

No. 20-1727

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In the  
**Supreme Court of the United  
States**

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JAMES DAVID O'BRIEN,  
Petitioner,

VS.

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Respondent.

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

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**SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF  
CERTIORARI**

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John M. Hanamirian  
HANAMIRIAN LAW FIRM, P.C.  
40 East Main Street  
Moorestown, New Jersey 08057  
Telephone: (856) 793-9092  
Facsimile: (856)793-9121  
E-mail: [jmh@hanamirian.com](mailto:jmh@hanamirian.com)  
*Counsel for Petitioner*

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## **PETITIONER'S SUPPLEMENTAL BRIEF**

Petitioner submits this Supplemental Brief to the Petition for Writ of Certiorari filed on June 10, 2021 (“the Petition”), to bring to the Court’s attention the recently decided case entitled Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380 (Pa. June 30, 2021), attached as Petitioner’s Appendix A (“Pet. App.”).

### **1. Cosby Opinion**

The issue presented in the Petition is:

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?

The issue presented in the Petition is nearly identical to that identified by the Supreme Court of Pennsylvania (the “Commonwealth Court”) in Cosby:

(2) Where: (a) [District Attorney Castor] agreed that [Cosby] would not be prosecuted in order to force [Cosby’s] testimony at a deposition in [Constand’s] civil action; (b) [the district attorney] issued a formal public statement reflecting that agreement; and (c) [Cosby] reasonably relied upon those oral and written

statements by providing deposition testimony in the civil action, thus forfeiting his constitutional right against self-incrimination, did the Panel err in affirming the trial court's decision to allow not only the prosecution of [Cosby] but the admission of [Cosby's] civil deposition testimony? Commonwealth v. Cosby, 236 A.3d 1045 (Pa. 2020) (per curiam).

The Commonwealth Court acknowledged that the nature of the issue presented in Cosby was one of first impression and proceeded to create a template for their decision based upon breach of contract principles and the Fifth Amendment. The Commonwealth Court relied primarily upon the opinions of this Court to weave together its conclusions. Despite the Cosby opinion stemming from a state court, that state court based its decision on this Court's precedent. The effect of the Commonwealth Court decision is to create an authority that resides in the Third Circuit on an issue that was without precedent in that Circuit or otherwise and that authority conflicts with the Second Circuit decision that is the subject of the Petition. Respectfully, the arbiter of federal law and, of course, the application and interpretation of existing precedent established by this Court is more appropriately, this Court.

2. Excerpts from the Cosby Opinion:

a. Case of First Impression:

"The circumstances before us here are rare, if not entirely unique. While this controversy shares

some features of earlier cases that contemplate the constitutional role of prosecutors, that import contract principles into the criminal law, and that address the binding nature of prosecutorial promises in plea agreements and in other situations—as well as breaches of those promises—there are no precedents directly on point that would make the remedy question an easy one.”

Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380, at \*39 (Pa. June 30, 2021).

b. Breach of Non-Prosecution Agreement—Immunity and the Fifth Amendment

On February 17, 2005, then-District Attorney Castor announced to the public, on behalf of the Commonwealth of Pennsylvania, that he would not prosecute Cosby for any offense related to the 2004 sexual abuse that Constand alleged...Given his “conclu[sion] that a conviction under the circumstances of this case would be unattainable,” D.A. Castor “decline[d] to authorize the filing of criminal charges in connection with this matter.” Id. In light of the non-prosecution decision, Cosby no longer was exposed to criminal liability relating to the Constand allegations and thus could no longer invoke his Fifth Amendment privilege against compulsory self-incrimination in that regard. With no legal mechanism available to avoid testifying in Constand’s civil suit, Cosby sat for depositions and, therein, made a number of statements incriminating himself. D.A. Castor’s

declination decision stood fast throughout his tenure in office. When he moved on, however, his successor decided to revive the investigation and to prosecute Cosby. Ruling upon Cosby's challenge to this belated prosecution, the trial court concluded that the former district attorney's promise did not constitute a binding, enforceable agreement.

Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380, at \*25 (Pa. June 30, 2021).

Further indicative of his intent to forever preclude prosecution of Cosby for the 2004 incident, former D.A. Castor testified that the signed press release was meant to serve as proof for a future civil judge that Cosby would not be prosecuted, thus stripping Cosby of his Fifth Amendment right not to testify. Mr. Castor emphasized that his decision was "absolute that [Cosby] never would be prosecuted." T.C.O. at 52. The former district attorney stressed that his intent was to "absolutely" remove "for all time" the prospect of a prosecution, because, in his view, only a steadfast guarantee would permanently strip Cosby of his right to invoke the Fifth Amendment. N.T., 2/2/2016, at 67. Mr. Castor also expounded upon the purpose of his emails to D.A. Ferman, which he claimed were an attempt to inform her that, while he bound the Commonwealth with regard to the 2004 incident, she was free to prosecute Cosby for any other crimes that she might uncover. Although former D.A. Castor stated that he intended permanently to bar prosecution of Cosby, he also testified that

he sought to confer some form of transactional immunity.

Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380, at \*26–27 (Pa. June 30, 2021).

c. Cosby Ruling:

For the reasons detailed below, we hold that, when a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced.

Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380, at \*27 (Pa. June 30, 2021).

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Considered together, these authorities obligate courts to hold prosecutors to their word, to enforce promises, to ensure that defendants' decisions are made with a full understanding of the circumstances, and to prevent fraudulent inducements of waivers of one or more constitutional rights. Prosecutors can be bound by their assurances or decisions under principles of contract law or by application of the fundamental fairness considerations that inform

and undergird the due process of law. The law is clear that, based upon their unique role in the criminal justice system, prosecutors generally are bound by their assurances, particularly when defendants rely to their detriment upon those guarantees.

Commonwealth v. Cosby, No. 39 MAP 2020, 2021 WL 2674380, at \*29 (Pa. June 30, 2021).

### CONCLUSION

Petitioner respectfully requests that this Court review this Supplemental Brief with Petitioner's originally filed Petition.

DATED this 8<sup>th</sup> day of July 2021.

Respectfully submitted,



John M. Hanamirian  
*Counsel of Record*  
HANAMIRIAN LAW FIRM, P.C.  
40 East Main Street  
Moorestown, New Jersey 08057  
Telephone: (856) 793-9092  
Facsimile: (856)793-9121  
E-mail: [jmh@hanamirian.com](mailto:jmh@hanamirian.com)  
*Counsel for Petitioner*