No. 19-389

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This Petition asks this Court to review an important federal common law question: whether the Federal Circuit may eliminate the longstanding rule that the spirit of a contract, and not the express terms, is the proper source to define a contract's implied covenant of good faith and fair dealing (the "Duty"). The Federal Circuit's rejection of the traditional statement[1] of the Duty presents an unambiguous split between panels of the Federal Circuit and with other federal circuits and merits certiorari.

The Federal Circuit's decision in *Dobyns II* (*Dobyns v. United States,* 915 F.3d 733 (2019)), incorrectly requires that the Duty be "tethered" to an express contract term, as opposed to the spirit of the agreement. This continues the Circuit's departure from the traditional common law statement of the Duty, supported by extensive scholarship. Pet. 16-19. *Dobyns II* reduces the Duty to nothing more than the ambiguous-language-exception to the *parol* evidence rule[2], with that equivalency, as a practical matter, extinguishing the Duty. By making the Duty entirely redundant with the *parol* evidence rule's allowance of extrinsic evidence to define ambiguous contract terms, the

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[1] *See Kirk La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933) ("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") (emphasis added).

[2] *See, e.g.*, *TEG–Paradigm Envt'l., 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).

Federal Circuit eliminates the Duty's intended ability to provide an independent cause of action for contract breach. This Court's review can correct the Federal Circuit's error regarding this important issue.

I. THE GOVERNMENT DOES NOT DISPUTE THAT INTRA-FEDERAL CIRCUIT SPLITS UNIQUELY MERIT CERTIORARI DUE TO THE EXCLUSIVE JURISDICTION OF THAT CIRCUIT

1. The United States (the "Government") does not dispute the primary rationale for this Court's review (Pet. 28-29), that the Federal Circuit's exclusive jurisdiction over certain statutes and federal subject matter merits review by the Supreme Court of intra-Federal Circuit splits of authority. The Government cites *Wisniewski v. U.S.*, 353 U.S. 901 (1957) (*per curiam*), to argue that a disagreement between a federal circuit's panels does not present an independent and sufficient basis for certiorari. Opp. 12. However, *Wisniewski* does not support a categorical denial of certiorari for all intra-circuit disputes, particularly not where one circuit panel unambiguously rejects another. Further, the Government ignores Petitioner's extensive authority that the Federal Circuit's exclusive jurisdiction over designated areas of federal law merits certiorari for sufficiently-ripe splits between Federal Circuit panels.

The Government overclaims the guidance of the sixty-year-old *Wisniewski* decision, which predates

the 1982 creation of the Federal Circuit[3] by more than two decades. 96 Stat. 25 (1982). That *per curiam* decision does not stand for the proposition which the Government attributes to it, that an intra-circuit split of authority can never suffice for certiorari. Opp. 12. Instead, *Wisniewski* states:

> Whatever procedure a Court of Appeals follows to resolve these problems—and desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals—doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification.

Id. at 902. *Wisniewski* (1) recognizes that intra-circuit uniformity is an important goal, particularly

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[3] U.S. Senator (for Arizona) Dennis DeConcini, the presiding Senate subcommittee chair for hearings creating the Federal Circuit, described petitioners' continued access to Supreme Court relief: "[t]he new court would strive to reduce inconsistencies in the law, yet parties would retain their right to file a petition with the Supreme Court […] that avenue would remain available." Dennis DeConcini, *The Federal Courts Improvement Act of 1982: A Legislative Overview*, 14 Geo. Mason L. Rev. 529, 533 (1992); *see id.* at 529 ("[O]f importance was the perceived need to strive for national uniformity in the law. Of particular interest were areas of the law which varied from circuit to circuit…").

where the same issue of law is decided differently but relatively contemporaneously; and (2) extends only so far as to discourage certiorari for cases that merely resolve "doubt about the respect to be accorded a previous decision." *Id*.

Wisniewski does not extend to *Dobyns II* negating established Federal Circuit precedent regarding the Duty, such as *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005), *Metcalf Constr. Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014), and their reliant Claims Court opinions, including *N. Star Alaska Hous. Corp. v United States,* 76 Fed. Cl. 158, 193 (2007), and *Malone v. United States*, 849 F.2d 1441, 1445–46, *modified* 857 F.2d 787 (Fed. Cir. 1988). *Dobyns II* offers no "doubt" or ambiguity that the Federal Circuit panel adopted the most limiting definition of the Duty possible, while rejecting contrary forms of the Duty found in *Centex*, *Metcalf*, and their progeny.

The Federal Circuit, by denying Petitioner's request for *en banc* review of *Dobyns II* (Pet. App. E), has refused squarely to "reconcile its internal difficulties" as *Wisniewski* envisioned, underscoring the pressing need for this Court's review.

2. To the contrary of the Government's argument, and as the Petition demonstrates, this Court frequently grants review over panel conflicts within the Federal Circuit due to that circuit's unique and exclusive federal jurisdiction. Pet. 28-29, citing *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 727 (2002); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 890

(2016); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.19 (11th ed. 2019) (the "likelihood of Supreme Court review increases" when the Federal Circuit "departs from its own precedents"); E. Gressman *et al., Supreme Court Practice* § 4.21 (9th ed. 2007); and *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 570 U.S. 947 (2013).

3. The Government effectively acknowledges that intra-Federal Circuit splits are an adequate ground for certiorari when it argues that Federal Circuit statements of the Duty are federal common law, incapable of "splitting" from state common law articulations of the Duty arising in other circuits. Opp. 13. If true, then such isolation of the federal common law of contracts from similar state common law means that the exclusive federal jurisdiction of the Tucker Act, 28 U.S.C. § 1491 prevents *Dobyns II* from percolating outside the Federal Circuit. The Government's logic means that the Federal Circuit's development of a separate (and conflicting) federal common law regarding federal questions decided exclusively within its jurisdiction elevates Federal Circuit panel splits to the equivalent importance of nationwide, inter-circuit splits meriting certiorari.

4. As the Petition establishes, this Court has granted certiorari for intra-circuit splits of authority between panels not just within the Federal Circuit, but throughout the federal circuits. Pet. 29 (collecting authorities).

II. A CLEAR INTRA-CIRCUIT SPLIT EXISTS WITHIN THE FEDERAL CIRCUIT BETWEEN *DOBYNS II* AND *CENTEX*, *METCALF*, AND THEIR CLAIMS COURT PROGENY

In an effort to claim uniformity of decisions within the Federal Circuit as to the Duty, the Government misstates the Federal Circuit's *Metcalf* decision and essentially ignores the Federal Circuit's decision in *Centex*.

1. The Government concedes that, under established federal common law, the Duty demands that each party not "act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex,* 395 F.3d at 1304. Opp. 9. *Centex* is central to the Claims Court's common rejection of a requirement that the Duty derive from express contract terms:

> 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.

Centex has factored into numerous decisions within the Federal Circuit rejecting a tethering requirement, finding instead that "the exact prohibited conduct need not be expressed" in a contract. *D'Andrea Bros., LLC v. United States*, 109 Fed. Cl. 243, 256 (2013); *see, e.g., Local Am. Bank v. United States*, 52 Fed. Cl. 184, 191–92 (2002) ("[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"). Instead of a tethering requirement, the Claims Court, "in interpreting a contract, seeks to effectuate its spirit and purpose." *N. Star Alaska Hous. Corp.,* 76 Fed. Cl. at 193; *see, e.g.*, *Malone,* 849 F.2d at 1445–46, *modified* 857 F.2d 787 (Fed. Cir. 1988).

2. The Government ignores adverse authority rejecting a tethering requirement by inaccurately portraying the Federal Circuit's *Metcalf* decision as supportive of the Government's position.

The Government sidesteps the logical foundation of *Metcalf's* fulcrum holding, 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." *Id.* at 994. The Government's logical prison is this: the doctrine of *Dobyns II* and the Government's position are that the Duty merely clarifies the operation of an express contract term to which the Duty is tethered and has no life apart from that or some other express term. In such event, however, a party cannot perform in bad faith with respect to a specific, express contract term without also breaching that term, since the Duty

and the term to which it is attached are inseparable. Thus, when *Metcalf* states that a party may violate the Duty found in a contract without breaching any express terms, *Metcalf* necessarily detaches the Duty from a contract's stated terms and rejects such a tethering requirement. Because *Dobyns II* relies so heavily on *Metcalf* —as does the Government in its Opposition—this unavoidable interpretation of *Metcalf* is fatal to the Federal Circuit's reasoning in *Dobyns II*.

Metcalf does not simply imply that conclusion. Specifically, *Metcalf* reversed "an unduly narrow view of the duty of good faith and fair dealing" (*Id.* at 992), ruling 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).

Metcalf's use of an untethered, spirit-based Duty is firmly embedded in the Claims Court's exercise of its Tucker Act powers. Rejecting the United States' efforts to ground the Duty "solely on express terms of a contract", the Claims Court 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). That understanding of the Duty has permeated throughout recent Claims Court decisions. *See Craig-Buff, Ltd., P'ship v. United States*, 69 Fed. Cl. 382, 388 (2006) ("the implied covenant has nothing to do with the enforcement of terms actually negotiated"); *see also N. Star.*, 76 Fed. Cl. at 188–89 ("[t]o 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 . . . ."); *SGS-92-X003 v. United States*, 118 Fed. Cl. 492, 524 (2014) (DEA'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").

3. Despite authority within the Federal Circuit basing the Duty on the spirit, and not the express terms of a contract, other decisions in the Federal Circuit require a plaintiff to identify specific contract language to which the Duty is attached. *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"); *P&K Contr., Inc. v. United States*, 108 Fed. Cl. 380, 396 (Fed. Cl. 2012) (citing *Centex*, 395 F.3d at 1306)); and *Alaska v. United States*, 35 Fed. Cl. 685, 704 (1996). *Centex, Metcalf*, and their progeny disagree with that line of Federal Circuit cases, calling for

review by this Court and the resolution of this split between panels.

Dobyns II makes this Federal Circuit split more extreme, and therefore completely ripe for this Court's review. *Dobyns II* does not reflect an effort by the Federal Circuit to navigate the existing common law and scholarship and harmonize the intricate, disparate intellectual concepts represented by the polarized statements of the Duty. Instead, *Dobyns II* is simply a negation of the "untethered" version of the rule, representing the latest pendulum swing in the Federal Circuit's application of a spirit- or terms-based statement of the Duty. Litigants seeking a fair and predictable application of the Duty are denied a uniform rule that the Federal Circuit consistently applies.

No further plaintiffs such as ATF Special Agent Jay Dobyns should be caught up in this dispute between Federal Circuit panels. This Court's review would resolve the increasingly arbitrary application of the Duty within the Federal Circuit and address *Dobyns II*'s evisceration of the Duty. This Court's grant of certiorari can achieve the goal of consistency of intra-circuit common law statements of the Duty that *Wisniewski* encourages.

III. THE INTER-CIRCUIT SPLIT BETWEEN FEDERAL AND STATE COMMON LAW EXPRESSIONS OF THE DUTY IS SUFFICIENT TO MERIT CERTIORARI

1. The Government cites no law to dissuade this Court from reviewing an inter-circuit split involving federal and state common law definitions of the

Duty. Indeed, the most identifiable contribution of the Federal Circuit to the traditional statement of the Duty has been merely to emphasize, as did the trial court (Pet. App. 78a), that the implied covenant of good faith and fair dealing *also applies to government actors*: "[t]he duty applies to the government just as it does to private parties." *Centex*, 395 F.3d at 1304; *Precision Pine & Timber*, 596 F.3d at 828 ("[t]he United States, no less than any other party, is subject to this covenant"); *SGS-92-X003, supra* at 524 ("Government's breach of its duty to protect the Princess was not only a breach of the duty of good faith and fair dealing, it was a breach of the implied-in-fact contract itself"); *id.* at 523 ("both Plaintiff and DEA had the expectation that DEA would protect Plaintiff while she was in the line of duty working undercover for DEA"); *Lakeshore Engineering*, 110 Fed. Cl. at 240.

2. The Government does not contest that *Dobyns II* represents a split from the Tenth,[4] Eighth,[5] and Third Circuits.[6] Whether statements of the Duty in other federal circuits are based on state common law is irrelevant to this Court's decision to grant certiorari.

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

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

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

IV. THE IMPORTANCE OF THE FEDERAL CIRCUIT EXTINGUISHING THE DUTY AS A PRACTICAL MATTER IS AN INDEPENDENT AND SUFFICIENT GROUND FOR THIS COURT'S REVIEW

1. The Government incorrectly claims that its agreement with Petitioner and its bad faith contract performance are not relevant to the interests of other law enforcement officers or sufficiently important to merit certiorari. Opp. 11. However, the Government does not contest that this Court regularly views Federal Circuit issues as having ""a special importance that warrants review by [this] Court," *Supreme Court Practice* § 4.21; see, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1754–55 (2017). The Government also does not dispute Petitioner's authority that Federal Circuit cases involving federal contracts are particularly important to this Court.[7]

2. As demonstrated by *amici* law enforcement organizations and officers, the Government's bad faith performance of a contract intended to protect the safety of Petitioner, following multiple, credible threats of death and violence against him and his family (Pet. 5-6), is of importance to state and federal law enforcement officers and to the interests of public safety. Violence against law enforcement

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[7] Pet. 34-35, *citing United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Hercules Inc. v. United States*, 516 U.S. 417 (1996); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); *United States v. Wunderlich*, 342 U.S. 98 (1951); and *United States v. Moorman*, 338 U.S. 457 (1950).

officers is at dramatically high levels (Am.Br. 11-14), and the risks faced by Alcohol, Tobacco, Firearms & Explosives agents are severe (*Id.* at 15). Undercover agents suffer extraordinary risks to themselves and their families' lives and safety. Pet. 30-34. Law enforcement officers who undertake the most dangerous public employment have a right to expect good faith conduct by their employers regarding their safety, without the need to involve legal counsel in every agreement. The importance of predictable expectations of good faith performance in federal contracts is sufficient to merit this Court's review. Pet. 34-35.

CONCLUSION

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

Respectfully Submitted,

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