IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12-5329, 12-5330

DYNALANTIC CORP.,

Appellee-Cross-Appellant

v.

DEPARTMENT OF DEFENSE, *et al.*,

Appellants-Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS-CROSS-APPELLEES' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY AFFIRMANCE

This case concerns the constitutionality of the sheltered-market component of Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), a business development program, as administered by appellants-cross-appellees Department of Defense, Department of the Navy, and Small Business Administration (collectively, DOD). It is a straight-forward challenge to a federal agency program under the Fifth Amendment. Even DynaLantic admits that its claim under 42 U.S.C. 1981 is "hardly the main issue on appeal here." Opp. 1. This Court should affirm the dismissal of DynaLantic's Section 1981 claim because Section 1981, by

its own terms, does not reach federal agency action, such as the challenged action in this case. See 42 U.S.C. 1981(c).

1. After the addition of Section 1981(c) – which provides that "[t]he rights protected by this section are protected against *impairment by nongovernmental discrimination and impairment under color of State law*" – to 42 U.S.C. 1981, see 42 U.S.C. 1981(c) (emphasis added), every court of appeals that has addressed whether Section 1981 applies to federal agency action, including courts that had previously found otherwise, has held that it does not. See, *e.g.*, *Sindram* v. *Fox*, 374 F. App'x 302, 304 (3d Cir. 2010); *Dotson* v. *Griesa*, 398 F.3d 156, 162 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006); *Omeli* v. *National Council of Senior Citizens*, 12 F. App'x 304, 307 (6th Cir.), cert. denied, 534 U.S. 1026 (2001); *Davis-Warren Auctioneers, J.V.* v. *Federal Deposit Ins. Corp.*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Davis* v. *United States Dep't of Justice*, 204 F.3d 723, 725 (7th Cir. 2000); *Lee* v. *Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998), cert. denied, 525 U.S. 1138 (1999). See also Gov't Mot. 10 n.4 (listing additional cases).

DynaLantic admits (Opp. 18) that the weight of post-1991 judicial authority supports finding that Section 1981 does not reach federal action, but argues that these courts got it wrong. In support, DynaLantic cites (Opp. 18) *La Compania Ocho, Inc.* v. *United States Forest Service*, 874 F. Supp. 1242, 1251 (D.N.M.

1995), and a law review article. Neither supports DynaLantic's position. The Tenth Circuit in *Davis-Warren Auctioneers*, 215 F.3d at 1161, specifically held that "the language of [Section] 1981(c) could hardly be more clear" that Section 1981, "by its terms, does not apply to" federal agencies. DynaLantic also relies on a footnote in a law review article about the use of military tribunals to try suspected terrorists. The authors of that article, however, concede that the addition of Section 1981(c) "may make it difficult to apply the statute to the federal government." See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1299-1300 (2002).

2. DOD has not argued that this Court lacks any jurisdiction over this case. We recognize that 5 U.S.C. 702 waives the United States' sovereign immunity as to DynaLantic's claims for declaratory relief. The fact that Section 1981 does not contain a waiver of sovereign immunity, however, combined with the language of Section 1981(c), underscore that Section 1981 does not apply to federal agency action.

To get around the unambiguous language of Section 1981(c), DynaLantic relies (Opp. 11-16) on legislative history to justify a finding that the statute nonetheless applies to federal conduct. But in any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." *Staples* v. *United States*, 511 U.S. 600, 605 (1994). The Supreme Court has instructed "time and

again that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). This "strong presumption" that a statute's plain language expresses congressional intent is rebutted only in "rare and exceptional circumstances" where a contrary legislative intent is "clearly expressed." *Ardestani* v. *Immigration & Naturalization Serv.*, 502 U.S. 129, 135-136 (1991) (citation omitted); see also *Milner* v. *Department of the Navy*, 131 S. Ct. 1259, 1266 (2011) (cautioning against "allowing ambiguous legislative history to muddy clear statutory language"); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.")

As stated in our motion for partial summary affirmance, Section 8(c)'s reference to impairment by private actors or impairment under color of state law was meant to be exclusive, not merely illustrative or supplementary. Gov't Mot. 7-8. Unlike Section 1981(b), which contains an illustrative list following the term "including" and was added to the statute together with Section 1981(c) in the Civil Rights Act of 1991, Section 1981(c) does not contain such a qualifier. Section 1981(c) states that the statute applies to discrimination by private and state actors. 42 U.S.C. 1981(c). That language clearly *excludes* this action. See *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of terms).

Where the statutory language is "plain and unambiguous," as it is here, courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009).

DynaLantic argues (Opp. 15) that the legislative history shows "that the addition of Section 1981(c) was [only] to insure the reach of Section 1981 to private conduct." In support, DynaLantic cites (Opp. 15) to a statement in *Arendale* v. *City of Memphis*, 519 F.3d 587, 598 (6th Cir. 2008), that Section 1981(c) merely reflects Congress's intent to codify the holding in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which applied Section 1981 to private discrimination, and not for any "other purpose." The Sixth Circuit relied specifically on a House Judiciary Committee Report addressing Section 1981(c) for this conclusion. *Ibid*. (citing H. Rep. No. 40(II), 102d Cong., 1st Sess. 37 (1991)). As stated in *Williams* v. *Glickman*, 936 F. Supp. 1, 4 n.5 (D.D.C. 1996), however, that "House Report was prepared in connection with a prior version of the Act that was rejected by Congress" and "is not entitled to great weight." Nor is it sufficient to overcome the "strong presumption" that the precise language of Section 1981(c) expresses Congress's intent.

Despite Section 1981(c)'s unambiguous text, DynaLantic asserts (Opp. 11-17) that a presumption against implied repeals precludes finding that Section 1981 does not apply to the federal government. The doctrine of implied repeal provides

that, absent a "clearly expressed congressional intent, * * * [a]n implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter [statute] covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri*, 555 U.S. at 395 (citation and internal quotation marks omitted). DynaLantic's reliance on this doctrine is misplaced. This is not the kind of case where two competing statutory provisions provide, for instance, different procedures, and the Court must determine which procedures apply and if an implied repeal is appropriate. See, *e.g.*, *ibid*. (declining to interpret definition in statutory provision in such a way that would nullify definition contained in the text of the original statute). Section 1981 never expressly covered federal action.

Notwithstanding the lack of express language, some courts – prior to the addition of Section 1981(c) – held that Section 1981 covers federal action based solely on the fact that Congress originally enacted the statute pursuant its authority under the Thirteen Amendment.[1] See Opp. 12 (citing cases). Thus, some courts stated that the law at the time Congress added Section 1981(c) indicated that Section 1981 applied to federal conduct. See, *e.g.*, *Bowers* v. *Campbell*, 505 F.2d 1155, 1157-1158 (9th Cir. 1974); *Baker* v. *F&F Inv. Co.*, 489 F.2d 829, 833 (7th Cir. 1973). Because courts must "assume that Congress is aware of existing law

[1] Congress reenacted Section 1981 as part of the Enforcement Act of 1870, pursuant to its authority under the then newly-enacted Fourteenth Amendment.

when it passes legislation," *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012) (citation omitted), this Court should presume that Congress "means in [Section 1981(c)] what it says," *Connecticut National Bank*, 503 U.S. at 253-254, and apply Section 1981 only to private and state discrimination.[2]

DynaLantic argues (Opp. 16) that it would be "strange" to hold that Section 1981 does not apply to the federal government when Congress's "general purpose in the Civil Rights Act of 1991 was to *expand* rights." Not so. The text of Section 1981 never covered federal action, while the amended statute defined the meaning of "make and enforce contracts," see 42 U.S.C. 1981(b), in a way that broadened the view taken by some courts at the time. In any event, even if Section 1981(c) is inconsistent with the statute's general statement of purpose, a specific statutory provision prevails over a conflicting general provision. See *Aeron Marine Shipping Co.* v. *United States*, 695 F.2d 567, 576 (D.C. Cir. 1982) (if there is an "inescapable conflict" between general and specific statutory provisions, the specific will prevail).

Accordingly, under the plain language of Section 1981(c), DynaLantic lacks a cause of action against DOD. This Court should summarily affirm the district court's dismissal of DynaLantic's claim under 42 U.S.C. 1981.

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[2] Tellingly, when Congress passed the Civil Rights Act of 1991, acting under its authority under the Thirteenth Amendment, Congress explicitly proscribed private discrimination, but not federal action. See 42 U.S.C. 1981(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2013, I electronically filed the foregoing APPELLANTS-CROSS-APPELLEES' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY AFFIRMANCE with the United States Court of Appeals for the District of Columbia using the CM/ECF system. All participants in the consolidated appeals are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that, within two business days of February 4, 2013, I will cause to be hand-delivered four paper copies of the foregoing reply to the United States Court of Appeals for the District of Columbia.

s/ Teresa Kwong
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