Proffer Agreement. This is not a subsequent civil action; this is the same case, same parties, same subpoena and one party does not want to abide the contract. The analysis for breach of the Proffer Agreement is whether the act of issuing the Second Subpoena compelling Petitioner to testify in the same proceeding in the same case before the same governmental agency, is a bad faith breach of the Proffer Agreement. If the answer is that Petitioner should merely assert his Fifth Amendment right in response to the Second Subpoena, he would have done so in response to the First Subpoena. It is not as simple as described. There has to be an independent reason for entering into a proffer agreement for, as Justice Marshall stated in Pillsbury, the Fifth Amendment and use immunity are equal in the eyes of the law:

> The admission of such answers at a subsequent criminal prosecution would represent a substantial departure from the fundamental premise of this Court's decision in Kastigar. In upholding the use-immunity statute against an attack based upon the Fifth Amendment privilege against self-incrimination, the Court concluded that use immunity affords a witness protection "as comprehensive as the protection afforded by the privilege." Id. at 449. The Court stated that the statute "prohibits the prosecutorial

> authorities from using the compelled testimony in any respect," Id. at 453 (emphasis in original), and that it "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom," Id. at 460. If the prosecution could introduce answers elicited from a witness by questions that would not have been asked but for the witness' immunized testimony, the protection afforded by use immunity would not be "as comprehensive as the protection afforded by the privilege." Id. at 449.

The District Court further concluded "were the Court to find otherwise, it would be O'Brien [Petitioner] who would unfairly receive all the benefits and none of the burdens of the proffer agreement. O'Brien's [Petitioner's] interpretation of the law would mean that once questioned under a proffer agreement about a particular set of facts, he could never be prosecuted or sued on those facts." (Pet. App. A at 7). But, yes, that was the expectation and that was the consideration for the contract; that is what the Proffer Agreement says and that is what was agreed. That is what the four corners of the contract provide. The "benefits" are use immunity and the "burdens" are that the proponent must be truthful, comprehensive and forego a Constitutional right. Pillsbury does not support a contrary conclusion.

III. Bad Faith and Immunity – Second Circuit

In seeking compliance or enforcement of a subpoena, the government has an option to obtain information from a

proponent (1) by the proponent voluntarily; (2) seeking a court's assistance to compel the proponent's response; or (3) the government may provide a proponent a form of immunity. Immunity is intended to protect against "prosecutorial use of any compelled inculpatory testimony". United States v. Balsys, 524 U.S. 666, 682 (1998) (citing Kastigar v. United States, 406 U.S., at 448–449, 92 S.Ct., at 1658–1659). Statutory immunity, also known as formal immunity, is distinguished from informal immunity. The latter term, often referred to as "pocket immunity," "letter immunity," or "Queen for a Day" immunity, is immunity conferred by agreement with the witness. For example, the government and a cooperating defendant or witness might enter into a plea agreement or a non-prosecution agreement if the defendant or witness agrees to cooperate. Testimony given under informal immunity is not compelled testimony, but is testimony pursuant to an agreement and thus has a voluntary component.

In a proffer agreement, a proponent trades their Fifth Amendment right against self-incrimination for use immunity and the government agrees that they will not prosecute that witness on that testimony. That is the contract.

In this case, the Respondent encouraged cooperation from Petitioner in exchange for certain use immunity protections contained within the form of Proffer Agreement. The Petitioner had an objective belief and understanding that his testimony provided under the terms of the Proffer Agreement was subject to use immunity. That is what the Petitioner understood and harbored as an expectation when he executed the Proffer Agreement with the Respondent and with the United States Attorneys' Office**.** The Second Circuit concluded, however, that immunity under the terms of the Proffer Agreement was only Petitioner's "implicit

understanding". The Second Circuit relied upon In Re Altro, F.3d 372 (2d Cir. 1999) to support their conclusion. (Pet. App. B at 5). In Re Altro involved an individual who entered into a plea agreement and later refused to testify in another individual's grand jury proceedings. The district court there granted the testifying individual immunity under 18 U.S.C. Sections 6002-6003, but the individual continued to refuse to testify pointing to his plea agreement as the basis for his refusal. In evaluating the validity of the individual's refusal to testify, the Second Circuit analyzed the individual's plea agreement and concluded that the (1) integration clause contained therein was dispositive; and (2) that the individual's implicit understanding of whether he would be later called to testify in another proceeding was not an appropriate basis for his refusal to testify in a subsequent grand jury proceeding involving a third-party. The Second Circuit identified the proponent's implicit understanding as parol evidence. Specifically, the Second Circuit found:

> Consistent with these principles, Altro cannot unilaterally modify the plea agreement to preclude the grand jury subpoena on the basis of an uninduced, mistaken belief that he had bargained for an exemption from all testimony. And, since no such unilateral modification of the plea agreement was possible, it was entirely appropriate for the Government to issue the subpoena. Id.

That is not this case. In Re Altro involved a plea agreement and a subsequent grand jury subpoena to testify in another person's inquiry. This case is the same individual, responding to the same subpoena, in the same case, providing the same potentially self-incriminating testimony as

provided pursuant to the Proffer Agreement. The dissent in In Re Altro properly identified that plea and similar agreements compromising constitutionally protected rights should be analyzed as follows:

> Several rules of interpretation, consistent with general contract law principles, are suited to the delicate private and public interests that are implicated in plea agreements. First, courts construe plea agreements strictly against the Government. This is done for a variety of reasons, including the fact that the Government is usually the party that drafts the agreement, and the fact that the Government ordinarily has certain awesome advantages in bargaining power. *See* Carnine, 974 F.2d at 928; Giorgi, 840 F.2d at 1026; United States v. De la Fuente, 8 F.3d 1333, 1338 (9th Cir. 1993); see also Farnsworth on Contracts, § 7.11 at 518 ("common" rule that terms are construed against drafter "often operates against a party that is at a distinct advantage in bargaining . . . [but] may be invoked even if the parties bargained as equals.").
>
> Although no inquiry was ever made on those lines by the district court, I would be astonished if the AUSA handling Altro's prosecution and negotiating a plea agreement had any such hide-the-ball tactic in mind. And that clearly

unacceptable fictional scenario cannot fairly be brushed aside as noncomparable to the present case just because in that instance the AUSA would have been guilty of a misleading omission, which was absent here. Instead I submit that it simply will not do for an AUSA who comes on the scene later, having his own fish to fry (quite properly, to be sure) in a separate prosecution, to advance that same "Gotcha!" argument by pointing to the fact that neither Altro's prosecutor nor Altro's defense counsel (to say nothing of Altro himself, of course) had thought of or had anticipated the possibility of later grand jury compulsion during the course of negotiation of the plea agreement.

In that situation it surely cannot be said that it is unreasonable for a lay person such as Altro to have believed that he had bargained away more time in custody in exchange for his having put behind him *any* prospect of incriminating his compatriots in *any* way. And it just as surely follows that such a reasonable belief must satisfy the showing of "just cause" that under the statute negates any incarceration for civil contempt. This is why the conventional contractual approach that would fit a commercial transaction cannot fairly be employed as the predicate for tacking added time

> onto Altro's criminal sentence with the label of civil contempt. Id.

This case falls within the foregoing analysis. The Proffer Agreement was not a negotiated document. The fact of the Proffer Agreement was negotiated, but not the terms. The government form of document controls and in the context of the proponent's expectations, in a plea or proffer environment, the proponent reasonably believes that once they provide the bargained-for testimony, they will not be placed in a position where their Fifth Amendment rights will later fail to be upheld as validly exchanged in the bargained-for element of the contract. In this case, the Proffer Agreement says expressly and precisely that the proponent will not be prosecuted on the testimony provided pursuant to the Proffer Agreement. Yet, the Second Circuit and District Court's respective contractual analyses lead to that mistaken result.

CONCLUSION

The Second Circuit herein stated:

> "There is something uh um, I don't know if fishy is the right word or troubling with having him [Respondent] come in under this agreement which makes certain promises, he spills his heart out and then you serve him bang with another subpoena."

"Fishy" is defined as conduct "causing doubt or suspicion: likely to be bad, untrue, dishonest, etc." Merriam-Webster's Collegiate Dictionary (11th. ed. 2020). "Fishy" is

the right word; the Respondent's conduct and the back-filled rationale for the conduct causing a breach of the Proffer Agreement are surrounded by fishy behavior. Each Court's conclusion hereunder, however, validates that bad faith conduct and leaves a proponent in any proffer agreement with no immunity at all. Each Court's conclusion allows the United States to preview testimony and then decide whether to honor their agreement. A proffer agreement then has no meaning. There would be, and there will now be, no reason to enter into a proffer agreement with any governmental agency under any circumstances.

Two courts reviewing the same facts and law concluded in very different ways on an issue that affects every existing proffer agreement, every governmental agency, every prosecutor, every defense lawyer, and every individual in every Circuit. This case is the type of case requiring this Court's guidance.

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED this 10th day of June, 2021.

Respectfully submitted,

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