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

BRIEF OF NATIONAL ASSOC. OF POLICE ORGS., ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ASSOC. OF RETIREES, INT'L ASSOC. OF UNDERCOVER OFFICERS, RICHARD W. HARPER, ROBERT R. ALMONTE, SAFE CALL NOW, SURVIVE FIRST, INC., AND THE ARIZONA ASSOCIATION FOR JUSTICE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND CODES

TREATISES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

STATEMENT OF THE *AMICI CURIAE*

The National Association of Police Organizations, The Alcohol, Tobacco, Firearms and Explosives Association of Retirees, The International Association of Undercover Officers, Richard W. Harper, Robert R. Almonte, Safe Call Now, Survive First, Inc., and The Arizona Association for Justice, submit this brief as *amici curiae* in support of petitioner Jay Anthony Dobyns.[1] Amici urge the Court to grant the petition to reverse the Federal Circuit's opinion reversing and vacating the U.S. Court of Federal Claims' opinion and judgment finding that the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") violated the covenant of good faith and fair dealing in an agreement between it and Dobyns. The agreement's intent was to provide for his safety and protection from threats of death and violence resulting from his employment duties as a federal undercover agent.

[1] Written consents from both parties to the filing of *amicus curiae* brief in support of either party were timely requested and were received. In accordance with Supreme Court Rule 37.6, the *amici curiae* avow that no counsel for either party has authored this brief either in whole or in part. Additionally, no party or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief, which was entirely funded by the Law Enforcement Legal Defense Fund, 2560 Huntington Avenue, Alexandria, Virginia, 22303, an IRC § 501(c)(3) charitable organization.

Interest of *Amici Curiae*

Amici are organizations and individuals possessing a strong interest and professional background in administering and interpreting agreements regarding federal employees in general, and in particular, law-enforcement agents and officers.

Amici represent members who have confronted dangers related to their law-enforcement missions, both during and after the missions. *Amici* and their law-enforcement members have encountered various forms of agreements between the United States and law-enforcement personnel where assumptions of good-faith performance by the federal government form a key ingredient to an agreement's success or failure.

As the *amici* members have found first-hand, the agent and the government employer commonly view law-enforcement agreements regarding employment or mission safety as secondary to successfully executing their law-enforcement objectives. Thus, *amici* often encounter agreements in the law-enforcement industry substantially different from the "norm" of employment or commercial contracts. For law-enforcement officers represented by the *amici*, pursuing public safety by preventing and timely responding to crimes is the main consideration. And so, safety and protection of individual law-enforcement officers often depend on the government's good-faith protection of those who keep our nation safe.

All *amici* have a strong interest in ensuring that the covenant of good faith and fair dealing implied in all contracts, including contracts between private parties

(such as law-enforcement officers and the United States, rests on the expectations of the parties and the circumstances and context of the agreements. Similarly, *amici* have a strong interest in opposing legal precedents such as the *Dobyns* Federal Circuit opinion, limiting the covenant of good faith to an interpretation of the express terms of agreements that often little resemble standard commercial or employment agreements.

Amici filing this brief are:

- The National Association of Police Organizations (NAPO), a coalition of American police unions and associations, was organized to advance the interests of law-enforcement officers through legislative advocacy, political action, and education. Founded in 1978, NAPO is the strongest unified voice supporting American law-enforcement officers. NAPO represents over 1,000 police units and associations, and over 241,000 sworn law-enforcement officers dedicated to vigorous and effective representation on behalf of American law-enforcement officers.

- The Alcohol, Tobacco, Firearms and Explosives Association of Retirees ("AFTAR"), established in 2001, provides association and peer support for agents and other employees with current or anticipated earned retirement from ATF.

- The International Association of Undercover Officers ("IAUO") promotes the safety, professionalism and training of undercover law-enforcement personnel. The non-profit association has 3,960 members and facilitates networking and sharing

investigative techniques among law-enforcement organizations and personnel. IAUO facilitates sharing up-to-date information about criminal organizations, new law-enforcement equipment and techniques. IAUO also sponsors state-of-the-art training programs for undercover agents.

- Richard W. Harper is a retired 34-year veteran and former Captain of the Tucson Police Department ("TPD"). He was the Training Division Commander at TPD for 1,200 law-enforcement employees. His TPD background includes the Violent Crimes Unit and hostage-negotiations team and directing "protective" activities for officers targeted by threats. He lectures on criminal justice at the University of Arizona, Arizona State University, and Northern Arizona University.

- Robert R. Almonte worked 25 years with the El Paso Texas Police Department and retired as a Deputy Chief overseeing the Major Crimes Bureau. He served as the United States Marshal for the Western District of Texas and as executive director and president of the Texas Narcotic Officers Association. He currently operates a law enforcement consulting company (Robert Almonte, LLC).

- Safe Call Now is a non-profit corporation established in 2009 in Washington State to provide mental-health crisis services to law-enforcement officers, first responders, and other public-safety employees. It was spearheaded by Washington State Lt. Governor Bradley Owen, U.S. Representative Dave Reichert, and Obama Administration Drug Czar Gil Kerlikowski.

- Survive First, Inc., is a resource for first responders and their families to speak confidentially with former law-enforcement officers, fire fighters, first-responder professionals, and/or mental-health care providers experienced in law-enforcement mental-health challenges.

- The Arizona Association for Justice is an Arizona trial lawyers association founded in 1964, with a core mission to promote an Arizona civil-justice system accessible to everyone. It provides attorneys with resources, information, professional support, and networking to maximize their effectiveness.

SUMMARY OF ARGUMENT

Amici support Dobyns' Petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit in *Dobyns v. United States*, 915 F.3d 733 (Fed. Cir. 2019), reversing the United States Court of Federal Claims in *Dobyns v. United States*, 118 Fed. Cl. 289 (2014). *Amici* urge this Court to hold that the implied covenant of good faith and fair dealing arises from the spirit of contractual agreements, and not merely from expressly-stated contract terms.

This Court has described the ubiquity of the principle that every contract has an implied covenant of good faith and fair dealing: "Of course, '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'" *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010) (quoting *Restatement (Second) of Contracts* § 205 (1981)). Indeed, all American jurisdictions universally recognize that the covenant of good faith and fair dealing is implied in every contract: "It is a fundamental principle

of law that in every contract there exists an implied covenant of good faith and fair dealing." *Lowell v. Twin Disc., Inc.*, 527 F.2d 767, 770 (2nd Cir. 1975).

While courts have applied good-faith-and-fair-dealing concepts for centuries, the usual formulation of an implied covenant of good faith and fair dealing in every contract crystallized in the 1930s, with the New York State Court of Appeals leading the way:

> In the last analysis those cases only apply the principle that in every contract 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, which means that in every contract there exists an implied covenant of good faith and fair dealing.

Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933).[2]

Recognition of the covenant of good faith and fair dealing evolved as separate and apart from the express terms of the contract.[3] Violation of the express

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[2] According to Westlaw, this relevant part of *Kirke* has been cited in two hundred and forty-two separate state and federal decisions, with the latest citations in 2019.

[3] The Court of Claims explained the traditional expression of the common-law implied covenant of good faith and fair dealing:

> Originally applied in late Nineteenth Century common law contract cases, *see, e.g.,* E. Allan

contractual provision could be redressed through actions for breach of contract. But actions which did not violate an express provision but which had the effect of destroying the purpose of the contract or the benefits which a party was to have received from the contract could be redressed only by recognition of an implied covenant that prohibited actions not expressly forbidden by contractual language but which would destroy or significantly impair the contractual promises which were made.[4]

> Farnsworth, Farnsworth on Contracts § 7.17 (2004), the covenant gained increased acceptance upon the adoption of the Uniform Commercial Code in 1951. U.C.C. § 1–201(b)(20). The covenant was then adopted by the American Law Institute, as § 205 to the Restatement (Second) of Contracts in 1979: "Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and execution." The comments to § 205 refer to the definition of "good faith" in the Uniform Commercial Code, which says, "'good faith' means honesty in fact in the conduct or transaction concerned." *See also Ophthalmic Surgeons, Ltd. v. Paychex, Inc.,* 632 F.3d 31, 40 (1st Cir.2011); Robert L. Summers, "The General Duty of Good Faith—Its Recognition and Conceptualization," 67 Cornell L. Rev. 810 (1982).

Dobyns, 118 Fed. Cl. at 316 n.42.

[4] Amici suggest the following illustration. Suppose D contracts with P to supply and ship an essential product to P at regular monthly or yearly intervals. But D finds the contract will not produce all of the profit that it had expected and wishes to end its obligation. It therefore proceeds to purchase from X the only facility that could handle the shipments. After destroying that facility, D refuses to go forward with the obligation, defending on

A reason central to the Petition and to the *amici's* support is the Court of Claims' acknowledgment of the importance and universality of the covenant of good faith and fair dealing:

> "Every contract implicitly contains a covenant of good faith and fair dealing, keyed to the obligations and opportunities established in the contract." [….] The covenant imposes on each party a "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." [….] The United States, no less than any other party, is subject to this covenant.

Dobyns, 118 Fed. Cl. at 316-317 (citations omitted).

The Court of Claims correctly described the implied covenant of good faith and fair dealing as not restricted to the express terms of the contract, citing extensive authority within the Federal Circuit and the Eighth Circuit. *See, Dobyns*, 118 Fed. Cl. at 318 n.46, citing *Chevron v. United States,* 116 Fed. Cl. 202, 206 (2014); *N. Star Alaska Hous. Corp. v. United States,* 76 Fed. Cl. 158, 188 (2007); *Craig–Buff Ltd. P'ship v. United States,* 69 Fed. Cl. 382, 388 (2006) ("a claim for a breach of the implied covenant of good faith and fair

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the grounds of impossibility of performance. Nothing expressed in the contract prohibited D from purchasing the shipping facility and destroying it; nothing that is, except the duty of good faith and fair dealing.

dealing is not limited to specific contract terms"); *Nat'l Australia Bank v. United States,* 63 Fed. Cl. 352, 354–55 (2004), *aff'd, in part, rev'd in part on other grounds,* 452 F.3d 1321 (Fed. Cir. 2006); *Cuyahoga Metro. Hous. Auth. v. United States,* 65 Fed. Cl. 534, 543 (2005); *Bluebonnet Sav. Bank, F.S.B. v. United States,* 266 F.3d 1348, 1355 (Fed.Cir.2001); *United States v. Basin Elec. Power Coop.,* 248 F.3d 781, 796 (8th Cir. 2001), *cert. denied,* 534 U.S. 1115 (2002) ("Since good faith is merely a way of effectuating the parties intent in unforeseen circumstances, the implied covenant has 'nothing to do with the enforcement of terms actually negotiated'").

The trial-court understood the covenant implied in the agreement between Petitioner Dobyns and ATF derived from an extensive array of evidence about the parties' intent to protect a law-enforcement officer from active and dangerous threats of death and violence. The Federal Circuit, however, disregarded both the good-faith-and-fair-dealing covenant and the reality of how the federal government contracts with its employees, including law-enforcement officers. The good-faith-and-fair-dealing covenant is not background noise. It is a crucial part of every employment contract. But under the Federal Circuit's opinion, for law-enforcement officers and their loved ones who are often in extreme peril, the implied good-faith-and-fair-dealing covenant vanishes.

If allowed to stand, the Federal Circuit's *Dobyns* opinion will shred the last and best safeguard that federal law-enforcement officers have from the federal government's bad-faith performance of its contract obligations. In the process, mission success and public

safety may be compromised, because agents will fear that their safety and the safety of their families during and after a criminal investigation is not a priority for the federal government, unless reduced to clear contract terms. The nation's brave men and women protecting all of us deserve and expect that the implied covenant of good faith and fair dealing always applies, especially when they and their loved ones are in peril because of dangerous work conditions. This Court should grant the Petition and reverse the Federal Circuit's ruling.

ARGUMENT

I. The Minimal Standards of Good Faith Required of Law-Enforcement Employers in the *Dobyns* Federal Circuit Opinion Endanger Law-Enforcement Officers and Undermine Mission Success

A. The Risks Posed to Petitioner Dobyns from ATF's Conduct Constitute Unacceptable Bad Faith by the United States

Amici need say little to convince anyone that ATF's conduct towards the safety of Petitioner, an ATF undercover agent, was atrocious. Most startling is the clear resolve of ATF and the Department of Justice to defend actions endangering an active agent under threat from criminal suspects. Career law-enforcement officers such as the *amici* reasonably question whether such events could happen to them. Those same *amici* members, in light of the strictness of the Federal Circuit's requirements to prohibit bad faith by a government employer, may reasonably question whether any law-enforcement officer could prevent

such endangering conduct as a contractual and practical matter.

The facts demonstrate the need for this Court's clear statement that the good-faith-and-fair-dealing covenant must derive from the spirit and circumstances of a contract, and not exclusively from express contract terms, often drafted by skillful federal contracting officers. A clear articulation of a good-faith-and-fair-dealing covenant of good faith based on the spirit of the contract between a government employer and an employee law-enforcement officer, will advance that officer's safety interests. Further, this clarification of the source of the covenant will help ensure that effective law-enforcement recruitment is successful for years to come.

B. A Definition of the Covenant of Good Faith and Fair Dealing Based on a Contract's Spirit is Critical to Agreements Addressing Dangers to Law-Enforcement Officers and Operations

1. Law Enforcement Carries Inherent Dangers Requiring That Government Employers Act with Good Faith as Determined by the Unique Circumstances of an Officer's Assignment

The dangers Dobyns experienced as part of his ATF undercover duties, and the threats he encountered after prosecution of criminal suspects, are not limited to high-profile criminal investigations. Instead, those risks are part of every investigation of both violent and "non-violent" criminals.

One of the most alarming statistics of a 2017 "Policing Strategy Summit" is the increasing homicides of police officers:

> 2016 will be marked as the year in which more officers were killed than during the previous five years, and 21 officers were killed in ambush attacks. This unacceptable development must be addressed rigorously and fully.[5]

Similarly, FBI statistics for law-enforcement officers killed in the line of duty during 2018 support the concerns expressed by Petitioner and *amici*:

> The 55 felonious deaths occurred in 28 states and in Puerto Rico. The number of officers killed as a result of criminal acts in 2018 was 9 more than the 46 officers who were feloniously killed in 2017. The 5- and 10-year comparisons show an increase of 4 felonious deaths compared with the 2014 figure (51 officers) and an increase of 7 deaths compared with 2009 data (48 officers).
>
> *Officer Profiles*. The average age of the officers who were feloniously killed was 37 years old. The victim officers had

[5] Edwin Meese III and John Malcolm, "Policing in America: Lessons from the Past, Opportunities for the Future, THE HERITAGE FOUNDATION, Sept. 18, 2017 (https://www.heritage.org/crime-and-justice/report/policing-America-lessons-the-past-opportunities-the-future).

> served in law enforcement for an average of 10 years at the times of the fatal incidents.[6]

Those statistics prove the dramatically different potential consequences between bad-faith performance by a government employer in law enforcement versus other governmental employers or contract partners in normal commercial settings. But the Federal Circuit's opinion neither acknowledges nor demonstrates any concern for the unique and heightened workplace risks law-enforcement officers confront every day.

Again, the FBI explains[7] the risks and consequences of danger that law-enforcement officers faced throughout 2018:

> *Circumstances.* Of the 55 officers feloniously killed:
>
> - 23 died as a result of investigative or enforcement activities
> - 8 were performing investigative activities
> - 6 were involved in tactical situations

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[6] "FBI Releases 2018 Statistics on Law Enforcement Officers Killed in the Line of Duty", FBI NATIONAL PRESS OFFICE, May 6, 2019 (https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2018-statistics -on-law-enforcement-officers-killed-in-the-line-of-duty)

[7] *Id.*

    - 3 were interacting with wanted persons
    - 3 were investigating suspicious persons or circumstances
    - 2 were conducting traffic violation stops
    - 1 was handling a person with mental illness
- 11 were ambushed (entrapment/premeditation)
    - 6 were involved in pursuits
    - 4 were involved in foot pursuits
    - 2 were involved in vehicular pursuits
- 4 were responding to crimes in progress
    - 2 were burglaries in progress
    - 1 was a report of a person with a firearm
    - 1 was reported in the category of other crime against property.
- 3 were involved in arrest situations and were attempting to control/handcuff/restrain the offender(s) during the arrest situations
- 2 were on administrative assignments and were performing prisoner transports
- 2 were assisting other law-enforcement officers with foot pursuits
- 2 were responding to disorders or disturbances
    - 1 was responding to a disturbance call
    - 1 was responding to a domestic violence call
- 1 was performing traffic control

- 1 was involved in an unprovoked attack

Even ATF, Dobyns' employer and the culpable actor in his Court of Claims lawsuit, acknowledges the risks ATF agents undertake in the course of their jobs:

> Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) special agents are the backbone of the ATF criminal enforcement mission. The special agent position is not only unique, but ultimately one of the most challenging in federal law enforcement. ATF is a law enforcement agency under the Department of Justice.
>
> ATF special agents are highly trained to investigate violations of federal laws relating to firearms, the criminal use of explosives, arson, the diversion of alcohol and tobacco, and related violent crimes.
>
> The special agent profession is exciting and rewarding, but also requires toughness both physically and mentally. The position requires rigorous training, personal risks, irregular hours, and extensive travel. Special agents are subject to reassignment to any ATF office in the United States, to include any U.S. territory or ATF overseas assignment.[8]

[8] "Fact Sheet – Special Agents," Bureau of Alcohol, Tobacco, Firearms and Explosives, May, 2019 (https://www.atf.gov/resource-center/fact-sheet/fact-sheet-special-agents).

Amici view with alarm the fact that the realization of known credible risks of death and violence targeting a federal agent was made more likely by ATF's actions, and that the Federal Circuit defended ATF's actions by eliminating the longstanding roots of the good-faith-and-fair-dealing covenant in the spirit, rather than the express language, of a contract. In light of the Federal Circuit's decision, it is realistic to ask: Why would anyone jeopardize his or her own health and safety for federal employers who endanger them, or for a federal court system placing 100% of the responsibility to ensure contractual safety protections on the agent?[9] That question, instead of a reasonably applied, traditional statement of the good-faith-and-fair-dealing covenant, is the logical outcome of *Dobyns v. United States*.

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[9] Further deterioration of law-enforcement recruitment would harm and already strained hiring process:

> Many agencies are already shorthanded, and the constant maligning of law enforcement officials hurts efforts to recruit high-quality police officers. Retention problems are putting pressure on police chiefs to lower their recruiting standards to fill their staffing needs. This, combined with the current and expected retirement of a large number of experienced officers and the consequent loss of institutional knowledge, makes effective training regimens especially important.

Fn. 5, *supra*.

2. The Federal Circuit's Opinion Ignores Those Inherent Risks and Disregards the Need for a Covenant of Good Faith and Fair Dealing Reflecting the Realities of Law-Enforcement Employment and Missions

The Federal Circuit's interpretation of the good-faith-and-fair-dealing covenant shreds that strong, venerable contract safeguard. Law-enforcement officers are rarely represented by attorneys when negotiating agreements to protect their on-duty and off-duty safety, or that of their families. Instead, those officers depend on trust based on a recognition of the daily risks they encounter.

The Federal Circuit's indifference to the risks law-enforcement officers accept in the name of public safety could not be more apparent when it concedes that it "is true that the alleged grievances that led to the 2007 agreement were based on ATF's security failures relating to Dobyns' safety." *Dobyns*, 915 F.3d at 740. And yet the Federal Circuit severs its opinion from the realities of law enforcement when it writes that, with no "grounding [of] the supposed duties in the specific provisions of the contract, the Claims Court imposed a vague duty of 'ensur[ing] the safety of Agent Dobyns and his family' on the government as well as non-discrimination.'" *Id.*

That duty is not "vague"; it is an implied requirement to act in good faith in specific ways depending on the circumstances of the contract, which a trier of fact must determine. In Dobyns' case, that "*vague duty*" is to not take actions that can lead to the death of a federal agent and his or her family – a duty that *amici* know is concrete. The Federal Circuit opinion and standard for the covenant of good faith, at

least with respect to law enforcement, bears no practical resemblance to the reality of law-enforcement work. It also ignores the central duty of any just government to protect all of its people—especially those putting themselves in danger to protect others.

Amici urge this Court to reject the Federal Circuit's conclusion, that any finding of breach of the good-faith-and-fair-dealing covenant must be "tethered" to an express contract provision. *Id. Amici* ask this Court to apply the universal principle that the good-faith-and-fair-dealing covenant arises in the spirit of the contract, as discerned by the testimony about the facts and context of the agreement, as articulated in *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1195 (10th Cir. 2004). In so doing, this Court will return the covenant to its traditional definition, force, and importance,[10] as fully embraced by the Federal Circuit decisions of *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014), and *Centex Corp. v. United States,* 395 F.3d, 1283, 1304 (Fed. Cir. 2005).

Such a ruling by this Court would also harmonize the Federal Circuit with the Eighth Circuit decisions of *Cox v. Mortgage. Electric Registration Syst., Inc.,* 685 F.3d 663, 670–71 (8th Cir. 2012),[11] and *S. Wine and Spirits of Nev. v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 534 (8th Cir. 2011), and with the Third Circuit

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[10] *See*, *e.g.*, *Chicago Rock Island & Pacific R.R. Co. v. Howard*, 74 U.S. (7 Wall.) 392, 413 (1868).

[11] To which *Amici* add the Court of Claims' partial reliance on the Eighth Circuit decision of *Basin Elec. Power Coop.*, 248 F.3d at 796, cited at *Dobyns*, 118 Fed. Cl. at 317.

decision of *Black Horse Lane Assoc., L.P., v. Dow Chemical Corp*., 228 F.3d 275, 287 (3d Cir. 2000).

3. Harmonizing the Unique Risks of Law Enforcement with a Covenant of Good Faith Rooted in the Spirit, and not the Express Terms of the Contract, is Entirely Consistent with Dominant Statements of the Covenant Within and Outside the Federal Circuit

Amici concur with the statement of the covenant of good faith set forth in Petitioner's brief. Prior precedential Federal Circuit opinions expressly adopted a rule of the covenant of good faith that the *amici* endorse in federal contracts with law-enforcement officers. *Centex Corp.*, 395 F.3d at 1304. In contrast, the Federal Circuit *Dobyns* opinion is adverse to the safety interests of the *amici*.

Previous Federal Circuit opinions found that the covenant of good faith and fair dealing prohibits actions "that, though not proscribed by the contract expressly, are *inconsistent with the contract's purpose* and deprive the other party of the contemplated value." *Metcalf,* 742 F.3d at 991 (emphasis added); *in accord*, *CanPro Invs. Ltd. v. United States*, 131 Fed. Cl. 528, 531–32 (2017). And within the Federal Circuit, as the Claims Court has stated, the covenant requires "the court, in interpreting a contract . . . to effectuate its spirit and purpose." *N. Star Alaska Housing Corp. v United States,* 76 Fed. Cl. 158, 193 (2007).

As Dobyns noted, the Court of Claims has given more protections in an oral contract with a DEA informant than ATF and the Federal Circuit provided to Dobyns—and did that without the "tethering" requirement in

Dobyns. *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 574. Petitioner similarly correctly describes the need for a broadly-rooted covenant of good faith and fair dealing for undercover agents following the disclosure of their identity. *Swanner v. United States*, 309 F. Supp. 1183, 1186 (M.D. Ala. 1970) (in a strikingly similar case, finding a duty on the part of the federal government to protect an IRS undercover agent and his family after death threats the IRS failed to address, with the agent's home subsequently bombed while he and his family were inside).

Extending the rule of those cases, and those on which the Court of Claims relied, through affirmance of the spirit of the contract as the source of the good-faith-and-fair-dealing covenant, should be the result of the *Dobyns* case, and not the destruction of the essential and unique protections of the covenant in law-enforcement personnel agreements.

C. The Claims Court Described ATF's Disregard of Agent Safety That is Particularly Alarming to *Amici*

Both before and after the August 10, 2008 arson of Dobyns' home, ATF intentionally endangered him and dealt with him in bad faith under the contract.

Regarding matters appearing in the Court of Federal Claims opinion but that are not featured in Petitioner's brief, *amici* note two things.

First, the trial-court record shows the government abandoned Dobyns after the arson, a clear disregard of

his and any similarly-situated agent's safety. The Court of Claims explained that that ATF's Internal Affairs Division ("IAD") had concluded that:

- The Phoenix Field Division's leaders, including its special agent in charge, assistant special agent in charge, and Agent Higman, delayed ATF's response to the arson at Dobyns's home in ways harming the arson investigation.

- The special agent in charge, assistant special agent in charge, and Agent Higman had targeted Dobyns as a suspect in his home's arson, even after highly-respected agents within the Phoenix Field Office concluded otherwise based on interviews and arson-scene evidence.

- The Phoenix Field Division's investigators had ignored credible suspects.

- Agent Higman provided a briefing to the FBI (when it took over the investigation from ATF) including false information and portraying Dobyns as ATF's lead suspect in the fire, although Agents Hildick and Moreland had eliminated Dobyns as a suspect based on their interviews with him and his family and their review of the arson-scene evidence.

- On October 29, 2012, ATF's Professional Review Board considered the investigative report and, based on the IAD's conclusions, proposed that the assistant special agent in charge be removed from his position and, in fact, from federal service.

- On November 30, 2012, ATF's Professional Review Board issued a similar memorandum to the special agent in charge and proposed his removal from his position and from federal service.

Dobyns, 118 Fed. Cl. at 307-309.[12]

That conduct, in the eyes of the professional law-enforcement *amici*, is inexcusable and outside any bounds of good faith and fair dealing in any agreement regarding the safety of an undercover law-enforcement officer. The Claims Court noted that "ATF agreed 'that it will comply with all laws regarding or otherwise affecting [Dobyns'] employment by the Agency.'" *Dobyns*, 118 Fed. Cl. 289, 298. In so stating, the Court of Claims, unlike the Federal Circuit, clearly understood the risks to law-enforcement officers that ATF's conduct poses to the lives of agents when

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[12] Regarding the credibility of the IAD report of investigation regarding ATF's response to the arson at Dobyns' home, the Court of Claims wrote:

> On the other hand, the court attaches considerable weight to the testimony of Agent Trainor, who authored the 2012 and 2013 IAD reports. . . . [T]here is every indication that Agent Trainor's reports were thorough, well–documented and accurately reflected the substance of the more than 4,000 pages of documents, electronic messages, depositions and notes of interview that he reviewed and summarized in his two reports. Those reports, indeed, corroborate hundreds of critical facts that are otherwise reflected by the testimony and documents in the record.

Dobyns, 118 Fed. Cl. at 312.

expectations of good-faith performance in compliance with laws affecting an agency are breached:

> [F]inally, 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.
>
> The ATF officials who entered into the Settlement Agreement with Agent Dobyns understood all this, as they had years of law enforcement experience. They recognized that this was no ordinary employment dispute and that the $373,000 being paid to Agent Dobyns related to the fundamental failure of ATF officials to act in conformity with the assurances that had been given to Agent Dobyns and his family—the same assurances that were given to all ATF agents in the form of policies, procedures and orders designed to promote agent safety. The record makes this understanding clear.

Id. at 319.

There is no ambivalence in the Court of Claims' opinion that the purpose of the agreement between Dobyns and ATF was other than for his protection and safety. *Id.* In that context, the government's intentional conduct is outrageous. The Court of Claims quotes from an email of an ATF arson-response supervisor, who happened to be the Assistant Special Agent in Charge of the Phoenix Field Division. That email shows that

ATF not only violated any expectation of Dobyns' safety, but did so knowingly:

> [. . . .] [I]t's not possible in this lifetime to control the Director, Deputy Director, ADs or so on down the chain from getting briefed on this case or contacting the homeowner and/or his family.
>
> However, what I can control (and fully intend to control) is the specific information that is briefed to the chain of command.
>
> [. . . .]I stand with you and your agents on this, so not releasing significant details (to anyone) that we may discover that would compromise our work won't come from me. I'll go out of my way to conceal them. [….] I have enough L.E. [law enforcement] and Intelligence community experience to know how to protect myself and my subordinates. (I can hide the ball with the best of them).

Id. at 303-204.[13]

The Court of Federal Claims described ATF supervisors wrongfully pursuing a decorated agent for arson after he had been cleared by experienced

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[13] Regarding the intentionality of ATF's misconduct, and therefore *scienter* for bad faith, the Court of Claims wrote: [I]it appears that ASAC Gillett purposely attempted to shield critical investigative information from senior ATF officials. . ." [Fn. 34 omitted]. *Id.*, at 312.

investigative agents on the scene, with the ATF failing to pursue the arsonist(s) who almost killed Dobyns' wife and children in their flame-engulfed home. The Court of Claims correctly found that violated the good-faith-and-fair-dealing covenant in the ATF/Dobyns contract.

As the Federal Circuit acknowledged, Dobyns and ATF resolved Dobyns' disputes over ATF's past failures to protect his safety related to his work as an ATF undercover agent. That is the basis of the contract and the spirit of the good-faith-and-fair-dealing covenant, which Dobyns, the Claims Court, and most of the Federal Circuit and Court of Claims common law appreciate. The Federal Circuit, in concluding that specific terms of the contract did not anticipate ATF's exact form of misconduct undermining the agreement with Dobyns, operates under a viewpoint that is uninformed and heedless of the daily dangers facing law-enforcement officers and the need for trust, good faith, and fair dealing in all aspects of the agents' relationships with their government employers.

The government's duty was consistent – to act in good faith. What is required by good faith will, of course, vary with the facts. The Court of Claims' factual findings show that the government did breach the implied covenant. The Federal Circuit has effectively ignored those facts.

The Federal Circuit opinion in *Dobyns* is an outlier and an incorrect view of the good-faith-and-fair-dealing covenant and must be reversed. The effectiveness and safety of federal law-enforcement agents, and state and local agents whose employers will take guidance from the Federal Circuit's opinion, depend on its reversal.

D. Left Undisturbed, the Federal Circuit's Opinion Undermines the Interests of Law Enforcement Nationwide

Amici are seasoned law-enforcement members from across America. We speak with authority when we state that Jay Dobyns and his courage and success in law enforcement represents the best of us, and that ATF's actions in endangering Dobyns and his family represents the worst. Why the U.S. Department of Justice chose Dobyns' lawsuit to argue against a good-faith-and-fair-dealing covenant based on the spirit, and not express contract terms, is beyond understanding. If there is any case illustrating the need for a covenant of good faith and fair dealing that is broad and untethered from the express terms of a contract, it is this case.

Neither Jay Dobyns, nor any of *amici's* members could have foreseen ATF's heinous conduct that may have contributed to the attack on Dobyns' home and the near death of his family. Nor would any reasonable law-enforcement officer dream of demanding contract terms to protect against intentional endangerment of the agent by his or her agency. *Amici* submit that a judicial stand must be taken that such protective language is rendered unnecessary by the implied covenant of good faith and fair dealing, especially in agreements between parties such as Dobyns and the federal government. This case represents just such an opportunity. We pray that this Court takes this opportunity to clarify that the covenant of good faith and fair dealing is synonymous with the spirit of the contract, derived from the parties' obvious intentions.

Honorable governments would not shun the implied good-faith-and-fair-dealing covenant but would actively embrace it as part of their clear duty to protect all citizens, especially those who imperil themselves and their families as they safeguard our nation from harm.

CONCLUSION

For the foregoing reasons, *Amici Curiae* ask that this Court grant the petition for a writ of certiorari by Jay Anthony Dobyns and reverse the Federal Circuit opinion.

Respectfully Submitted,

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