No. 19-389

In the Supreme Court of the United States

JAY ANTHONY DOBYNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the federal government did not breach the covenant of good faith and fair dealing implicit in the government's settlement agreement with petitioner.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Federal Claims:

Dobyns v. *United States*, No. 08-700 (Sept. 16, 2014)

United States Court of Appeals (Fed. Cir.):

Dobyns v. *United States*, No. 15-5044 (May 1, 2015)

Dobyns v. *United States*, Nos. 15-5020, 15-5021, 17-1214 (Feb. 6, 2019), petition for reh'g denied (Apr. 24, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 915 F.3d 733. The opinion of the Court of Federal Claims (Pet. App. 17a-115a) is reported at 118 Fed. Cl. 289. A subsequent opinion of the Court of Federal Claims is reported at 127 Fed. Cl. 63.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2019. A petition for rehearing was denied on April 24, 2019 (Pet. App. 171a-172a). On July 17, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2019 (Saturday), and the petition was filed on September 23, 2019 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner began working for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as a special agent in 1987. Pet. App. 22a. From 2001 to 2003, petitioner worked undercover as part of an investigation known as Operation Black Biscuit. *Ibid.* During that investigation, petitioner "successfully infiltrated the Hells Angels Motorcycle Club and assisted in the indictment of 36 people for racketeering and murder charges." *Id.* at 2a.

Petitioner's cover was blown, however, when his identity was subsequently revealed in court. Pet. App. 2a, 23a. To protect petitioner and his family from possible threats to their safety, ATF provided fictitious identification documents—called "backstopping"—to petitioner and his wife. *Id.* at 33a; see *id.* at 24a. ATF also recommended transferring petitioner to a location away from Tucson, Arizona, where he and his family had been living. *Id.* at 22a, 24a. Although petitioner disagreed with that recommendation, ATF relocated him and his family to Santa Maria, California, after he was threatened by a member of the Hells Angels. *Id.* at 24a-25a. In the years that followed, ATF learned of other threats made against petitioner, *id.* at 25a-27a, and relocated him to Washington, D.C., and later to Los Angeles, California, *id.* at 26a.

2. In 2006, petitioner submitted a grievance to ATF, as well as a complaint to the Equal Employment Opportunity Commission, alleging that ATF had improperly investigated several threats made against him and had relocated him and his family without providing sufficient backstopping. Pet. App. 27a. Petitioner raised the same issues in a complaint to the Office of the Inspector

General of the Department of Justice. *Id.* at 54a; see *id.* at 205a-238a.

Although ATF found insufficient support for petitioner's allegations, Pet. App. 27a, it entered into a settlement agreement with petitioner in September 2007, *id.* at 174a-179a. The agreement stated that it had been "entered into by [the parties] to fully resolve and settle any and all issues and disputes arising out of [petitioner's] employment with ATF," including the grievance and various complaints he had submitted. *Id.* at 174a.

In the agreement, ATF agreed to reassign petitioner to a position in Tucson, Pet. App. 174a; to increase his paygrade, retroactive to one year before the execution of the agreement, *ibid.*; to pay him full backpay and benefits for that one-year period, as well as a lump sum of $373,000, *ibid.*; to expunge from his personnel files "any documents related to the matters being settled," *id.* at 176a; and to not pursue discipline against him for any matter "currently under investigation," *id.* at 175a. In paragraph 2 of the agreement, ATF further agreed that, "[s]hould any threat assessment indicate that the threat to [petitioner] and his family has increased from the assessment completed in June 2007," *id.* at 174a—which indicated a threat level of "medium," *id.* at 28a—ATF would "fully review the findings with [petitioner] and get input from [him] if a transfer is necessitated," *id.* at 174a. And in paragraph 10, ATF agreed that "it will comply with all laws regarding or otherwise affecting [petitioner's] employment by [ATF]." *Id.* at 177a.

In exchange, petitioner agreed to withdraw his grievance and various complaints, Pet. App. 175a, and to "release[] and discharge[]" the United States, the Department of Justice, and ATF "from any and all liability,

claims, causes of action, etc.," resulting from the subject matter of the agreement or "otherwise concerning [petitioner's] employment" with ATF, *id.* at 176a. The agreement contained an integration clause stating that it "constitutes the entire agreement by and between the parties," and that "[n]o other promises are binding unless in writing and signed by the parties." *Id.* at 177a.

3. Following execution of the settlement agreement, ATF transferred petitioner to Tucson, where he became a regional coordinator for ATF's National Integrated Ballistic Information Network. Pet. App. 32a-33a. In November 2007, ATF ordered petitioner "to return all fictitious identifications issued to [him] and his wife." *Id.* at 35a. That order was based on a determination that their safety was no longer threatened. *Ibid.* ATF's Internal Affairs Division (IAD) would later find, in a report released in 2013, that "there had been no valid reason for the withdrawal of these fictitious identities and that the safety risks to [petitioner] and his family had been ignored." *Id.* at 3a; see *id.* at 59a-61a.

In August 2008, a fire caused substantial damage to petitioner's home. Pet. App. 3a. Petitioner's wife and children were home at the time, *id.* at 36a, but were "able to escape without injury," *id.* at 3a. ATF personnel did not arrive at the scene to investigate until the day after the fire. *Id.* at 40a. Petitioner complained about ATF's handling of the investigation, *id.* at 51a, and IAD would later find, in a report released in 2012, that certain ATF employees had purposely delayed the investigation, wrongly targeted petitioner as a suspect in the arson, and withheld information from superiors, *id.* at 55a-58a.

4. In October 2008, petitioner filed suit in the Court of Federal Claims (CFC), invoking that court's jurisdiction under the Tucker Act, ch. 359, 24 Stat. 505, over "any claim against the United States founded * * * upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1). Compl. ¶ 1. In his second amended complaint, petitioner alleged that ATF had breached the 2007 settlement agreement—including its implied covenant of good faith and fair dealing, Pet. App. 162a—by, among other things, withdrawing his fictitious identification documents and failing to properly investigate the fire at his home, *id.* at 167a-168a. Petitioner sought damages to remedy the alleged breach. *Id.* at 170a; Second Am. Compl. 42-43.

Following a trial, Pet. App. 68a, the CFC entered final judgment in petitioner's favor, *id.* at 173a; see *id.* at 17a-115a. The court found "no express breach of the settlement agreement." *Id.* at 19a. In particular, the court rejected petitioner's contention that ATF had breached paragraph 10 of the agreement by violating various administrative orders promulgated by ATF governing operational and security matters. *Id.* at 71a-77a; see *id.* at 75a n.41. The court observed that paragraph 10 requires ATF to "comply with all laws regarding or otherwise affecting [petitioner's] employment by [ATF]." *Id.* at 71a (citation and emphasis omitted). The court determined, however, that the phrase "all laws" does not encompass the ATF orders allegedly violated. *Id.* at 77a.

The CFC then held that ATF had breached the implied covenant of good faith and fair dealing. Pet. App. 77a-89a. The court explained that "[e]very contract implicitly contains a covenant of good faith and fair deal-

ing, keyed to the obligations and opportunities established in the contract." *Id.* at 77a (citation omitted). The court reasoned that "the essence" of the 2007 settlement agreement was "to ensure the safety of [petitioner] and his family—and, secondarily, that ATF employees would not discriminate against [petitioner]." *Id.* at 83a. And the court concluded that ATF "undermined the intent of the agreement," *id.* at 88a, by withdrawing petitioner's backstopping, by failing to reform the agency's procedures for responding to the kinds of threats experienced by petitioner and his family, and by mishandling the investigation into the fire at his home, *id.* at 84a-88a. Those actions, the court reasoned, put petitioner's safety at risk and thus breached the implied covenant. *Id.* at 86a-88a. The court awarded petitioner $173,000 in damages as compensation for "the emotional distress, as well as pain and suffering, that [he] experienced in the period * * * while the covenant of good faith and fair dealing was being breached." *Id.* at 99a-100a.

5. The court of appeals reversed in relevant part. Pet. App. 1a-16a.

a. The court of appeals determined that ATF had not breached the implied covenant of good faith and fair dealing. Pet. App. 8a-12a. The court explained that, although "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 9a (quoting *Metcalf Constr. Co.* v. *United States*, 742 F.3d 984, 994 (Fed. Cir. 2014)), "the duty must be 'keyed to the obligations and opportunities established in the contract,' so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract," *ibid.* (quoting *Lakeshore Eng'g Servs., Inc.* v. *United*

States, 748 F.3d 1341, 1349 (Fed. Cir. 2014)). The court determined that the CFC had erred by imposing on ATF "vague" duties of "'ensur[ing] the safety of [petitioner] and his family'" and "non-discrimination" "[w]ithout grounding the supposed duties in the specific provisions of the contract." *Id.* at 11a (citation omitted; first set of brackets in original). The court explained that "[t]hese obligations went well beyond those contemplated in the express contract," and it rejected petitioner's attempt to "add additional provisions to the contract" via "[p]arol evidence," in light of the agreement's integration clause. *Ibid.*

The court of appeals acknowledged that "the alleged grievances that led to the 2007 agreement were based on ATF's security failures relating to [petitioner's] safety." Pet. App. 12a. But the court found that the agreement contained "no future promises regarding how the government would ensure the safety of [petitioner] and his family," except for paragraph 2's provision on reviewing threat assessments, which no one claimed "was undermined by [ATF's] actions." *Ibid.* The court explained that "[i]nferring an implied duty based on the supposed purpose of the 2007 agreement, without a tether to the contract terms, would fundamentally alter the balance of risks and benefits associated with the 2007 agreement." *Ibid.* And the court held that, "[b]ecause the [CFC's] judgment was not based on the government undermining any specific promise of the 2007 agreement," "the judgment for breach of the covenant of good faith and fair dealing cannot be sustained." *Ibid.*

b. The court of appeals further determined that the "judgment cannot be sustained on the alternative ground that there was an express breach of paragraph

10 of the 2007 agreement." Pet. App. 12a-13a. The court agreed with the CFC that the phrase "all laws" in paragraph 10 does not encompass "internal ATF orders" regarding "procedures for operational security" or "investigative protocols." *Id.* at 13a; see *id.* at 13a-14a. The court of appeals therefore rejected petitioner's contention that ATF had breached the agreement's express terms. *Id.* at 12a-13a.[1]

6. The court of appeals denied rehearing en banc. Pet. App. 171a-172a.

ARGUMENT

Petitioner contends (Pet. 16-35) that the court of appeals erred in determining that ATF did not breach the covenant of good faith and fair dealing implicit in the parties' 2007 settlement agreement. The court of appeals' decision is correct and does not conflict with any decision of this Court, the Federal Circuit, or any other court of appeals. Further review is unwarranted.

1. Federal common law governs contracts with the federal government. *Roedler* v. *Department of Energy*, 255 F.3d 1347, 1351 (Fed. Cir.), cert. denied, 534 U.S. 1056 (2001). As a matter of federal common law, such

[1] The court of appeals also affirmed the denial of relief under Rule 60 of the Rules of the Court of Federal Claims. Pet. App. 2a. While the appeal from the CFC's final judgment was pending, the CFC had "issued an indicative ruling noting that it would investigate whether relief under Rule 60 would be appropriate" based on alleged misconduct by governmental attorneys. *Id.* at 5a. The court of appeals remanded the case to the CFC "to determine whether such relief was warranted but otherwise retained jurisdiction." *Ibid.* On remand, the CFC denied Rule 60 relief, finding that the alleged misconduct did not affect the CFC's judgment or petitioner's ability to pursue his case. *Ibid.* The court of appeals affirmed that denial, holding that Rule 60 "cannot be used to seek sanctions." *Id.* at 7a.

contracts have been construed to contain an implied covenant of good faith and fair dealing. *Metcalf Constr. Co.* v. *United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). That implied covenant "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Ibid.* (quoting *Centex Corp.* v. *United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)) (emphases omitted).

"[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*, 742 F.3d at 994. But under federal common law, "any breach of that duty has to be connected, though it is not limited, to the bargain struck in the contract." *Ibid.* That is because, under federal common law, the duty exists to "honor[] the reasonable expectations created by the autonomous expressions of the contracting parties," not to "expand a party's contractual duties beyond those in the express contract." *Id.* at 991 (citations omitted). Thus, "an act will not be found to violate the duty (which is implicit in the contract) if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision." *Ibid.* Under federal common law, the "implied duty of good faith and fair dealing" therefore "is limited by the original bargain: it 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." *Ibid.*

Applying those principles here, the court of appeals correctly found no breach of the implied covenant of

good faith and fair dealing under the particular circumstances of this case. Pet. App. 8a-12a. Petitioner alleges (Pet. 11-15) that ATF breached the implied covenant by withdrawing his fictitious identifications and by failing to properly respond to the fire at his home. But as the court explained, those allegations bear no connection to "any specific promise of the 2007 agreement." Pet. App. 12a. The only provision of the 2007 agreement that contains any "future promise[] regarding how the government would ensure the safety of [petitioner] and his family" is paragraph 2, *ibid.*, which provides that if "any threat assessment" should indicate an "increased" threat to petitioner and his family since the "assessment completed in June 2007," ATF "agrees to fully review the findings with [petitioner] and get input from [him] if a transfer is necessitated," *id.* at 174a. As the court observed, "[t]here is no claim here that this provision was undermined by [ATF's] actions." *Id.* at 12a. Indeed, ATF's actions—which had nothing to do with the findings of an increased-threat assessment—did not deprive petitioner of any benefits under that provision.

Petitioner does not dispute that the actions he alleges constituted a breach of the implied covenant are not connected to any specific provision of the 2007 agreement. Rather, he contends (Pet. 26) that any requirement of such a connection should be rejected; in his view (Pet. 30), ATF's actions should be deemed to have breached the implied covenant because they violated the purported "spirit" of the contract. But as the court of appeals explained, "[i]nferring an implied duty based on the supposed purpose of the 2007 agreement, without a tether to the contract terms, would fundamentally alter the balance of risks and benefits associated

with the 2007 agreement." Pet. App. 12a. If it were unnecessary to show that an alleged breach of the implied covenant "interfere[d] with the other party's performance" of a particular contractual duty, or "destroy[ed] the reasonable expectations of the other party regarding the fruits" of a particular contractual provision, the implied covenant would risk becoming a doctrine for expanding—rather than simply honoring—the parties' contractual bargain. *Metcalf*, 742 F.3d at 991 (citation and emphases omitted).

Petitioner expresses concern (Pet. 30) that the decision below will have broad consequences for "cases dealing with undercover law enforcement personnel." That concern is misplaced. The decision below turned on the provisions of the particular agreement in this case. Pet. App. 11a-12a. Indeed, "understanding the allocation of benefits and risks by the specific contract provisions at issue" is "central[]" to determining whether the implied covenant has been violated. *Metcalf*, 742 F.3d at 992 n.1; see *id.* at 992 (emphasizing "the need to take account of the particular contract at issue in considering a claim of breach of the good-faith-and-fair-dealing duty implicit in that contract"). Tying the duty to express contract provisions is critical because "[w]hat is promised or disclaimed in a contract helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance.'" *Id.* at 991 (citation omitted). Because "the implied duty of good faith and fair dealing depends on the parties' bargain in the particular contract at issue," *id.* at 994, petitioner is wrong to contend that the decision below will have far-reaching consequences beyond this case.

2. Petitioner contends (Pet. 19-24, 28-30) that this Court's review is warranted to resolve a conflict between decisions of the Federal Circuit. "It is primarily the task of a Court of Appeals," however, "to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). That is so even on matters that fall within the exclusive appellate jurisdiction of the Federal Circuit.

In any event, no intra-circuit conflict exists. Petitioner asserts (Pet. 19-20) that the decision below conflicts with the Federal Circuit's decisions in *Metcalf*, *supra*, and *Centex*, *supra*. But the Federal Circuit's decision in *Metcalf* rests on the same principle as the decision below: that although "a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract," "any breach of that duty has to be connected, though it is not limited, to the bargain struck in the contract." 742 F.3d at 994; see Pet. App. 8a-9a (quoting *Metcalf*, *supra*, throughout the discussion of applicable law). The Federal Circuit's decision in *Centex* reflects the same principle; in that case, the Federal Circuit concluded that the government had breached the implied duty by "interfering with the plaintiffs' enjoyment of the *benefits contemplated by the contract*." 395 F.3d at 1306 (emphasis added).[2] Although the Federal Circuit in that case, unlike in this one, found a breach of the implied duty, it did so not because it applied a different legal

[2] Petitioner also contends (Pet. 20-23) that the decision below implicates a conflict between decisions of the CFC. But a conflict between CFC decisions (or between a CFC decision and a decision of the Federal Circuit) would not warrant this Court's review, even if such a conflict existed. See Sup. Ct. R. 10(a).

standard, but because of the particular "benefits contemplated by the contract" in that case. *Ibid.*; see Pet. App. 10a (distinguishing *Centex*, *supra*).

3. Petitioner also contends (Pet. 24-27) that this Court's review is warranted to resolve a conflict between the decision below and decisions of the Third, Eighth, and Tenth Circuits. None of the decisions of other circuits petitioner cites (Pet. 24-26), however, involved a contract governed by federal common law. Rather, each of those other decisions involved a contract governed by the common law of a particular State. See *Black Horse Lane Assoc., L.P.* v. *Dow Chem. Corp.*, 228 F.3d 275, 288 (3d Cir. 2000) (New Jersey law); *Cox* v. *Mortgage Elec. Registration Sys., Inc.*, 685 F.3d 663, 670-672 (8th Cir. 2012) (Minnesota law); *O'Tool* v. *Genmar Holdings, Inc.*, 387 F.3d 1188, 1195 (10th Cir. 2004) (Delaware law). And the implied covenant of good faith and fair dealing need not have the same meaning across the laws of different jurisdictions. Indeed, this Court has observed that, "[w]hile most States recognize some form of the good faith and fair dealing doctrine, it does not appear that there is any uniform understanding of the doctrine's precise meaning." *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 285 (2014). Given that none of the decisions of the other circuits involved the same body of law at issue here, any asserted conflict with those decisions does not warrant this Court's review.

In any event, each of the other circuits' decisions reflects the same principle the Federal Circuit applied here, Pet. App. 9a: that although a breach of the implied covenant does not require "violating an express term of the agreement," any breach must still constitute an effort "to deny the other side the fruits of the parties' bargain," lest the implied covenant "be used to forge a new

agreement beyond the scope of the written contract." *O'Tool*, 387 F.3d at 1195 (citations omitted); see *Black Horse*, 228 F.3d at 288 (explaining that, under New Jersey law, the implied covenant prohibits either party from "do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract") (citation omitted); *Cox*, 685 F.3d at 670 (explaining that, under Minnesota law, a breach of the implied covenant must be "'based on the underlying . . . agreements' because the implied covenant * * * extends to actions within the scope of the underlying enforceable contract") (citation omitted). Petitioner's reliance on those other circuits' decisions is therefore misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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