No. 19-____

IN THE

# Supreme Court of the United States

JAY ANTHONY DOBYNS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI


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September 23, 2019


WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTIONS PRESENTED

(1) Whether the duty of good faith and fair dealing implied in all contracts, including contracts between private parties and the United States, permits a finding of breach of the duty when bad faith conduct by the United States violates the purpose of a contract regardless of whether the bad faith conduct is also "tethered" to a specific contract provision, a question about which panels within the Federal Circuit have disagreed frequently.

(2) Whether agreements for the safety of federal undercover agents are protected by a duty of good faith and fair dealing that is not restricted to the express terms of the contract, a question which has divided courts within the Federal Circuit.

## PARTIES TO THE PROCEEDING

All parties in this proceeding are identified in the caption of the case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jay Anthony Dobyns respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The opinion of the Federal Circuit is reported at 915 F.3d 733 (Fed. Cir. 2019) (Pet. App. A).

The Federal Circuit's April 24, 2019, Order denying Agent Dobyns' petition for *en banc* rehearing, is reproduced at Pet. App. E.

The opinion of the U.S. Court of Federal Claims is reported at 118 Fed. Cl. 289 (2014) (Pet. App. B).

The August 28, 2014 judgment of the Claims Court is reproduced at Pet. App. F.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

This Petition involves the "Big" Tucker Act, 28 U.S.C. § 1491. The relevant provisions are set forth as follows:

> Claims against United States generally; actions involving Tennessee Valley Authority
>
> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

## STATEMENT OF THE CASE

### I. Summary of the Proceedings

This Petition arises from the reversal of the trial opinion of the United States Court of Federal Claims ("Claims Court"), *Dobyns v. United States*, 118 Fed. Cl. 402 (2014) ("*Dobyns I*"), by the United States Court of Appeals for the Federal Circuit in its precedential opinion, *Dobyns v. United States*, 915 F.3d 733 (Fed. Cir. 2019) ("*Dobyns II*" or "Opinion").

Review of the Federal Circuit Opinion by this Court is necessary to return the Federal Circuit's application of the common law implied covenant of good faith and fair dealing under the Tucker Act to harmony with existing Federal Circuit authority and with authority from other federal circuits. The Petition also raises important questions about how to evaluate the United States' duties under contracts concerning the protection and safety of federal employees, especially law enforcement and military personnel whose duties place them at substantial risk of harm.

On October 2, 2008, Petitioner sued under the Tucker Act, 28 U.S.C. § 1491, alleging that the Government violated its settlement agreement with Petitioner by failing to protect him and his family from threats and violence. The Claims Court summarized the settlement agreement (Pet. App. G) between Agent Dobyns and the United States (the "Contract") in its earliest decision (Pet. App. D), 91 Fed. Cl. at 415, and later denied cross-motions for summary judgment (Pet. App. C), concluding that extrinsic evidence was necessary to interpret ambiguous portions of the Contract. *Dobyns v. United States*, 106 Fed. Cl. 748 (2012).

After conducting a three-week trial, the Claims Court found that Petitioner's employer, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), violated the duty of good faith and fair dealing (the "Covenant" or alternatively the "Duty") in the Contract between Petitioner Dobyns and the United States. Pet. App. B. On August 28, 2014, the Claims Court entered judgment in favor of Petitioner for $173,000.00. Pet. App. F. The Claims Court determined that the purpose and spirit of the Contract was to enhance the safety and protection of Petitioner, who had received multiple credible threats of death and violence against himself and his family following Petitioner's successful undercover infiltration of the "Hells Angels" motorcycle gang between 2001 and 2003 ("Operation Black Biscuit"), and following the disclosure of his identity in court as part of that and other prosecutions. Pet. App. B at 83a-89a.

Following an appeal by the United States, the Federal Circuit found that, while "[i]t is true that the alleged grievances that led to the 2007 agreement were based on ATF's security failures relating to Dobyns' safety", a trial court must nevertheless "ground[] the supposed duties in the specific provisions of the contract." Pet. App. A at 11a. The Federal Circuit concluded that any finding of breach of the Covenant must be "tethered" to an express provision of the contract. *Id.*

The Federal Circuit reversed the Claims Court's opinion and vacated the judgment. In so doing, the Federal Circuit's holding, that the entire scope of the duty of good faith and fair dealing is limited to the express terms of the contract, conflicts with precedent

within the Federal Circuit,[1] and in the Tenth,[2] Eighth,[3] and Third Circuits.[4] There is no operational difference between the Federal Circuit's articulation of the duty of good faith in *Dobyns II* and the court's use of the *parol* evidence rule, which restricts the use of extrinsic evidence in interpreting contracts. *See, e.g.*, *TEG–Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006); *accord Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.,* 169 F.3d 747, 752 (Fed. Cir. 1999). The Federal Circuit simply substituted the standards for *parol* evidence for the Duty, reading the duty of good faith and fair dealing out of existence as a practical matter.

## II. Statement of Facts Material to Consideration of the Questions Presented

### A. Petitioner Jay Dobyns, an Undercover ATF Agent Who Infiltrated the Hells Angels, and the United States Entered into a Contract to Address ATF's Past Failures to Respond to Retaliatory Threats of Death and Violence Against Petitioner Dobyns and His Family

Between 2001 and 2003, Petitioner was ATF's lead undercover agent in Operation Black Biscuit, an ATF

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[1] *See, e.g.*, *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014); *Centex Corp.,* 395 F.3d, 1283, 1304 (Fed. Cir. 2005).

[2] *O'Tool v. Genmar Holdings, Inc., 387 F.3d 1188, 1195 (10th Cir. 2004).*

[3] *Cox v. Mortg. Electr. Registration Syst., Inc.,* 685 F.3d 663, 670–71 (8th Cir. 2012); *accord S. Wine and Spirits of Nev. v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 534 (8th Cir. 2011).

[4] *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp*., 228 F.3d 275, 287 (3d Cir. 2000).

investigation that involved infiltration of the notorious "Hells Angels" motorcycle gang. Pet. App. B at 22a-23a.

Operation Black Biscuit resulted in the indictment of 36 people, including over a dozen Hells Angels for drug trafficking and the murder of Cynthia Garcia, who was stabbed and beheaded by her killers. Pet. App. B at 22a-23a; "Stockbroker by day, alleged violent Hells Angel by Night," The Washington Post (July 25, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/25/stockbroker-by-day-alleged-violent-hells-angel-by-night-15-years-after-his-arrest-fugitive-biker-back-for-murder-case; Kerrie Droban, *Running With The Devil: The True Story Of The ATF's Infiltration Of The Hells Angels* (2007), at 5.

Following disclosure of his identity in court and as a result of other ATF investigations,[5] Petitioner and his family received multiple threats of death and violence, including from Hells Angels members and the "Aryan Brotherhood." Pet. App. B at 23a-27a.

Petitioner Dobyns was the subject of several violent threats from the Hells Angels and others over the course of many years:

- August 31, 2004 – Following a Black Biscuit indictment, Hells Angel Robert McKay is arrested for telling Dobyns that he is "a marked man" who was "going to spend the rest of his life

[5] As a result of his work on Operation Black Biscuit, as well as on other investigations, Agent Dobyns received twelve ATF Special Act Awards, two ATF Gold Stars for critical injuries received during investigative operations, an ATF Distinguished Service Medal for outstanding investigative accomplishment, and the United States Attorney's Medal of Valor award. Pet. App. B at 23a.

on the run from [the Hells Angels]." (Corrected Confidential Joint Appendix, *Dobyns v. United States*, No. 15-05020 (Fed. Cir. June 19, 2018) ("Appx") 506);

- September 2004 – Curtis Duchette, whom Dobyns had previously investigated for unlawful arms sales, describes an intention to see Dobyns killed with firearms (Appx510);
- November 2005 – Dax Mallaburn, a member of the Arizona Aryan Brotherhood, circulates a hit list that includes Dobyns (Appx511-512);
- November 2006 – Hells Angel Doug Wistrom states that the Hells Angels intended to coordinate a retaliatory campaign against Dobyns (Appx515);
- November 2006 – an ATF informant provides ATF with a letter by Hells Angel Kevin Augustiniak directed to a Hells Angels cohort describing specific methods to kill Dobyns and rape Dobyns' wife (Appx1802-1809);
- November 2006 – a source tells ATF that "two individuals with ties to the Hells Angels and the Aryan Brotherhood were plotting to kill Dobyns" (Appx518-519); and
- December 2006 – an ATF source describes an attempt by a Hells Angels member to contract with the Aryan Brotherhood to kill Dobyns (Appx516).

Office of Inspector General September 22, 2008 Investigative Report (Appx499–519). The Government conceded that the Hells Angels was fully capable of carrying out these threats. *See* Government's Response to RFA 54 ("defendant admits that . . . members of the

Hells Angels are capable of carrying out acts of violence, murder, rape, torture, and attempted murder.") (Appx2016–17).

On September 20, 2007, ATF and Petitioner entered into the Contract to settle disputes over ATF's repeated failures to respond to the threats detailed in the paragraph above. Pet. App. G. The threats were sufficiently credible and serious that the Department of Justice ("DOJ") Office of Inspector General ("OIG") issued a Report,[6] and the Office of Special Counsel ("OSC") issued a separate analysis[7] of ATF's inadequate threat responses and failures regarding Petitioner's safety. Pet. App. B at 54a–55a, 86a. DOJ sent both reports to President Obama.[8]

In Paragraph 2 of the Contract, ATF agreed to the following term requested by Petitioner:

> Should any threat assessment indicate that the threat to [Dobyns] and his family has increased from the assessment completed in June 2007, the Agency agrees to fully review the findings with [Dobyns] and get input from [Dobyns] if a transfer is necessitated.

Pet. App. G at 174a ¶2. Furthermore, the ATF agreed to provisions setting forth more general requirements for the execution of the Contract:

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[6] "[OIG] Report on Allegations by [ATF] Special Agent Jay Dobyns," September 22, 2008 (Appx499–519).

[7] "[OSC] Analysis of Disclosures, Agency Investigation and Report, Whistleblower Comments and Comments of the Special Counsel" (Pet. App. H).

[8] "[OSC] letter to the President," June 18, 2009 (Pet. App. H).

> The Agency agreed that it will comply with all laws regarding or otherwise affecting the Employee's employment by the Agency.

Pet. App. G at 177a ¶10.

In exchange for these assurances from ATF, Petitioner waived his claims against ATF for its past failures to respond to threats of death and violence against Petitioner and his family. Specifically, he agreed to, "withdraw and/or dismiss with prejudice his Agency Grievance, his discrimination/retaliation complaints, any Whistleblower claims, any complaints filed by the Employee with the Office of Special Counsel, and any other complaints the Employee could have raised regarding his employment with the agency as of the date this agreement is executed by the parties." Pet. App. B at 31a. The Claims Court correctly reasoned that the breadth of Petitioner's waivers reflected the expectation that ATF would take appropriate actions to ensure his and his family's safety following entry of the Contract.

On November 23, 2007, merely two months after the ATF executed the settlement agreement, the agency revoked all of Dobyns' fictitious identifications, exposing his true identity to the public. On August 10, 2008, at 3:30 am, Petitioner's home was destroyed by arson; his wife and children narrowly escaped the fire. Pet. App. B at 36a; *see also* Appx1829. This attack occurred less than one year after Petitioner's employer, ATF, entered into the Contract with Petitioner to protect his personal safety.

### B. The Claims Court Found at Trial that "the essence of the Settlement Agreement was to ensure the safety of Agent Dobyns and his family"

Based on the ambiguity of the Contract, and particularly Paragraph 10 regarding ATF's future obligations, the Claims Court made extensive findings based on trial testimony as to the spirit of protection and safety of Petitioner in the Contract.

Based upon exhibits and trial testimony, the Claims Court found that "the essence of the Settlement Agreement was to ensure the safety of Agent Dobyns and his family," and "secondarily, that ATF employees would not discriminate against Agent Dobyns." Pet. App. B at 83a. In its opinion denying the Government's motion to dismiss, the Claims Court held that the Contract required ATF to undertake "several prospective obligations" in accordance with Paragraphs 2 and 10 of the Contract. Pet. App. D at 124a. The Claims Court found that Paragraph 10 "sweeps more broadly, undoubtedly to afford [Petitioner] a contractual remedy should ATF, in the future, not comply with all laws regarding or affecting his employment." Pet. App. D at 137a; *Id.* at n.15.

ATF's chief settlement negotiator for the Contract was ATF Deputy Director Ronnie Carter. During the Contract negotiations, Carter and ATF's subordinate negotiator Assistant Director William Hoover told Petitioner that the Contract would focus on his and his family's safety. Appx13212:9–20. At trial, Carter testified that the parties to the Contract intended:

- "for Dobyns to be more safe than he was prior to the settlement agreement" (Appx10606:13–18);

- "for Dobyns to have more protection from threats than he did before the settlement agreement" (Appx10606:19–23);
- to provide more safety and protection to Dobyns from threats than ATF had previously provided (Appx10542:18–10543:6; Appx10486:9–12);
- to obligate ATF pursuant to Paragraph 10 of the settlement agreement to "*protect [Dobyns] as best as [ATF] can.*" (Appx10615:3) (emphasis added);
- that "the protection of Agent Dobyns is included within the expectations of Paragraph 10 of the settlement agreement" (Appx10617:15–22);
- that the substance of the conclusions of the September 22, 2008 OIG Report regarding the importance of ATF's protection of its agents and Jay Dobyns in particular was embodied in the settlement agreement (Appx10483:15–10484:11; *see also* Appx10479:5–10481:4); and
- that ATF orders governing how ATF investigated threats against the agency's employees were included in the settlement agreement (Appx10610:1522).

Petitioner Dobyns also understood the Contract to constitute ATF's promise to reasonably pursue his future safety and protection. Appx12764:10–12765:10. The Claims Court wrote: "[t]he ATF officials who entered into the [Contract] with Agent Dobyns understood all this, as they had years of law enforcement experience with the agency." Pet. App. B at 84a. In light of this testimony and other evidence, the Claims Court identified Petitioner's safety as the purpose of the Contract, and as the benefit he sought when he

forfeited his right to continue to pursue claims against ATF. Pet. App. B at 83a.

### C. The ATF Engaged in Bad Faith in Performing the Contract

In 2003, as Operation Black Biscuit was completed, ATF's Undercover Branch issued to Petitioner and his wife full-spectrum fictitious identifications (e.g., William and Sasha Johnson) for protection against threats of death and violence. Appx645–646. The identifications concealed Petitioner's home address from the public. Appx13348:1–17. Remarkably, only two months after signing the settlement agreement, on November 23, 2007, ATF recalled all of Dobyns' fictitious identifications. ATF took this step despite an ATF June 22, 2007 Threat Assessment stating that a "potential threat [to Petitioner] exists which may become active at any time in the future." Appx635, ¶¶3–4.

The ATF completed its withdrawal of Dobyns' fictitious identifications on April 24, 2008. Appx1710.

Only three and a half months later, in the early hours of August 10, 2008, Dobyns' home was set on fire. Appx12187:1–9. Dobyns' wife and two minor children were in the house at the time but escaped. Pet. App. B at 36a. The house was a total loss.

ATF's actions made it easier for the Hells Angels and other criminal organizations to locate and harm Petitioner and his family. Appx12160:5–12161:23; Appx10609:14–23.

The Government has conceded that withdrawing the fictitious identifications removed Dobyns' family's only safety countermeasures and enabled dangerous criminals, who had motives to harm Petitioner as a

result of his undercover work, to find the family's home. *See* Government's response to Plaintiff's Request for Admissions No. 37–69, Appx2008–2021. The Government admitted that the withdrawal of the fictitious IDs endangered the Dobyns family:

> Admits that the recall of the covert identification documents, conducted pursuant to ATF Order 3250.1A, reduced the level of protection with respect to information about the location of Mr. Dobyns' residence that could be found in the public domain or as part of a search of government records such as social security information, driver's licenses and vehicle registration, because the purpose of the covert identification documents is to protect information from public disclosure.

Appx2005–2006. *See also*, Government's response to RFA 60 (Appx2018) ("Admits that some covert identification documents . . . replace documents that are in the public domain, such as the county recorder's office, or in quasi-public domains, such as the Motor Vehicle Division, that would otherwise accurately describe an ATF agent's true identity").

The Government has also admitted it was aware, prior to the identification withdrawal, of threats against Petitioner and his family:

> 25. Admits that ATF was aware of threats to kill plaintiff. . . .
>
> [. . . .]
>
> 50. Admits that the confidential source advised that he had been offered on one occasion a "contract" to kill plaintiff. . . .

> 51. Admits that the confidential informant advised ATF of a threat involving plaintiff's daughter. . . .

Government's Answer to the Second Amended Complaint, Appx2877; Appx2884.

Accordingly, the Government was aware that Petitioner had a particularized risk of danger based on his undercover work, his testimony against the Hells Angels, and other credible threats of death and violence. *See, e.g.*, Government's response to: RFAs 39–41, 56–66 (Appx2010–2020).

The ATF concluded that there was a Critical Risk[9] rating for Petitioner following an ATF Risk Assessment conducted on September 8, 2004, basing its rating on a direct threat to Petitioner, "including [the Hells Angels'] ability to locate and make direct contact with SA Dobyns." Appx2146–2148. Another Risk Assessment conducted in 2005 concluded: "it has been determined that the overall risk level to SA Dobyns and his family is CRITICAL" (Appx642; Appx2166), and described a nationwide threat posed to Petitioner and his family by the Hells Angels and the Aryan Brotherhood (Appx2159–2164). ATF's Operations Security Office (OPSEC) knew that earlier risk assessments documented threats against Petitioner. Appx12479:24–12480:6.

Moreover, the ATF's Internal Affairs Division (IAD) conducted an investigation and concluded that the ATF was *aware* of threats against Petitioner Dobyns *at the time* the ATF withdrew the fictitious identifications. Appx635. The IAD also concluded that when

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[9] "Critical Risk," if realized, means injury or death, plus high vulnerability. Appx14912:9–19.

the ATF withdrew the identifications the identifications had been effective in their designed purpose to protect the identities and residence location of the Dobyns family. Appx634, ¶2.

IAD found that ATF had never before reviewed or withdrawn fictitious identifications issued to an ATF employee, and that no valid reason explained the withdrawal of Dobyns' identifications. Appx635, ¶5.

### D. The Claims Court Found that ATF's Conduct Endangered Petitioner and His Family and Violated the Duty of Good Faith and Fair Dealing

After trial, the Claims Court found that "to ensure the safety of Agent Dobyns and his family" (Pet. App. B at 83a), the Contract required ATF to take specific actions that included preservation of fictitious identities:

> Based on how ATF functioned, and given the intent underlying the [Contract], those assurances took at least three forms. The first related to the risk assessments that ATF regularly conducted — assessments designed to ensure that threats to agents were identified, but not realized. The second involved protecting the identity of the agents and providing them "backstopping" — both while they acted undercover and after their work on particular investigations was at an end. And, finally, other assurances focused on the interaction between fellow agents and their superiors — interactions that potentially proved *important when life-and-death decisions hung in the balance.*

Pet. App. B at 83a (emphasis added).

However, the Claims Court concluded that "the conduct of ATF officials and other employees grossly breached the [Duty] associated with the [Contract]." Pet. App. B at 77a. Indeed, with the withdrawal of Petitioner's fictitious identification specifically in mind, the Claims Court found "clear indication that certain ATF officials violated the covenant of good faith and fair dealing literally *within weeks* after the execution of the Settlement Agreement, and that they and other ATF employees continued to violate the covenant in the years that followed." Pet. App. B at 77a (emphasis added).

The Claims Court found that "the conduct of ATF officials and other employees grossly breached the Covenant associated with the Settlement Agreement" (Pet. App. B at 77a) and determined that:

> certain ATF officials — albeit not the ones who signed the Settlement Agreement — set out to reappropriate the benefits that Agent Dobyns expected to obtain from the bargain; to act in a fashion designed to undercut the Settlement Agreement's purpose so as to "deprive [Agent Dobyns] of the contemplated value." *Metcalf Constr.*, 742 F.3d at 991.

Pet. App. B at 84a. The Claims Court also documented instances of ATF officials: (1) making inaccurate statements about threats to Dobyns' safety; (2) providing inconsistent and incredible testimony "unworthy of belief" at trial; and (3) failing to properly respond to the arson of Petitioner's residence. Pet. App. B at 64a–66a, 84a, 87a–88a.

Both before and after the August 10, 2008 arson of Petitioner's home, ATF intentionally endangered Petitioner and dealt with him in bad faith under the Contract for his safety and protection.

## REASONS FOR GRANTING THE PETITION

### I. In Direct Conflict with Prior Decisions of the Federal Circuit, the *Dobyns* Federal Circuit Panel Erroneously Held that Breach of the Duty of Good Faith and Fair Dealing Must be Tethered to a Specific Contract Term to the Detriment of the Contracting Parties

#### A. The Duty of Good Faith and Fair Dealing is a Bedrock Principle of Contract Law

There is no dispute that federal common law recognizes the duty of good faith and fair dealing in federal contracts. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement . . . ." Restatement (Second) of Contracts § 205 (1981); Arthur L. Corbin, 3 *Corbin on Contracts* § 541 (1960) ("In order to prevent the disappointment of expectations that the transaction aroused in one party, as the other had reason to know, the courts find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must.").

Courts have recognized that the "contractual duty of good faith is . . . not some newfangled bit of welfare-state paternalism or . . . the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases." *Mkt. St. Assocs. v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) (Posner, J.) (citing, *inter alia*, *Bush v. Marshall*, 47 U.S. (6 How.) 284, 291 (1848); *Chi. Rock Island & Pac.*

*R.R. v. Howard*, 74 U.S. (7 Wall.) 392, 413 (1868)). *See also* Austin Abbott, *Abbott's New Cases* 51 (1894) ("[t]hat obligation of good faith and fair dealing [is] a part of the contract, indeed the marrow and substance, the very essence of the contract. . . . To hold otherwise would be to say that this franchise and the contract were worth nothing at all. . . .").

Judge Posner also recognized that the duty is particularly important to contracting parties post-signing, when a baseline level of trust exposes parties to deceptive acts. *Mkt. Street*, 941 F.2d at 594 ("Afterwards the situation is different. The parties are now in a cooperative relationship. . . .").

The duty of good faith and fair dealing involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a (1981). "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205 cmt. d (1981).

"The implied covenant of good faith and fair dealing encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included." Howard O. Hunter, *Modern Law of Contracts* § 10:9 (2019). "The government can be held liable for breach of the duty of good faith and fair dealing in government contracts as well." *Id.* at § 10:12.

In *Tymshare, Inc. v. Covell,* 727 F.2d 1145, 1152 (D.C. Cir. 1984), then-Judge Scalia surveyed various interpretations of the duty of good faith and fair dealing before determining that, "it becomes clear that the doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes 'bad faith.'" In deciding on whether Virginia law encompassed the duty, Judge Scalia wrote, "Ultimately, however, we think it unnecessary to speculate upon the Virginia Supreme Court's acceptance or rejection of the modern doctrine of 'obligation to perform in good faith.' That doctrine, it seems to us, is simply a rechristening of fundamental principles of contract law well established in Virginia and elsewhere." *See* Steven J. Burton & Eric G. Andersen, *The World of a Contract*, 75 Iowa L. Rev. 861, 869 (1990) (the implied duty of good faith and fair dealing is "standard common law doctrine").

Likewise, then-Judge Breyer, articulated that "every contract carries an implied covenant of good faith and fair dealing." *Atlas Truck Leasing, Inc. v. First NH Banks, Inc.*, 808 F.2d 902, 904 (1st Cir. 1987). Parties have an "obligation" to "make reasonable good faith efforts" to execute the contract, and would foreseeably cause damages and "violate this covenant" if they acted "unreasonably . . . to deprive [the other party] of the contract's benefits." *Id.*

But the Federal Circuit ignored this venerable doctrine in *Dobyns v. United States*. In doing so, the *Dobyns* panel turned a blind eye to one of most egregious instances of bad faith imaginable—a federal agency intentionally creating circumstances to allow known criminal organizations to attack and attempt to kill one of its own agents, along with his family.

### B. The Courts in the Federal Circuit Irreconcilably Disagree on Whether the Duty of Good Faith Must be Tethered to an Express Term of the Contract

While a limited line of cases within the Federal Circuit, including *Dobyns II*, hold that a breach of the duty of good faith and fair dealing must be tied to a specific provision of the contract, 915 F.3d at 740–41, many Federal Circuit cases have held that the Duty may be violated by breaching the "untethered" spirit of the contract. The Federal Circuit's law remains muddled as panels continue to grasp for a consistent formulation of the duty of good faith and fair dealing.

Under established federal common law, the duty of good faith and fair dealing demands that each party not "act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp.,* 395 F.3d at 1304. "[T]he court, in interpreting a contract, seeks to effectuate its spirit and purpose." *N. Star Alaska Hous. Corp. v United States,* 76 Fed. Cl. 158, 193 (2007) (internal quotation marks omitted); *see, e.g.*, *Malone v. United States*, 849 F.2d 1441, 1445–46, *modified* 857 F.2d 787 (Fed. Cir. 1988); *Local Am. Bank v. United States*, 52 Fed. Cl. 184, 191–92 (2002) (holding "[b]ecause the implied covenant demands enforcement of the spirit of the bargain, we may look beyond the fact that the Agreement does not expressly guarantee the covered asset loss deduction over the course of its life").

Contrary to its opinion in *Dobyns II*, the Federal Circuit has held in other cases that "a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014); *see D'Andrea Bros.*,

*LLC v. United States*, 109 Fed. Cl. 243, 256 (2013) ("the exact prohibited conduct need not be expressed" (quoting *Rivera Agredano v. United States,* 70 Fed. Cl. 564, 574 (2006), and citing *Centex Corp.,* 395 F.3d at 1306)).

In *Metcalf Construction v. United States*, 102 Fed. Cl. 334 (2011), the Claims Court rejected a contractor's claim for breach of the implied duty of good faith and fair dealing. The Federal Circuit reversed, holding that the trial court decision "rests on an unduly narrow view of the duty of good faith and fair dealing." *Metcalf*, 742 F.3d at 992. Instead, the Federal Circuit found that the Duty "prevents a party's acts or omissions that, though not proscribed by the contract expressly, are *inconsistent with the contract's purpose* and deprive the other party of the contemplated value." *Id.* at 991 (emphasis added).

In line with these decisions, the Court of Claims has held that:

> Requiring the implied duty of good faith and fair dealing to literally "attach" to a specific contractual duty, rather than be grounded in contractual provisions generally to ensure that the reasonable expectations of the parties are respected, improperly . . . render[s] the implied duty wholly superfluous. The United States Court of Appeals for the Federal Circuit has recognized as much.

*CanPro Invs. Ltd. v. United States*, 131 Fed. Cl. 528, 531–32 (2017) (citing *Centex*, 395 F.3d at 1306)).

In a remarkably similar case involving a government informant for DEA ("the Princess"), the Federal Claims Court found a breach of the duty of good faith and fair dealing without imposing any "tethering"

requirement. *SGS-92-X003 v. United States*, 118 Fed. Cl. 492, 524 (2014). The court found that the duty of good faith and fair dealing protected the safety of the DEA informant. *Id*. at 95 ("As such, Defendant's breach of its duty to protect Plaintiff embodied in the parties' contract and Defendant's implied duty of good faith and fair dealing led to Plaintiff's kidnapping").

In *Mansoor*, the Claims Court rejected the government's attempts to ground the Duty "solely on express terms of a contract" and held that such a limitation would:

> eliminate any possibility that the implied duty of good faith and fair dealing could itself provide the basis for a claim that a contract was breached. That is wrong. The implied duty stems from the consensual terms reflected in an express contract, but it addressed the parties' reasonable expectations that may not have been embodied in explicit contractual language.

*Mansoor Int'l Dev. Servs. v. United States*, 121 Fed. Cl. 1, 15 (2015). "A basic starting point for the duty of good faith and fair dealing is that the contract's written words do not provide an exhaustive guide to the contract's terms." Paul McMahon, *Good Faith and Fair Dealing as an Unenforced Legal Norm*, 99 Minn. L. Rev. 2051, 2074 (2015) (internal quotation marks omitted).[10] Indeed, "the implied covenant has nothing

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[10] Citing Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 Iowa L. Rev. 503, 523 (1991) (under the U.C.C., "[t]he concept of agreement is not limited to the terms of the parties' writing: it includes a variety of elements, all of which must be synthesized" (footnote omitted)).

to do with the enforcement of terms actually negotiated." *Craig-Buff, Ltd., P'ship v. United States*, 69 Fed. Cl. 382, 388 (2006). "To hold that, absent a separate breach [of an express contract term], the covenant is not violated would be to deprive this implied promise of any vitality in the particular universe for which it was designed – that of contract discretion. . . ." *N. Star*., 76 Fed. Cl. at 188–89.

Despite this clear line of authorities within the Federal Circuit, nonetheless some courts have required a strict connection between a specific obligation articulated in the contract and the Duty. *See, e.g.*, *Lakeshore Eng'g Servs. v. United* States, 748 F.3d 1341, 1349 (Fed. Cir. 2014) (stating that the Duty is "keyed to the obligations and opportunities established in the contract"). These decisions refer to a requirement that the implied duty "must attach" or be "tethered" to specific terms in the written contract. *See, e.g.*, *P&K Contr., Inc. v. United States*, 108 Fed. Cl. 380, 396 (2012) ("Any breach however, must be tethered to some substantive obligation in the contract." (citing *Centex Corp.*, 395 F.3d at 1306)); *Alaska v. United States*, 35 Fed. Cl. 685, 704 (1996) ("The implied obligation of good faith and fair dealing must attach to a specific substantive obligation, mutually assented to by the parties.").

Cases like *Dobyns II* have reopened an earlier split within the Federal Circuit on the issue of whether a contracting party breaches the implied Duty when it acts contrary to the spirit and purpose of the contract, regardless of whether the breaching conduct is connected to specific terms. For example, in *Alaska v. United States*, the State of Alaska argued that the legislation granting it statehood in 1959 created a contract between the state and the federal govern-

ment. 35 Fed. Cl. 685 (1996). Alaska argued that an amendment to the Mineral Leasing Act created a contract under which there was an implied duty of good faith and fair dealing on the part of the government to maximize revenue from the federally-held lands. *Id.* at 704. In rejecting the claim, the Court of Federal Claims held that "the implied obligation of good faith and fair dealing must attach to a specific substantive obligation mutually assented to by the parties." *Id.* at 704–05; *see also Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829–830 (Fed. Cir. 2010) (government did not breach the duty of good faith and fair dealing because its actions were not "specifically targeted . . . for the specific purpose of eliminating an express, bargained-for benefit in the contracts").

Likewise, in *Detroit Housing Corp. v. United States*, the Court of Claims dismissed a property buyer's action for damages against the federal government, holding that "the implied obligation 'must attach to a specific substantive obligation, mutually assented to by the parties.'" 55 Fed. Cl. 410, 417–18 (2003) (quoting *Alaska*, 35 Fed. Cl. at 704). *See also Greenhill v. United States*, 92 Fed. Cl. 385, 397 (2010) (holding "the implied covenant of good faith and fair dealing must attach to a specific contractual obligation" (quoting *Precision Pine*, 596 F.3d at 829)); *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 743 (2003) (same); *Austin v. United States*, 118 Fed. Cl. 776, 789 (2014) (same). The Federal Circuit in *Dobyns II* relied on this line of cases to reverse the Claims Court's judgment in favor of Dobyns.

The Federal Circuit split exacerbated by *Dobyns II* makes review by this Court imperative. No amount of further percolation within the Federal Circuit can cure

the muddled and confused state of the law within the Circuit post-*Dobyns II*. Review is ripe now.

### C. *Dobyns II* Represents a Stark Deviation from Other Federal Appellate Courts

*Dobyns II* splits the Federal Circuit's newly limiting version of the duty of good faith from other circuits, meriting Supreme Court review and reversal.

The Tenth Circuit Court of Appeals offers a clear example of the schism with Federal Circuit decisions on the duty of good faith and fair dealing, demonstrated by outcomes such as *Dobyns II*. The Tenth Circuit embraces the analytical process for determining the spirit of a contract that is the core of the Duty:

> This implied covenant is a judicial convention designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain. [*Chamison v. Healthtrust, Inc.,* 735 A.2d 912, 920 (Del. Ch. 1999)]. It requires the [finder of fact] to extrapolate the spirit of the agreement from its express terms and based on that "spirit," determine the terms that the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose. [*Id. at 920–921*]. The "extrapolated term" is then "implie[d] . . . into the express agreement as an implied covenant," and its breach is treated "as a breach of the contract." *Id.*

*O'Tool v. Genmar Holdings, Inc*., 387 F.3d 1188, 1195 (10th Cir. 2004). The Tenth Circuit's explication of the duty captures the unique analytical process required

to apply the rule properly. Requiring courts to determine the spirit of an agreement allows for necessary protections against forms of bad faith not expressly barred by the contract language. The duty exists to address the basic problem that contracting parties (like Dobyns) cannot be expected to anticipate all possible harms (such as the surreptitious withdrawal of his fictitious identifications) at the time of contract execution.

The *O'Tool* decision is no outlier. The Eighth Circuit Court of Appeals, in recognizing that the duty need not be tethered to an express term, criticizes the logical consequences of the tethering requirement:

> [A] plaintiff alleging a claim for breach of the implied covenant of good faith and fair dealing "need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes the parties did not expressly articulate the covenant allegedly breached." *In re Hennepin Cty. 1986 Recycling Bond Litig.,* 540 N.W.2d 494, 503 (Minn. 1995). Plaintiffs need not allege a breach of an express duty under a contract so long as the claims are "based on the underlying . . . agreements" because the implied covenant of good faith and fair dealing extends to actions within the scope of the underlying enforceable contract.

*Cox v. Mortg. Elec. Registration Sys., Inc.,* 685 F.3d 663, 670–71 (8th Cir. 2012). Using the same application test as the Eighth Circuit, the Third Circuit similarly rejects a tethering requirement when enforcing the duty of good faith and fair dealing:

> The implied covenant is an independent duty and may be breached even where there is no breach of the contract's express terms. *Emerson Radio Corp. v. Orion Sales, Inc.*, 80 F.Supp.2d 307, 311 (D.N.J.2000) (citing, *inter alia*, *Sons of Thunder, Inc.,* 690 A.2d at 575); *see also Bak–A–Lum Corp. v. Alcoa Bldg. Prods., Inc.,* 351 A.2d 349, 352 ([N.J.] 1976). The implied covenant of good faith and fair dealing requires that "neither party shall do *anything* which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Sons of Thunder, Inc.*, 690 A.2d at 587 [. . .]; *Palisades Prop., Inc. v. Brunetti,* 690 A.2d 522, 531 ([N.J.] 1965) (emphasis added).

*Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 288 (3d Cir. 2000) (emphasis added) (other citations omitted) (also citing *Ass'n Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 382, 384 (N.J. 1972)) (behavior "not contemplated by the spirit of the contract and [which] fell short of fair dealing" breaches the duty of good faith and fair dealing).

The foregoing decisions reject any requirement or expectation that a breach of the Duty must also undermine an express contract term. Importantly, and yet largely unspoken by those courts, such decisions assume that if a duty is "tethered" to an express contract term, then a breach of the Covenant, by exceeding the limits of a party's discretion in performing its obligations, cannot exist without a corresponding breach of the underlying express term. The Third and Eighth Circuit decisions are correct in rejecting such a result. However, by mandating that the Covenant always be conjoined to express contract language, *Dobyns II*

merely repackages the *parol* evidence rule as the latest iteration of Covenant doctrine. A rejection of such efforts by the Federal Circuit to eviscerate the Duty is in part why this Court's review of *Dobyns II* is necessary.

### D. The Supreme Court Has Not Substantively Addressed the Duty of Good Faith and Fair Dealing in 150 Years

This Court has been largely silent on the duty of good faith and fair dealing since the nineteenth century, when it recognized that the Duty applied to corporations as well as individuals:

> Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced.

*Chi. Rock Island & Pac. R.R. Co. v. Howard*, 74 U.S. (7 Wall.) 392, 413 (1868).

This Court's most recent mention of the duty of good faith and fair dealing was limited to an interstate compact between Alabama and North Carolina. In *Alabama v. North Carolina*, 560 U.S. 330, 351–52 (2010), this Court found the duty of good faith and fair dealing did not apply to an interstate compact because "an interstate compact is not just a contract; it is a federal statute enacted by Congress. . . . We do not--we cannot--add provisions to a federal statute." *Id.* at 351–52. Further, this Court reasoned "[w]e are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers

concerns that would arise were we to rewrite an agreement among sovereign States."[11]

Variations of the rule for contracts between government and private parties, and state and federal attempts at applying the rule, have created a wide range of inconsistent applications of the Duty. *See* McMahon, *supra*, at 2095–96 ("the case law is much too varied to admit only of a single interpretation."). An expression of the common law rule of the duty of good faith and fair dealing by this Court would go far towards clarifying this extraordinarily important rule of contract interpretation, at least as a matter of federal common law.

### E. An Intra-Circuit Conflict Is an Appropriate Vehicle for Review

This Court has frequently granted review over intra-circuit conflicts regarding issues within the Federal Circuit's exclusive jurisdiction. *See, e.g.*, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 727 (2002) (granting *certiorari* when the Federal Circuit's holding over an issue exclusively within its jurisdiction "departed from its own cases"); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (granting *certiorari* to resolve "significant disagreement within the Court of Appeals for the Federal Circuit" over an issue exclusively within the Circuit's jurisdiction); *Cuozzo Speed Techs., LLC v.*

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[11] This Court also referred to a "duty of good faith and fair dealing" in passing when it affirmed the Ninth Circuit decision in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). However, the *Humana* court was not addressing the duty of good faith and fair dealing that applies to all contracts, but a Nevada common-law tort rule for insurers to negotiate in good faith with their insureds. *Id.* at 312.

*Lee*, 136 S. Ct. 890 (2016) (granting *certiorari* over an alleged intra-circuit split within the Federal Circuit); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.19 (11th ed. 2019) (confirming the "likelihood of Supreme Court review increases" when the Federal Circuit "departs from its own [exclusive federal] law precedents"); *see* E. Gressman *et al., Supreme Court Practice* § 4.21 (9th ed. 2007) (the "likelihood of Supreme Court review increases" when the Federal Circuit "departs from its own patent law precedents"); *see also Highmark Inc. v. Allcare Health Mgmt. Sys.*, 570 U.S. 947 (2013) (same). The Federal Circuit's exclusive jurisdiction over the "Big" Tucker Act means that *Dobyns II* will not percolate, and guidance from other circuits will not be forthcoming.

This Court has also granted review over internal conflicts outside the Federal Circuit, despite that further percolation of the conflict over contract theory was possible. *See, e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630 (2015) ("intra-circuit conflict" in the Ninth Circuit regarding the Tucker Act); *see also*, *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 765 n.2 (2018) ("the *en banc* Sixth Circuit [was] unwilling (or unable) to reconcile its precedents" regarding the interpretation of contracts); *Inyo Cty., Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (question on which the Ninth Circuit "expressed divergent views"); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) ("because of this intra-circuit conflict"); *Maggio v. Zeitz*, 333 U.S. 56, 59–60 (1948) ("conflicting views within" the Second Circuit, the Circuit that most frequently decided the matter at issue); and *John Hancock Mut. Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) ("conflict in the rulings of the Court of Appeals of the Fifth Circuit").

Both intra-circuit and extra-circuit splits make this Court's review essential to a predictable and fair application of the duty of good faith and fair dealing.

## II. Consistent Application of the Duty of Good Faith and Fair Dealing in Federal Contracts, Particularly Those Involving the Safety of Federal Agents, Is of Significant National Importance

### A. The Federal Circuit's *Dobyns II* Decision Places Thousands of Undercover Agents in Danger and Threatens to Undermine the Effectiveness of Undercover Operations

The United States enters into innumerable contracts with private citizens and private enterprises each year. Under established federal common law, those agreements each contain a duty of good faith and fair dealing that allows the Government and its contracting parties to avoid drafting endless hypothetical contractual protections against conduct that undermines the intended benefits of the bargain. *Metcalf*, 742 F.3d at 991 (explaining that "the implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain. . . ."). The *Dobyns II* Opinion, by finding a good faith duty only when "tethered" to express terms of the contract, reads out of existence the "spirit" of each such contract with the United States and, therefore, introduces tremendous uncertainty for parties entering into contracts with the Government.

This inconsistent application of the Duty is particularly troublesome in cases dealing with undercover law enforcement personnel. Over 40 federal agencies

engage in undercover operations[12] involving agents who endure incredible danger[13] over long periods of time.[14] Scholars have recognized the unique pressures on undercover agents and the concurrent risks of harm[15]:

> [Undercover employees] face unique experiences and stressors that set them apart from their overt counterparts and place them at increased risk for psychological injury, disciplinary action, and other adverse personal and professional consequences. . . . Undercover employees play a vital role in local and federal

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[12] Eric Lichtblau & William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, New York Times, Nov. 15, 2014, at A1.

[13] For decisions illustrating the danger of undercover work, *see, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 387 (1978) (murder of undercover agent in line of duty); *United States v. Gonzales*, 520 U.S. 1, 3 (1997) (pulling "of guns on undercover police officers"); *Garcia v. United States*, 469 U.S. 70, 71 (1984) (assault of undercover agent "with a loaded pistol"); *Busic v. United States*, 446 U.S. 398, 400 (1980) (attempt "to rob" an undercover agent "at gunpoint" and subsequent firing of shots); and *United States v. Feola*, 420 U.S. 671, 674 (1975) (conspiracy to defraud undercover agents, and in the alternative, "assault" them and "relieve them of the[ir] cash").

[14] Michel Girodo, *Health and Legal Issues in Undercover Narcotics Investigations: Misrepresented evidence*, 3 Behav. Sci. & L. 299, 300 (1985) ("Operations can last for a day or two, but they are most commonly weeks, months, and not infrequently years in duration.")

[15] Petitioner's experiences provide examples of such risks. Even prior to Operation Black Biscuit, on his first week of employment with ATF and before he received his first paycheck, Jay Dobyns was shot through the chest by a criminal assailant. Lourdes Medrano, *Shoot-out Kills 1, Hurts U.S. Agent*, Ariz. Daily Star, Nov. 20,1987, at A1.

> law enforcement agencies and experience a unique set of demands, stressors, and challenges in the execution of their duties. Case examples and research reports offer chilling evidence of the very real human toll of undercover investigations and emphasize the need for specialized selection, training, and support services suited to the needs of UCEs.

Meredith Krause, *Safeguarding Undercover Employees: A Strategy for Success*, 77 FBI L. Enforcement Bull. 1, 1 (2008). "Whether the threat is real or imagined, when undercover officers fear discovery, they experience emotional discomfort. To defeat this stressor, law enforcement agencies must make a substantial effort to *establish aliases or false identification* for the officers involved in each specific operation. . . ." Stephen R. Band & Donald D. Sheehan, *Managing Undercover Stress: The Supervisor's Role*, 68 FBI L. Enforcement Bull. 1, 3 (1999) (emphasis added).

The government increases the risk to undercover agents, and their families, when it fails to follow proper protocols to keep its agents safe. As a result, courts have recognized the government's inherent duty to protect its undercover employees, even when the duty was never formally articulated.

In *SGS-92-X003 v. United States*, an undercover informant (the "Princess") working for the Drug Enforcement Administration ("DEA") was kidnapped and held captive for over three months following the government's inadvertent disclosure of her identity to a criminal defendant. 118 Fed. Cl. 492, 498–503 (2014). The agency approved her mission even though the agency was aware of enhanced danger to the Princess, and nonetheless failed to follow standard procedures designed to ensure her safety. The court

held that "[a] fundamental bargain of the [agent's] contract was that while she worked undercover, DEA would protect her," rejecting the government's position that there was no duty to protect the agent. *Id.* at 523–24.

In *Swanner v. United States*, an undercover employee for the Internal Revenue Service faced life-threatening danger after his identity was discovered. 309 F. Supp. 1183, 1186 (M.D. Ala. 1970). The IRS took no action to protect the agent following death threats, and the agent's home was bombed while he and his family were inside. *Id.* The district court found "[t]he law is clear that whenever there is reasonable cause to believe that a government agent or employee, or any member of his family, is endangered as a result of the performance of his duty to the government, a duty on the part of the government to protect him and the members of his family arises." *Id.* at 1187.

By narrowing the government's duties to expressly-articulated contract terms, the *Dobyns II* panel overlooked a longstanding government obligation to protect undercover agents. It is inconceivable that the court could entertain the notion that both parties to the contract did not expect ATF to continue to protect Petitioner Dobyns and his family. Petitioner Dobyns continued to serve with ATF for seven years after the Contract.

For example, Agent Dobyns testified in court against ultra-dangerous Hells Angels criminal defendants long after executing the Settlement Agreement. Specifically, Dobyns testified in the murder trial of Kevin Augustiniak, a member of Hells Angels who was indicted for beheading Cynthia Garcia. Dobyns

testified even though he was at risk of facing retaliation from the Hells Angels.

*Dobyns II* represents a stark departure from prior case law recognizing a duty of the United States to protect undercover agents.

### B. Apart from the Intra-Circuit Split within the Federal Circuit, the Question Raised by *Dobyns II* Represents an Important One Worthy of Certiorari Review

This Court has granted certiorari over matters within the Federal Circuit's exclusive jurisdiction without an intra-circuit conflict because of the importance of the question presented.[16] *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1754–55 (2017) (granting certiorari to review the Federal Circuit's holding that a provision of the Trademark Act was facially invalid under the First Amendment). Issues within the Federal Circuit regularly have "a special importance that warrants review by [this] Court," *Supreme Court Practice* § 4.21 (collecting cases), including — like here — issues involving contract disputes with the government. *See United States v. Winstar Corp.*, 518 U.S. 839 (1996) (government contract issue); *Hercules Inc. v. United States*, 516 U.S. 417 (1996) (reimbursement for costs issues arising out of litigating government contract); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) (interpretation of government contract issue); *United States v. Wunderlich*, 342 U.S. 98 (1951)

[16] *Supreme Court Practice* § 4.21 ("[T]he Supreme Court's *certiorari* concerns with the [exclusive law] decisions of the Federal Circuit turn largely on the importance of the questions presented.").

(government contract issue); *United States v. Moorman*, 338 U.S. 457 (1950) (same).

Plaintiffs under the "Big" Tucker Act (the jurisdictional basis for Petitioner's original 2008 lawsuit) have no alternative to the jurisdiction of the Court of Federal Claims or the Federal Circuit for claims exceeding $10,000 under contracts with the United States. Those plaintiffs are uniquely vulnerable to the inconsistencies and suddenly-shifting sands of the Federal Circuit's definition of the duty of good faith and fair dealing, exemplified by the abrupt departure of *Dobyns II* from the Federal Circuit decisions of *Centex* and *Metcalf*, as well as from the Claims Court decisions of *SGS-92-X003* and *North Star Alaska Housing Corp.* Those contracting partners upon whom the United States depends in order to function every day in countless ways deserve a consistent and predictable protection of the duty of good faith and fair dealing. This Court's review of *Dobyns II* is critical to achieving that goal.

"The underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 5 *Williston on Contracts* § 670 (3d ed. 1961). "The covenant imposes on a party both the duty to refrain from rendering performance impossible, and to do everything that the contract presupposes should be done by a party to accomplish the contract's purpose." 30 *Williston on Contracts* § 77:10 (4th ed. 2004).

For the reasons described herein, the proper interpretation of the duty of good faith and fair dealing is an issue of national importance warranting certiorari review.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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September 23, 2019