No. 15-

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

LORETTA E. LYNCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Longstanding precedent of this Court holds that plaintiffs prevailing in actions under federal civil-rights statutes "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and that prevailing defendants should not recover fees unless "the plaintiff's action was frivolous, unreasonable, or without foundation," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Here, Petitioner Shelby County was a prevailing plaintiff in an action under Section 14(b) of the Voting Rights Act. *See Shelby County. v. Holder*, 133 S. Ct. 2612 (2013).

The question presented is whether the district court can refuse to apply the *Piggie Park* standard based on its value judgment that Congress would not have wanted Shelby County to recover its attorney's fees.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Loretta E. Lynch, in her official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shelby County, Alabama, submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 2015 WL 5099964 and is reproduced in the Appendix ("App.") at 1a-40a. The opinion of the United States District Court for the District of Columbia is reported at 43 F. Supp. 3d 47 and is reproduced at App. 41a-88a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit rendered its decision on September 1, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY PROVISION INVOLVED

Section 14(e) of the Voting Rights Act, 52 U.S.C. § 10310(e), provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

STATEMENT OF THE CASE

1. On April 27, 2010, Shelby County brought an action against the Attorney General of the United States ("Attorney General" or "Government") under Section 14(b) of the Voting Rights Act ("VRA") challenging the constitutionality of Section 4(b) and Section 5 of the VRA, 52 U.S.C. §§ 10303(b), 10304, on the grounds that those provisions exceeded Congress's authority under the Fourteenth and Fifteenth Amendments. *See* Dkt. 1 (Complaint ¶¶ 1, 38, 42, 44). Because Shelby County was a "covered" jurisdiction under Section 4(b), it was required to submit all voting changes (no matter how minor) for "preclearance" under Section 5. This obligation imposed great costs on Shelby County and its citizens—both in terms of expenditure of county resources and the intrusion on autonomy and self-government. Shelby County argued that neither Section 4(b) nor Section 5 was "appropriate" enforcement legislation and sought a declaration that these provisions were unconstitutional under the Fourteenth and Fifteenth Amendments, along with a permanent injunction, reasonable attorney's fees and costs, and all other appropriate relief.

Several groups and individuals ("Defendant-Intervenors") sought to intervene early in the action, which the district court allowed. All parties thereafter filed cross-motions for summary judgment on the merits of Shelby County's claims. On September 21, 2011, the district court issued an opinion and order granting the Government's and Defendant-Intervenors' cross motions for summary judgment, and denying Shelby County's motion for summary judgment. *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

On appeal, the D.C. Circuit issued a 2-1 decision affirming the district court's judgment. *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012). Judges Tatel and Griffith found both Sections 4(b) and 5 constitutional, holding that the evidence of voting discrimination in covered jurisdictions justified Section 5's remedial remedy and Section 4(b)'s coverage formula. *Id.* at 884. Senior Judge Williams dissented. He found that Section 4(b) exceeded Congress's authority under the Fourteenth and Fifteenth Amendments because its coverage formula was not responsive to current conditions in the covered jurisdictions and was not "congruent and proportional" to the violations it sought to remedy. *Id.* at 885.

The Supreme Court reversed in a 5-4 decision. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The Court accepted Shelby County's argument that Section 4(b)'s coverage formula was not rational in theory and thus held that the formula was not "appropriate" enforcement legislation under the Fourteenth and Fifteenth Amendments.

Writing for the Court, Chief Justice Roberts explained that the Court previously had upheld the VRA because the coverage formula was rational when enacted in 1965. *Id.* at 2627-28 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)). Section 4(b) had targeted the jurisdictions that "shared two characteristics: 'the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.'" *Id.* at 2625. *Katzenbach* upheld the formula as "rational in both practice and theory" because "[i]t accurately reflected those jurisdictions uniquely characterized by voting discrimination on a pervasive scale, linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement." *Id.*

But whereas Congress in 1965 "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both," Congress in 2006 relied on "a formula based on 40-year-old facts having no logical relation to the present day." *Id.* at 2627-29. Moreover, Congress sought to prevent vote dilution, yet continued to employ a formula tied to ballot access. *Id.* Thus, the coverage formula was no longer rational in theory and thus was not "appropriate" enforcement legislation.

Given this holding with respect to Section 4(b), the Court declined to reach Section 5's constitutionality. *See id.* at 2631. Justice Thomas concurred, writing separately to explain why he would have found Section 5 unconstitutional as exceeding Congress's enforcement power under the Fourteenth and Fifteenth Amendments. *Id.* at 2631-32. Justice Ginsburg dissented, arguing that the evidence assembled by Congress justified the exercise of remedial power under the Reconstruction Amendments to subject the covered jurisdictions to preclearance. *See id.* at 2632-52.

2. On remand, Shelby County timely filed a motion for attorney's fees. Shelby County argued that it was eligible for and entitled to fees because it was the "prevailing party" in an action to "enforce the voting guarantees of the Fourteenth and Fifteenth Amendment." 52 U.S.C. § 10310(e).

The district court denied Shelby County's fee request. The court first examined whether Shelby County was eligible for fees under Section 14(e) of the VRA. The

court found Section 14(e) susceptible to three possible interpretations concerning the parties who might be eligible for fees: (1) that only *plaintiffs* that filed a lawsuit seeking "to enforce the voting guarantees of the fourteenth or fifteenth amendment" would be eligible for attorney's fees; (2) that any party could be eligible for attorney's fees as long as that party was *the party seeking to enforce* "the voting guarantees of the fourteenth or fifteenth amendment"; or (3) that any prevailing party would be eligible for attorney's fees as long as *the lawsuit* could be described as "an action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." App. 54a-67a. The court concluded that the third interpretation was "the best answer," App. 66a, and thus that this case was likely an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." App. 66a n.12.

Yet the Court declined to actually decide whether Shelby County was *eligible* for fees because it believed that Shelby County was not *entitled* to fees. App. 66a-67a. The district court began by emphasizing that the Supreme Court had employed a "purposive" mode of analysis to "cabin district court discretion in awarding attorney's fees under the federal civil rights laws." App. 68a; *see also* App. 74a-75a (contrasting this "purposive" approach with the more evenhanded approach employed in applying fee statutes outside of the civil-rights context).

Notwithstanding that "prevailing party" statutes are party neutral, the district court explained that this Court had elected to treat prevailing plaintiffs more favorably than defendants in civil rights cases. App. 75a. On the one hand, prevailing civil-rights plaintiffs "should ordinarily

recover attorney's fees unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). On the other hand, the Court "insulate[d]" unsuccessful civil-rights plaintiffs from most attorney's fee claims, holding that prevailing defendants should be entitled to fees "only if 'the plaintiff's action was frivolous, unreasonable, or without foundation.'" App. 72a (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

The district court found two reasons why this Court had treated plaintiffs more favorably. First, a plaintiff proceeding under a federal civil-rights statute "'is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority.'" *Id.* (quoting *Christiansburg*, 434 U.S. at 418). "'Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.'" *Id.* (quoting *Christiansburg*, 434 U.S. at 418). These dual standards stemmed from the Court's "value judgment about the subjective intent of Congress." App. 70a. "'Congress sought to ... provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.'" App. 75a (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994)).

Having outlined the required analysis, the district court emphasized that the D.C. Circuit had "arguably" gone "further than the Supreme Court has" by "employ[ing] this purposive approach even in economic statutes outside of the civil rights context." App. 78a. Moreover, the district court read D.C. Circuit precedent as endorsing an inquiry into "the actual motivations of the plaintiff

and the defendant in a particular case." App. 83a. Thus, the district court explained, "a court should look beyond the simplistic labels of 'plaintiff' and 'defendant.'" App. 77a; *see also* App. 78a (stating that *Christiansburg* does not apply where "'the procedural posture of a case places the party who seeks to vindicate rights guaranteed by the Constitution in the position of defendant'") (quoting *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 440 (D.C. Cir. 1982)).

Turning to this case, the district court believed that whether *Piggie Park*'s broadly permissive standard or *Christiansburg*'s more restrictive standard should apply was "a question of first impression." App. 46a. The district court elected to apply the *Christiansburg* standard to Shelby County's request for fees, notwithstanding that Shelby County is the plaintiff in this VRA action. In the district court's view, Shelby County's lawsuit "was about as far as possible from the lawsuit the drafters of section 1973l(e) were hoping to incentivize." App. 81a. The Attorney General and the defendant intervenors "were actually ... the parties charging civil rights violations and seeking to assert their civil rights." App. 84a (quotation omitted). And Shelby County, the plaintiff, was "essentially the opposite of the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." App. 85a (quotations omitted). As the district court saw it, Shelby County's position "was openly hostile to Congress's policy choices, attacking them as unconstitutional." App. 86a. Because Shelby County did not "fit the statute's preferred profile," App. 81a, the court applied the more restrictive *Christiansburg* standard. Applying *Christiansburg*, the district court concluded that the Government's and the Defendant-Intervenors' positions were not "frivolous,

unreasonable, or without foundation," App. 87a (quoting *Christiansburg*, 434 U.S. at 421), and therefore Shelby County was not entitled to fees.

3. The D.C. Circuit affirmed, in three separate opinions. Writing for the court, Judge Griffith noted that whether Shelby County was *eligible* for fees was a "difficult question." App. 15a-16a. Declining to answer that question, Judge Griffith held that Shelby County was not *entitled* to fees because "its victory did not advance any of the goals Congress meant to promote by making fees available." App. 2a. While purporting to apply *Piggie Park*, Judge Griffith followed the Court's analysis in *Christiansburg.* According to Judge Griffith, Shelby County's argument in support of its fee request "boils down to the proposition that Congress introduced the fee-shifting provision into the VRA in 1975 with the express goal of inducing a private party to bring a lawsuit to neuter the Act's central tool." App. 17a. To Judge Griffith, this made "no sense" because Congress "enacted fee-shifting provisions in civil rights statutes to 'secur[e] broad compliance' with [them], not to immobilize them." *Id.* (quoting *Piggie Park*, 390 U.S. at 401). Nor did "Congress need to enlist private suits to challenge the constitutionality of the coverage formula," because Congress included a "sunset provision that would ensure the formula's expiration at some point in the future absent new authorization." *Id.* In short, Judge Griffith concluded that Shelby County was not entitled to rely on the *Piggie Park* standard for the same reasons that the defendant-employer in *Christiansburg* could not: because it had not "helped ensure compliance with the civil rights laws." App. 15a.

In his concurrence, Judge Tatel agreed that Shelby County was not entitled to attorney's fees, but would have found that Shelby County also was not eligible for fees under Section 14(e) of the VRA. According to Judge Tatel, Shelby County's complaint was not designed to "protect any voting right guaranteed by the Fourteenth or Fifteenth Amendment," but was instead designed to "enforce the *Tenth Amendment* by vindicating federalism interests and the fundamental principle of equal sovereignty among the states." App. 31a (emphasis in original). Accordingly, Shelby County's lawsuit was not an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e).

Judge Silberman concurred in the judgment, writing separately to rebut the fees analysis of Judges Griffith and Tatel. According to Judge Silberman, they improperly found that "a suit that challenges the constitutionality of a version of the Voting Rights Act [could] be rejected merely because it challenges the Voting Rights Act." App. 38a Unlike other civil rights statutes that speak to suits to enforce the *statute*, the VRA provides fees for suits "to enforce the *voting guarantees* of the Fourteenth and Fifteenth Amendments." *Id.* For example, a party challenging a version of the VRA that was discriminatory to African-American voters clearly would be entitled to fees, as even the Defendant-Intervenors acknowledged. *Id.*

Judge Silberman further found that a plaintiff whose action invalidated Section 4(b) and Section 5 could receive attorney's fees because "the Section 5 procedure … limit[ed] the ability of voters to expeditiously change various voting practices and insofar as the formula for

inclusion of covered jurisdiction was arbitrary, it was discriminatory." App. 39a. In other words, a plaintiff could receive fees if it "protect[ed] the rights of *individual* voters in governed jurisdictions not to be discriminated against under the Fourteenth and Fifteenth Amendments" by ensuring their votes were not "abridged" by arbitrary means. *Id.*

Despite this recognition, however, Judge Silberman believed that Shelby County could not recover attorney's fees because "the original suit was not brought on behalf of the individual voting rights of the citizens of Shelby County." App. 40a. Instead, Shelby County's "claim of inappropriateness—at least originally—was only based on precepts of federalism of the Tenth Amendment, not individual voting guarantees." *Id.* Believing that the fees analysis must turn on how the complaint was framed (and not the ultimate result of the action), Judge Silberman concluded that Shelby County should not receive fees.

REASONS FOR GRANTING THE PETITION

Under the Fourteenth and Fifteenth Amendments, States and individual voters within them have the right to control their electoral processes unless Congress enacts "appropriate" legislation overriding this authority. In *Shelby County, Alabama v. Holder*, this Court issued a landmark decision enforcing these voting guarantees. 133 S. Ct. 2612 (2013). Striking down the antiquated coverage formula of the VRA, the Court found that Shelby County and its citizens had been denied their rights by a federal law that was not "appropriate" enforcement legislation under the Fourteenth and Fifteenth Amendments.

Through its lawsuit, Shelby County obtained historic success. Before Shelby County filed its complaint, thousands of jurisdictions had to go "hat in hand" to Washington, D.C. to seek federal approval before it could enact *any* voting change—no matter how small or inconsequential. This federal regime imposed enormous costs—in terms of sovereignty, individual rights, and resources. Through *Shelby County*, this Court declared the VRA's coverage formula unconstitutional and reinstated the voting rights of individual voters in covered jurisdictions throughout the country.

On remand, Shelby County sought to recover its attorney's fees under Section 14(e) of the VRA, which provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee." 52 U.S.C. § 10310(e). This fee petition followed logically from Shelby County's victory before this Court. Shelby County indisputably prevailed on the merits and the relief it obtained enforced the Fourteenth and Fifteenth Amendment guarantees of local autonomy against discriminatory and "inappropriate" federal regulation. In addition, there were no equitable circumstances of the kind present in *Christiansburg* counseling in favor of denying attorney's fees. Shelby County's sole reason for bringing this lawsuit was to stop the Attorney General from depriving the county and its citizens of rights guaranteed to them by the Fourteenth and Fifteenth Amendments. Shelby County should have recovered its fees.

Yet the court of appeals did not accept this Court's views on the deprivation of constitutional rights imposed by the VRA. The court of appeals denied Shelby County's fee request based on nothing more than its value judgment about whether Congress would have wanted a party such as Shelby County to recover its attorney's fees. Congress, the court believed, would have cared little about protecting States and localities from an unconstitutional law; all Congress wanted was to enforce the federal regime to the maximum extent feasible.

As a consequence, the court refused to apply this Court's longstanding rule that plaintiffs "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." *Piggie Park, Inc.*, 390 U.S. at 402. Instead, the court of appeals employed an analysis borrowed from *Christiansburg*. This approach finds no basis in this Court's decisions or the text of the VRA. Nothing but antipathy to this Court's decision and the constitutional rights it protected can explain the court of appeals' denial of Shelby County's fee request.

Under the court of appeals' reasoning, no party could ever be entitled to fees for challenging an unconstitutional federal law or action. But that cannot be right. Section 14(e) provides for the recovery of fees by parties that prevail in actions "to enforce the voting guarantees of the fourteenth or fifteenth amendment," and those guarantees apply against the federal government. 52 U.S.C. § 10310(e). Congress thus should be equally concerned with unconstitutional federal and state actions. At a minimum, it is entirely reasonable for Congress to pass a fees provision and intend for it to apply to *future* federal laws that violate constitutional rights. That is exactly what

happened here, as Shelby County successfully challenged the enforcement of the 2006-reauthorized preclearance regime and then sought fees under a 1975 fees provision.

But the court's denial of fees will not just injure Shelby County—it will prevent future States and localities from resisting similar federal overreach. Not only will these jurisdictions be unable to recover their attorney's fees, but they will face the possibility of *paying* the attorney's fees of any groups that intervene on behalf of the government. Indeed, just weeks before the decision here, the court of appeals ordered the State of Texas to pay more than a million dollars in attorney's fees to the many individuals and groups that intervened as defendants in Texas's preclearance action—despite the fact that *Shelby County* meant that the defendant-intervenors there did not prevail in that lawsuit. Faced with such prospects (paying its own fees if it wins or paying *all* parties' fees if it loses), no jurisdiction will venture forth to protect itself and its citizens.

This may have been the goal of the lower courts, but it should give this Court tremendous pause. *Shelby County* was one of the most important voting rights decisions of the past 50 years. It enforced the limits on congressional authority under the Fourteenth and Fifteenth Amendments and vindicated the rights of the covered jurisdictions and the millions of individual voters within them. But similar cases may never go forward if the court of appeals' decision is allowed to stand. This Court should grant the petition.

I. Review Is Warranted Because The Decision Below Conflicts With *Piggie Park* And Will Hinder States And Local Governments From Opposing Federal Overreach.

At the turn of the decade, there were numerous lawsuits across the country stemming from the Attorney General's enforcement of Sections 4(b) and 5 of the VRA. States were seeking "preclearance" from the District Court for the District of Columbia for their voting changes, such as redistricting plans, *see, e.g.*, *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), and changes to election procedures, *see, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012). Individuals and interest groups were asking other district courts to enjoin voting practices until the covered jurisdiction obtained preclearance. *See, e.g.*, *Davis v. Perry*, No. 11-cv-788, 2011 WL 6207134, at *1 (W.D. Tex. Nov. 23, 2011). And counties and individuals were bringing lawsuits in the District Court for the District of Columbia challenging the constitutionality of the Act itself. *See, e.g.*, *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

This Court's decision in *Shelby County* resolved all of these cases. Finding that "the conditions that originally justified [preclearance] no longer characterize voting in the covered jurisdictions," 133 S. Ct. at 2622, the Court held that Section 4(b) of the VRA unconstitutionally exceeded Congress's powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, *id*. at 2629. In short, the Court struck down the VRA's coverage formula and thus freed every state and local jurisdiction in the country from their obligation to obtain federal permission before enacting voting changes.

Two things should have been clear following *Shelby County*. First, Shelby County, as the prevailing plaintiff in a case brought under a civil rights act statute, should have received attorney's fees. Under *Piggie Park*, this Court has long held that a plaintiff "who succeeds in obtaining an injunction under [Title II of the Civil Rights Act] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402 (1968). This rule is well established. Before *Shelby County*, courts regularly awarded fees to prevailing plaintiffs in a wide array of voting litigation, including suits involving apportionment and redistricting plans, *see, e.g., Williams v. Board of Com'rs of McIntosh County*, 938 F. Supp. 852 (S.D. Ga. 1996), voter-residency requirements, *see, e.g., Lytle v. Commissioners of Election of Union County*, 541 F.2d 421 (4th Cir. 1976), the dilution of African-American or other minority voting strength, *see, e.g., Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975 (S.D.N.Y. 1986), at-large methods for electing legislators, *see, e.g., NAACP v. City of Dover, Del.*, 123 F.R.D. 85 (D. Del. 1988), election procedures, such as all-English ballots, *see, e.g., Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976), and a jurisdiction's failure to obtain preclearance, *see, e.g., Andrews v. Koch*, 554 F. Supp. 1099 (E.D.N.Y. 1983). Indeed, no party or court below has cited a *single case* in which a plaintiff sued under a civil rights statute, prevailed, and was denied fees under a standard other than *Piggie Park*.

Second, those individuals and interest groups intervening as defendants to defend the VRA's preclearance regime and oppose covered jurisdictions' attempts to obtain preclearance should *not* have received attorney's fees. Even assuming that defendant-intervenors in

preclearance actions are eligible for fees under Section 14(e) of the VRA, *see infra* at 17, there was no question that the defendant-intervenors in these cases were not "prevailing parties" after *Shelby County*. The Attorney General and his supporting intervenors lost all of these cases the moment this Court declared the preclearance regime unconstitutional.

Yet when the issue arose in two cases, the D.C. Circuit flipped the script. In Shelby County's case, the court of appeals *denied* attorney's fees—despite the fact that Shelby County was unequivocally the prevailing party in an action brought under the VRA. But then in *Texas v. United States*, the D.C. Circuit *awarded* fees to the defendant-intervenors—despite the fact that Texas had prevailed on every claim after *Shelby County*. 798 F.3d 1108 (2015). In short, the D.C. Circuit declared that the winners should lose and the losers should win.[1]

Only antipathy to this Court's decision in *Shelby County* and the plaintiffs supporting it explains these backward decisions. Under this Court's precedent, Shelby County should have received fees, and the defendant-intervenors in *Texas* should not have, *see* Petition for Certiorari, *Texas v. Davis*, No. 14-5151 (Oct. 22, 2015). While these decisions obviously harm the jurisdictions involved, they do far more damage to future jurisdictions in similar situations. By putting an enormous thumb on the scale, the D.C. Circuit grossly distorts a State or local

1. The D.C. Circuit was not the only court to impose attorney's fees on covered jurisdictions despite *Shelby County*. *See Davis v. Abbott*, 991 F. Supp. 2d 809 (W.D. Tex. 2014), *rev'd* 781 F.3d 207 (5th Cir. 2015). That case too is pending before this Court. *See Davis v. Abbott*, No. 15-46 (S. Ct.).

government's ability to defend its rights and the rights of its voters under the VRA and other similar statutes.

As it made plain in *Texas*, the D.C. Circuit interprets Section 14(e) of the VRA to mean that defendant-intervenors "should be awarded attorney's fees … if [they] contributed substantially to the success of the litigation." *Donnell v. United States*, 682 F.2d 240, 248-49 (D.C. Cir. 1982). And history demonstrates that defendant-intervenors are nearly always awarded fees, notwithstanding the fact that the Attorney General is perfectly capable of litigating actions under the VRA. For example, in *Commissioners Court of Medina County, Texas v. United States*, the D.C. Circuit found that three Mexican-American citizens who intervened as defendants in a preclearance action would be eligible for fees. 683 F.2d 435, 440 (D.C. Cir. 1982) ("[N]either [the party's] status as intervenors nor as defendants precludes an award of fees under the Voting Rights Act."). The court's holding rested on the belief that "[h]aving voluntarily entered the suit, a defendant-intervenor's position can more readily be analogized to that of a plaintiff." *Id*. at 440 n.5; *see also Castro County, Tex. v. Crespin*, 101 F.3d 121, 126 (D.C. Cir. 1996) (holding that "a party intervening as a defendant in a section 5 action may be a prevailing party" and thus may be entitled to attorney's fees); *Shelby County v. Holder,* 43 F. Supp. 3d 47, 55 (D.D.C. 2014) (documenting history of D.C. Circuit awarding fees to defendant-intervenors).

As a consequence, if the D.C. Circuit's decisions are allowed to stand, a jurisdiction like Shelby County must now assume an enormous risk before bringing a similar lawsuit. It cannot recover damages (because the statute does not allow them) and it cannot recover attorney's fees

(unless the high *Christiansburg* standard is met). Thus, even a win will cost the jurisdiction significant sums of money. At the same time, a loss would cost them even more. Defendant-intervenors are almost always granted leave to intervene, *see* Cunningham Motion to Intervene at 5-6, *Shelby County v. Holder*, No. 10-651 (D.D.C.) (Dkt. 6-1) (listing cases), and almost always awarded attorney's fees if they prevail, *see, e.g., Castro County, Tex.*, 101 F.3d at 126. And as the *Texas* case shows, defendant-intervenors—despite having the United States government as the lead defendant—often incur substantial attorney's fees. *See, e.g., Texas*, 798 F.3d at 1108 (affirming award to defendant-intervenors in district court redistricting litigation of over $1 million in attorney's fees).

Indeed, that easily could have happened here. As the district court recognized, if Shelby County had lost before the Supreme Court, "defendant-intervenors would likely have sought attorney's fees" and the court "presumably would have awarded" them. App. 63a. Defendant-Intervenors in this case were represented by eighteen lawyers from seven different law firms or organizations. There is no doubt that Shelby County would have been handed a massive bill had this Court gone the other way on the merits.

Faced with such prospects—paying its own attorney's fees if it wins and paying the fees of perhaps dozens of additional attorneys if it loses—a jurisdiction such as Shelby County would never file a similar lawsuit in the future, as "only a lunatic or a fanatic" would go forward against such odds. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). That is precisely the kind of "distortion" of incentives that this Court has sought

to avoid in applying equitable concepts to fee-shifting statutes like Section 14(e). *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 763-64 & n.4 (1989) (fee-shifting statutes should not be construed so as to impose "one-way fee liability" on parties who bring lawsuits merely "to defend their own constitutional or statutory rights").

These decisions will also inject enormous risk and uncertainty into the decision of whether to bring a lawsuit involving "unsympathetic" positions. Courts should not deny fees merely because they believe Congress would have disfavored the litigants, *see, e.g., Maloney v. City of Marietta*, 822 F.2d 1023, 1026 (11th Cir. 1987) (awarding attorney's fees to a white male plaintiff under Section 14(e) of the VRA); *Coyote v. Roberts*, 502 F. Supp. 1342, 1354 (D.R.I. 1980) (awarding attorney's fees to admitted prostitutes over the government's objection that it was not in "the interest of the public [to] protect[] and legitimiz[e] prostitution"), because they dislike the parties' motivations, *see e.g., Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (awarding fees even though the plaintiff was motivated by "personal financial gain rather than a desire to promote constitutional rights [or] the public at large"), or because the individual has no need for the fees, *see, e.g., Hastert v. Ill. State Bd. of Election Comm'rs*, 28 F.3d 1430, 1443 (7th Cir. 1993) (awarding fees even though the plaintiff had the "ability to pay for legal representation"). Similarly, courts should not *award* fees to parties that did not prevail, even if they are promoting a good cause or are in need of the fees. *See Doe v. Boston Pub. Sch.*, 358 F.3d 20, 29 (1st Cir. 2004) (explaining how the "undeniably laudable" goal of encouraging prompt resolution of disputes regarding appropriate education for

handicapped children "does not affect our interpretation of the term prevailing party"). The D.C. Circuit's decisions undermine these basic principles.

At bottom, the D.C. Circuit has reduced the determination of fee awards in civil-rights cases into judicial handpicking of winners and losers based on nothing more than the "value judgment[s]," App. 75a, of the sitting panel. This "judge-made ranking of rights" warrants correction. *Zipes*, 491 U.S. at 763 n.4.

II. Review Is Warranted To Limit *Christiansburg*'s Misguided Countertextual Approach To Fee Determinations.

In 1968, the Court in *Piggie Park* laid down the rule that a plaintiff "who succeeds in obtaining an injunction under [Title II of the Civil Rights Act] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402 (1968). The Court explained that the statute's fee-shifting provision must provide fees to successful plaintiffs in nearly all civil rights cases because successful plaintiffs under Title II "cannot recover damages." *Id.* Thus, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts" if they were "routinely forced to bear their own attorneys' fees." *Id.* The Court's *Piggie Park* decision established the default standard for awarding fees to a prevailing party who sues under a statute for which fees are authorized and prevails.

Twelve years later, the Court carved out an exception to the *Piggie Park* rule that prevailing parties are ordinarily entitled to fees. In *Christiansburg Garment*, the Equal Employment Opportunity Commission ("EEOC") sued Christiansburg Garment Company alleging that the company had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. The district court granted the company summary judgment on procedural grounds, finding that the EEOC could not bring its claim because no charges were "pending" before the EEOC when Title VII took effect. 434 U.S. at 421.

Christiansburg Garment then sought fees under the *Piggie Park* standard. Because Title VII's fee provision, like the VRA's, is a "prevailing party" statute, *see Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602-03 (2001) (listing examples), the provision is party-neutral as to plaintiffs and defendants.[2] Accordingly, Christiansburg Garment argued "that the language of [the attorney's fee provision] admits of only one interpretation: 'A prevailing defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff.'" *Christiansburg*, 434 U.S. at 418.

Yet the Court in *Christiansburg* rejected this "mechanical construction" of the statute as "untenable," noting that the terms of the statute "provide no indication whatever of the circumstances under which either a plaintiff or a defendant should be entitled to attorney's

2. Section 706(k) of Title VII provides: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee[.]" 42 U.S.C. § 2000e-5(k).

fees." *Id.* The Court simply assumed that Congress would not have wanted prevailing defendants to regularly receive fees and so it created a restrictive standard under which prevailing defendants would recover fees only when the plaintiff's claim was "frivolous, unreasonable, or groundless." *Id.* at 422.

The *Christiansburg* Court based this standard upon certain "equitable considerations"—namely, its perception that a prevailing plaintiff under a civil rights statute "is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority" and that the losing defendant is "a violator of federal law." 434 U.S. at 418 (internal quotation omitted). But *Christiansburg* created these considerations out of whole cloth. Indeed, the Court has long recognized that they did not arise from the text. *Id.* ("The terms of § 706(k) provide no indication …."); *see also West Virginia Univ. Hosps., Inc. v. Carey*, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) ("[*Christiansburg*'s] holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text.").

Though courts have described this approach as "purposive," that is a charitable description. A purposive construction is one in which a court "consider[s] statutory language in light of a statute's basic purposes," and thus is understood to reflect the purposes and intentions of Congress. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part). But *Christiansburg*'s purposivism is so unhinged from the statute that it cannot fairly be said to reflect the purposes and intentions of Congress. Indeed, *Christiansburg* itself indicates that the "equitable

considerations" supporting the restrictive standard it adopted grew out of the court's own "moment[ary] reflection." 434 U.S. at 418. As the district court acknowledged, *Christiansburg*'s purposivism thus is no more than a court's "value judgment about the subjective intent of Congress." App. 70a. This is essentially no standard at all.[3]

Although *Christiansburg*'s mode of analysis is suspect, the dual approach it set out for fee determinations at least had the benefit of clarity: under *Piggie Park*, prevailing plaintiffs "almost always" recover their fees, and under *Christiansburg*, courts "almost always" deny fees to prevailing defendants. S. Wilborn, *Public Pensions & the Uniform Management of Public Employee Retirement Systems Act*, 51 Rutgers L. Rev. 141, 171 n.170 (1998). *Christiansburg*'s lack of standards, however, has replaced clarity with confusion, as courts now read *Christiansburg* to throw away the "simplistic labels of 'plaintiff' and 'defendant.'" App. 77a.

Indeed, this case illustrates the mischief caused by *Christiansburg*. Guided by nothing other than their own preferences, courts will award fees to whichever prevailing parties they favor. Here, the lower courts cited no case in which a prevailing plaintiff in an action under

3. Congress has employed similar "prevailing party" statutes in numerous instances outside of the civil-rights realm. But these are uniformly applied in an "evenhanded" manner. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 536 (1994) (Thomas, J., concurring in the judgment). That the same language has resulted in two entirely divergent regimes for fee determinations confirms that the *Christiansburg* approach is entirely court-driven and does not reflect choices made by Congress. *Id.*

the civil-rights laws was denied fees; yet both held that Shelby County's fee request should be denied based on nothing more than their view that Congress would not have wanted to incentivize this type of lawsuit.

The district court was at least candid about its "value judgment[s]." App. 70a. While the D.C. Circuit purported to apply *Piggie Park*, it did no such thing. Instead, it employed the same analysis as the district court, tracking *Christiansburg* to evaluate for itself whether Shelby County was a "chosen instrument of Congress." App. 13a. The court never engaged in the inquiry actually called for under *Piggie Park* to determine whether "special circumstances" existed that would render a fee award to Shelby County "unjust."

There are only two possible reasons why the court would say it was applying *Piggie Park* while not actually doing so. Either the *Christiansburg*'s standardless approach has so muddled the fee analysis that the court was confused about how to apply the precedent; or the court strategically manipulated the precedent in order to achieve a particular outcome. One may be worse than the other, but either is an indictment of the *Christiansburg* approach.

At bottom, *Christiansburg*'s standardless approach to statutory interpretation "robs the law of the clarity of its command and the certainty of its application." *Fogerty*, 510 U.S. at 537 (Thomas, J., concurring in the judgment). Review is warranted to remedy the mischief *Christiansburg* has created and make clear that *Piggie Park* applies to all plaintiffs prevailing under civil-rights statutes.

III. Under A Proper Application Of The Governing Precedent, There Can Be No Question That Shelby County Is Entitled To Recover Its Fees.

Resolving this fee dispute requires no more than a straightforward application of *Piggie Park*. Under *Piggie Park*, prevailing civil-rights plaintiffs "recover attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. Shelby County is a prevailing plaintiff in an action under Section 14(b) of the Voting Rights Act. No party contended and neither lower court found that "special circumstances" exist that would render a fee award to Shelby County "unjust." Nor is there a *single case* in which a prevailing plaintiff under a civil rights act statute was denied fees under a standard other than *Piggie Park*. Shelby County is entitled to a fee recovery.

Even assuming that *Christiansburg* properly could apply to the fee request of a prevailing civil-rights plaintiff, it should not here. *Piggie Park* applies for several reasons. *First*, and most important, Shelby County is a classic "private attorney general," *Piggie Park*, 390 U.S. at 402, as it brought this action directly under a civil rights act statute in order to "advance the public interest by invoking the injunctive powers of the federal courts," *id.*, on behalf of itself and thousands of similarly situated jurisdictions and their millions of citizens. Shelby County sought to restore proper constitutional order and to regain for its citizens their fundamental right to structure and order elections in the way they see fit, subject to universal constitutional restraints. In this regard, it was hugely successful. *See Shelby County*, 133 S. Ct. at 2625.

Second, by bringing its lawsuit, Shelby County was vindicating a policy of the "highest priority," *Piggie Park*, 390 U.S. at 402, as it sought to enforce the Fourteenth and Fifteenth Amendments and the bounds of congressional authority thereunder and to preserve the federalism rights of covered jurisdictions and the rights of individual voters therein. The lower courts suggested Congress would have disagreed, but this could be true only if Congress is presumed to have no regard for the limits on its own constitutional authority, the rights of States to be free of a prior restraint that runs counter to the principles of federalism and self-government, or the rights of individual voters within those restrained jurisdictions. But of course, Congress is duty bound to uphold the Constitution, *see* U.S. Const., art. VI, cl. 3 ("The Senators and Representatives … shall be bound by Oath or Affirmation, to support this Constitution."), and to consider the limits of its authority when legislating, *see City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

Third, awarding Shelby County fees would not undermine any congressional goal of encouraging plaintiffs to bring actions to protect voting rights under the VRA. Future VRA plaintiffs could still anticipate recovering their fees under *Piggie Park* if they prevailed. And "blameless" intervenors could still intervene and assert their rights while being protected from catastrophic fee awards. In fact, it is the court of appeals that has now grossly distorted the incentives to litigate under the VRA and other civil rights statutes. *See supra* at 17-19.

Finally, a fee award against the Government would not be inequitable because the Government is not "blameless" or "innocent" like the Title VII plaintiff in *Christiansburg*

or the intervenors in *Zipes*. After this Court twice interpreted Section 5 to lessen the federalism burdens of the preclearance obligation (and to avoid serious questions about its constitutionality), *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Georgia v. Ashcroft*, 539 U.S. 461 (2003), Congress disregarded both of those decisions in passing the 2006 reauthorization of the VRA. Moreover, the Court warned Congress in *Northwest Austin v. Holder* that the "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the changed circumstances in the covered jurisdictions. 557 U.S. 193, 204 (2004). Yet Congress did nothing in response. It held not one hearing, proposed not one bill, and amended not one law. *See Shelby County*, 133 S. Ct. at 2631 ("[I]n [*Northwest Austin*], we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").

Even worse, the Attorney General actively and aggressively enforced an unconstitutional statute over those same warnings and in ways that served only to exacerbate the problems with the coverage formula. For example, the Attorney General refused to preclear Texas and South Carolina voter ID laws, despite the fact that the Supreme Court had previously upheld a similar Indiana law. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). The Attorney General likewise refused to preclear Florida's decision to reduce early voting from 14 days to 8 days, when noncovered States such as Connecticut and Rhode Island have no early voting whatsoever. *See Florida*, 885 F. Supp. 2d at 299.

Clearly, then, the actions of Congress and the Attorney General in disregarding the limits of federal authority under the Fourteenth and Fifteenth Amendments are what forced the constitutional showdown in *Shelby County*.[4] *See Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (explaining that *Piggie Park* applies where a plaintiff prevails against "the party whose misconduct created the need for legal action"). The federal government enacted and aggressively enforced an unconstitutional statute. Awarding counsel fees to Shelby County thus would be "awarding them against a violator of federal law." *Christiansburg*, 434 U.S. at 418. And it clearly would promote "the general policy that wrongdoers make whole those whom they have injured." *Zipes*, 491 U.S. at 762.[5]

The D.C. Circuit's principal reason for denying fees was its belief that Congress would never have wanted to award fees to a party that succeeded in "convincing the [Supreme] Court to strike down the VRA's signature statutory device." App. 24a. But this analysis is deeply flawed.

To begin, the court of appeals' reasoning ignores the fact that Congress specifically included a provision in the

4. The D.C. Circuit thus is plainly wrong to suggest that Congress did not "need[] help" in enforcing the limits of its authority under the Fourteenth and Fifteenth Amendments. App. 18a.

5. There is no meaningful difference in the injury caused by enforcement of an unconstitutional statute and an unconstitutional ad hoc decision that leads to the same result—both affect the injured party in the same way. *See, e.g., Lavin v. Husted*, 764 F.3d 646 (6th Cir. 2014) (awarding fees after successful challenge to 30-year-old campaign finance law that had not been enforced).

VRA—Section 14(b), 52 U.S.C. § 10310(b)—which creates a cause of action for a plaintiff to seek a "declaratory judgment ... or permanent injunction against the execution or enforcement of any provision of [the VRA] or any action of any Federal officer or employee pursuant hereto." 52 U.S.C. § 10310(b). Attorney General Katzenbach, one of the primary drafters of the VRA, emphasized that the point of this provision was to spur a challenge to the statute: "it seemed to us that the important thing was to get this act tested, to get it tested in one court, and not to interfere with the jurisdiction of that court, and provide an appeal to the Supreme Court." *To Enforce the 15th Amendment to the Constitution of the United States: Hearing on S.1564 Before the S. Comm. on the Judiciary,* 89th Cong. at 144 (1965). Shelby County thus brought its lawsuit directly under Section 14(b) of the VRA. This was exactly what Congress intended. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 558 (1969) (recognizing that Section 14(b) specifically authorizes plaintiffs to pursue various actions including lawsuits "attack[ing] ... the constitutionality of the Act itself"); *see also* App. 51a-54a.

Moreover, as Judge Silberman recognized, the VRA's fee provision was enacted in 1975, whereas the provisions Shelby County challenged were enacted in 2006. Thus, it is entirely possible that Congress would have supported awarding fees to plaintiffs challenging *future* unconstitutional actions. Indeed, courts have repeatedly recognized that litigants that succeed in declaring a law unconstitutional provide a public benefit. *See, e.g., Lavin*, 764 F.3d at 651; *Kulkarni v. Nyquist*, 446 F. Supp. 1274, 1277-78 (N.D.N.Y. 1977).

Under the D.C. Circuit's rule, no party would ever be entitled to fees for challenging an unconstitutional federal law or action. Yet Congress should be equally concerned about unconstitutional federal and state actions, especially given that the recovery of fees under Section 14(e) is tied to the enforcement of the voting guarantees of the Fourteenth and Fifteenth Amendments, which apply to the federal government.

In fact, Section 14(b) is hardly unique. Numerous examples abound of statutes in which Congress sought to police the limits on its own authority by providing for a challenge to a statute, particularly where one or more of its provisions were of debatable constitutionality at the time of its enactment. *See, e.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81 (2002) (creating cause of action to "challenge the constitutionality of any provision of this Act or any amendment made by this Act" and prescribing rules for venue, intervention, and the like for such challenges). Nor is it unusual for fees to be available to a prevailing party in such an action. *See, e.g.*, *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126 (2012) (employee challenging constitutionality of the Civil Service Reform Act must bring action under that act; fees available pursuant to 5 U.S.C. § 5596); *Shelter Framing Corp. v. Pension Benefit Guar. Corp.*, 705 F.2d 1502 (9th Cir. 1983), *rev'd on other grounds sub nom. Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (fees freely available to business that sought a declaratory judgment under ERISA that a provision of the ERISA statute was unconstitutional and prevailed on the merits). In other words, even if an action like Shelby County's was not the *primary* reason Congress created the VRA's fees provision, the presence of Section 14(b) is

good reason to believe that Congress wanted to encourage jurisdictions to bring an action to enforce the limits of the Fourteenth and Fifteenth Amendments.

In the end, the infirmity of the D.C. Circuit's analysis is laid bare by what it does not cite: any case in which a plaintiff sued under a statute for which fees are available, prevailed on the merits, and had its request for fees from the defendant judged under a standard other than *Piggie Park*. That absence of authority is telling. This Court should not endorse the D.C. Circuit's transparent attempt to deny fees based on its antipathy to this Court's decision in *Shelby County*.

IV. Shelby County Is Eligible For Fees.

Although neither lower court ruled on the issue, both Judge Griffith and District Judge Bates strongly indicated that Shelby County would be eligible for fees under Section 14(e) if they reached the issue. *See* App. 2a-30a, 41a-88a. While Judges Tatel and Silberman believed that Shelby County was not eligible for fees under the statute, their reasoning suffers from the same errors affecting the court of appeals' entitlement analysis. *See* App. 28a-40a (Silberman, J.) (applying the same analysis to both issues). There is no question that Shelby County is eligible for attorney's fees.

Section 14(e) of the VRA gives district courts the discretion to award fees to prevailing parties in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." The Fourteenth and Fifteenth Amendments, in turn, create two categories of voting guarantees: (1) a guarantee to individuals against

discriminatory voting practices, and (2) a guarantee to state and local governments against federal nullification of voting laws unless by "appropriate" legislation. *See* amend. XIV, § 1 ("No state shall … deny to any person within its jurisdiction the equal protection of the laws."); amend. XIV, § 2 (imposing apportionment penalties "when the right to vote at any election … is denied … or in any way abridged"); amend XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."); amends XIV, § 5, XV, § 2 (providing Congress with the power to enforce the amendments by "appropriate legislation"). Shelby County's successful lawsuit enforced both of these voting guarantees. *See* Black's Law Dictionary 621 (4th ed. 1968) (defining "enforce" as "to compel obedience to").

First, Shelby County's lawsuit enforced the right of its citizens to be free of discriminatory voting practices. As Judge Silberman accurately explained, "the Section 5 procedure … limit[ed] the ability of voters to expeditiously change various voting practices and insofar as the formula for inclusion of covered jurisdiction was arbitrary, it was discriminatory." App. 39a. In other words, Shelby County is eligible for fees because it "protect[ed] the rights of individual voters in governed jurisdictions not to be discriminated against under the Fourteenth and Fifteenth Amendments" by ensuring their votes were not "abridged" by arbitrary means. *Id.*[6]

6. Although Judge Silberman recognized the right principle, he believed that Shelby County was not eligible for fees because its action "was not brought on behalf of the individual voting rights of the citizens of Shelby County" but instead on "precepts of federalism of the Tenth Amendment." App. 39a. But it is mere

Second, Shelby County's lawsuit enforced its right (and by extension its citizens' rights) to be free of "inappropriate" federal regulation of its voting practices. Shelby County prevailed in this litigation because it demonstrated that the record of racial discrimination in voting upon which Congress acted was insufficient to subject Shelby County and those similarly situated to comprehensive preclearance. Indeed, this Court recognized that Section 5 impaired the fundamental voting rights of citizens of covered jurisdictions in a way that comparable fundamental voting rights of citizens of non-covered jurisdictions were not. *See Shelby County*, 133 S. Ct. at 2626-27 (observing that the 2006 reauthorization of Section 5 provided only certain citizens, but not other citizens, with a substantive protection of their ability "to elect their preferred candidates of choice," and that "the preclearance requirements in one State [might] be unconstitutional in another" because Section 5 required race-based action with regard to voting) (internal quotations and citations omitted). Shelby County succeeded, and its citizens once again possess the full panoply of voting rights that citizens of non-covered jurisdictions have always enjoyed. *Cf. Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (federalism-based arguments ultimately promote individual liberty).

Both Judge Tatel and Judge Silberman believed that Shelby County is not eligible for fees because its action

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formalism to say that Shelby County was acting only on its own behalf. Shelby County acted to protect it and its residents from federal overreach and to protect its voters' ability to make changes in voting practices. Moreover, even a lawsuit to protect federalism is ultimately a promotion of individual rights. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

was "only based on precepts of federalism of the Tenth Amendment, not individual voting guarantees." App. 40a. But that is simply not true. From the beginning, Shelby County argued that Sections 4(b) and 5 of the VRA violated the Fourteenth and Fifteenth Amendments' requirement that enforcement legislation be "appropriate," *see, e.g.*, App. 56a ("The 'preclearance' obligation of Section 5 exceeds Congress's enforcement authority under the Fourteenth and Fifteenth Amendments"), and the courts recognized it as such, *see, e.g., Shelby County*, 679 F.3d at 853 ("Shelby County, Alabama, a covered jurisdiction, contends that when Congress reauthorized section 5 in 2006, it exceeded its enumerated powers."). This case was about what Congress was no longer authorized to do under the Fourteenth and Fifteenth Amendments, plain and simple.

In any event, Shelby County's *intentions* are not important, *see Herrington*, 883 F.2d at 744; what matters is whether its ultimate *result* "enforce[d] the voting guarantees of the fourteenth or fifteenth amendment," 52 U.S.C § 10310(e). Shelby County's enforcement of the limits on congressional authority under the Fourteenth and Fifteenth Amendments and the concomitant guarantees to States and their citizens falls squarely within the scope of Section 14(e). As a prevailing party, it is eligible for fees.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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Date: November 3, 2015

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 1, 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5138

SHELBY COUNTY, ALABAMA,

Appellant,

v.

LORETTA E. LYNCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

April 10, 2015, Argued
September 1, 2015, Decided

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-00651).

Before: TATEL and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Appendix A

Concurring opinion filed by *Circuit Judge* TATEL.

Opinion concurring in the judgment filed by *Senior Circuit Judge* SILBERMAN.

GRIFFITH, *Circuit Judge*:

Shelby County, Alabama, prevailed in a challenge to the constitutionality of section 4 of the Voting Rights Act of 1965 (VRA) and now seeks attorneys' fees from the Government under the Act's fee-shifting provision. The district court found that Shelby County was not entitled to receive fees because its victory did not advance any of the goals Congress meant to promote by making fees available. We agree.

I

The historical and legal background to this dispute has been set out several times over the history of this case. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2619-21, 186 L. Ed. 2d 651 (2013); *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 853-58, 400 U.S. App. D.C. 367 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612, 186 L. Ed. 2d 651; *Shelby Cnty., Ala. v. Holder*, 43 F. Supp. 3d 47, 50-52 (D.D.C. 2014); *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 428-41 (D.D.C. 2011), *aff'd*, 679 F.3d 848, 400 U.S. App. D.C. 367 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). We assume familiarity with those discussions and will cover only the topics relevant to this fee dispute.

Appendix A

A

In the aftermath of the Civil War, the Nation ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution in an effort to stamp out the race-based forms of legal oppression that the states had imposed throughout the first century of the Republic. These amendments worked a profound change by sweeping away the most appalling forms of legal subjugation that had defined the pre-Civil War era. Black Americans now held the sovereign franchise and were entitled to equal treatment under the law. But racial prejudice is not only insidious, it is resilient. The serpent of state-sponsored racism remained in the garden and "the blight of racial discrimination" simply switched its focus to a new battleground and "infected the electoral process" that black citizens had only begun to enter. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). Almost as soon as Reconstruction ended, a number of states adopted a variety of devices to suppress the newly established franchise of black citizens. *Id.* at 310. Literacy tests, grandfather clauses, poll taxes, and property qualifications prevented black Americans from voting at all. *Id.* at 310-11. And cunning district design and other tactics almost completely diluted the political power of black citizens. *See Shaw v. Reno*, 509 U.S. 630, 640, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

It was not until the 1950s that Congress began to take action to secure the promise of equal citizenship extended after the Civil War; among other things, Congress passed three statutes authorizing individual suits to protect

voting rights. *Katzenbach*, 383 U.S. at 313. But case-by-case litigation proved too slow, so Congress enacted a further-reaching solution to "rid the country of racial discrimination in voting," *id.* at 315: the Voting Rights Act of 1965. The VRA contained two principal provisions. The first, section 2, created a permanent, nationwide replacement for earlier civil rights statutes and authorized individual suits against any state or local jurisdiction that adopted a voting practice that had a discriminatory purpose or result. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). The second, section 5, was even more dramatic: It imposed on "covered jurisdictions" the requirement of obtaining "preclearance" for "all changes in state election procedure" from a three-judge federal district court in Washington, D.C., or from the Attorney General before they could take effect. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 203, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). The scope of section 5 was set by a formula in section 4 of the Act that covered any state or political subdivision that met certain telltale criteria of discriminatory voting practices as of November 1, 1964. *See Shelby County*, 679 F.3d at 855. The scope of this intrusion onto state affairs, Congress found, was justified by the severity and intractability of the problem posed by racial discrimination in voting. Under the older case-by-case approach to litigating voting abuses, progress had been "painfully slow," in part "because of the intransigence of [s]tate and local officials and repeated delays in the judicial process," but also because "even after apparent defeat resisters [sought] new ways and means of discriminating." H.R. Rep. No. 89-439, at 9-10 (1965). "Barring one contrivance too often

. . . caused no change in result, only methods." *Id.* at 10. In the face of this record, Congress concluded that there was "little basis for supposing" that without legislative action "the [s]tates and subdivisions affected will themselves remedy the present situation . . . ." S. Rep. No. 89-162, at 19 (1965). "Thus, to keep minorities from continuing to be victimized by [s]tates and political subdivisions' actions, Congress sought, through [sections 4 and 5] to 'shift the benefit of time and inertia from the perpetrators of evil to the victim.'" H.R. Rep. No. 109-478, at 8 (2006) (quoting *Katzenbach*, 383 U.S. at 328).

"The historic accomplishments of the Voting Rights Act are undeniable." *Northwest Austin*, 557 U.S. at 201. "The Act . . . proved immensely successful at redressing racial discrimination and integrating the voting process." *Shelby County*, 133 S. Ct. at 2626. The change wrought by section 5 in particular can hardly be overstated. As Congress put it when reauthorizing the VRA in 2006, section 5 was a "vital prophylactic tool[], protecting minority voters from devices and schemes that continue[d] to be employed by covered [s]tates and jurisdictions." H.R. Rep. No. 109-478, at 21; *see also id.* at 24 ("[T]he existence of [s]ection 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes."); S. Rep. No. 94-295, at 19 (1975) ("[I]t is largely [s]ection 5 which has contributed to the gains thus far achieved in minority political participation. Moreover, it is [s]ection 5 which serves to insure that this progress shall not be destroyed through new procedures and techniques.").

Appendix A

The coverage formula in section 4 and the preclearance regime in section 5 of the VRA were both originally subject to five-year sunset clauses. *Northwest Austin*, 557 U.S. at 199. When their scheduled expiration drew near in 1970, Congress renewed both provisions and once again set an expiration date for five years later. The House supported the reauthorization by a vote of 272 to 132, the Senate by a margin of 64 to 12. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 Tex. L. Rev. 667, 687 (2008). When the next deadline approached in 1975, Congress reauthorized both provisions yet again with a seven-year sunset clause, this time by a vote of 346 to 56 in the House and 77 to 12 in the Senate. *Id.* at 705-06. In 1982, with the seven-year window coming to an end, Congress reauthorized both provisions a third time, but added a twenty-five-year sunset clause. The House voted for reauthorization 389 to 24 and the Senate 85 to 8. *Id.* at 707. Finally, in 2006, Congress again reauthorized both provisions for another twenty-five years. In the House, 390 members supported reauthorization, with 33 opposed. *Id.* In the Senate, the vote was 98 to 0 in favor of reauthorization. *Id.* When he signed the reauthorization into law, President George W. Bush remarked: "The Voting Rights Act . . . broke the segregationist lock on the ballot box . . . . Today, we renew a bill that helped bring a community on the margins into the life of American democracy." Press Release, Office of the Press Secretary, The White House, President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006 (July 27, 2006), 2006 WL 2076688, at *1-2. Because of this series of reauthorizations, neither section 4 nor section 5 ever expired. Congress made some changes

to the provisions along the way, twice altering the basic coverage formula in section 4 so that it would include even more jurisdictions. *Shelby County*, 133 S. Ct. at 2620.

B

Shelby County, Alabama, was covered by the section 5 preclearance regime under the formula set out in section 4 of the VRA and challenged the constitutionality of both in a suit filed in district court in the District of Columbia.

After losing in the district court and before us, Shelby County ultimately prevailed when the Supreme Court ruled the coverage formula unconstitutional. *Shelby County*, 133 S. Ct. at 2631. The Court explained that "'the Framers of the Constitution [also] intended the [s]tates to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Id.* at 2623 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)). Moreover, "[n]ot only do [s]tates retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the [s]tates." *Id.* (quoting *Northwest Austin*, 557 U.S. at 203). The Court held that the VRA constituted a departure from those principles by infringing on the sovereignty of the states to design their own electoral process and burdening only some states while leaving others unaffected. *Id.* at 2623-24. Congress could only impose burdens that departed so significantly from constitutional norms if the burdens were justified under "current conditions." *Id.* at 2627. But, the Court explained, the coverage formula had never evolved to match the Nation's social

and political changes. Congress had "ignore[d] these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Id.* at 2629. Congress could not, the Court explained, impair the equal dignity of the states and infringe on their sovereignty simply by relying on the existence of a problem in the past. *Id.* Because the coverage formula did not adequately target contemporary conditions, the Court struck it down. *Id.* at 2631.

On remand to the district court, Shelby County filed a motion for attorneys' fees, seeking $2 million in fees and $10,000 in costs. The 1975 amendments to the VRA had introduced a fee-shifting provision at section 14(e) of the Act, which provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable [attorneys'] fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

52 U.S.C. § 10310(e).[1] Shelby County insisted that it had prevailed in an "action or proceeding to enforce the

1. The Voting Rights Act was originally codified in Title 42 of the United States Code. Section 14(e) was first codified as 42 U.S.C. § 1973*l*(e). On September 1, 2014, the Office of the Law Revision Counsel recodified the VRA and other provisions related to voting and elections into a new Title 52. *See* Editorial Reclassification, Office of the Law Revision Counsel, http://uscode.house.gov/editorialreclassification/t52/index.html (last visited Sept. 1, 2015). We will cite to the current version of the Code.

voting guarantees" of the Fourteenth and Fifteenth Amendments (which, for ease of reference, we shall term the Reconstruction Amendments) and so should receive fees under section 14(e). The Government opposed. The district court sided with the Government, concluding that Shelby County was not entitled to fees because, far from helping ensure compliance with the VRA, its lawsuit had explicitly opposed Congress's enforcement mechanism by trying--and succeeding--to have the coverage formula declared unconstitutional.

Shelby County timely appealed. We have jurisdiction over a final order of the district court under 28 U.S.C. § 1291. As the question in this case is whether the district court correctly applied the proper legal standard to determine whether Shelby County should receive fees, we review the decision de novo. *See Conservation Force v. Salazar*, 699 F.3d 538, 542, 403 U.S. App. D.C. 69 (D.C. Cir. 2012).

II

We agree with the district court that Shelby County is not entitled to fees.

A

The rules governing this dispute are straightforward. Fee-shifting provisions set out the criteria a court must use to determine whether a party is even *eligible* for fees. In addition to those statutory criteria, the Supreme Court has also created an additional requirement: A party

can only receive fees if it also shows that it is *entitled* to them, meaning that its victory in court helped advance the rationales that led Congress to create fee-shifting provisions in the first place. Though the entitlement requirement does not appear in the text of any fee-shifting provision, the Supreme Court has enforced it on a number of occasions and both this court and Congress have accepted that a prevailing party must show entitlement to receive a fee award. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) ("The terms of [the fee-shifting provision in Title VII] provide no indication whatever of the circumstances under which [a prevailing party] should be *entitled* to attorney's fees." (emphasis added)).

The Court has also explained that the primary rationale for such fee-shifting provisions--and the only rationale on which Shelby County relies to justify its entitlement to fees here--is encouraging private parties to bring civil rights lawsuits by protecting them from the costs of litigation. In no circumstances is a fee award a prize. Nor is it a bonus form of compensation to a litigant whose position the court finds sympathetic. It is an inducement to private parties to engage in favored activity. A party is entitled to fees only when it shows that its success in litigation advanced the goals Congress intended the relevant fee-shifting provision to promote. When a party's success did not advance those goals, it is not entitled to fees.

The Court first explained this standard in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964,

19 L. Ed. 2d 1263 (1968). In *Piggie Park*, a district court had refused to award fees to parties who unmistakably prevailed in a suit brought under Title II of the Civil Rights Act of 1964. The Court found that refusal an error. The prevailing parties were entitled to fees and so the district court was required to award them. The Court explained that Congress meant for fee-shifting provisions in civil rights statutes to encourage private parties to bring their own civil rights litigation. Congress was well aware that "the Nation would have to rely in part upon private litigation as a means of securing broad compliance" with Title II, given the obvious impossibility of the federal Government identifying and prosecuting every violation. *Id.* at 401. Indeed, the Court continued, a private party bringing a civil rights suit "does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Id.* at 402 (internal quotation marks omitted). Yet without a provision enabling prevailing parties to recover their fees, "successful plaintiffs" would be "routinely forced to bear their own attorneys' fees," meaning that "few aggrieved parties would be in a position to advance the public interest" by bringing civil rights litigation. *Id.* This obviously posed a problem, given congressional awareness that private litigation was an indispensable element of any successful enforcement program. *See, e.g., Allen v. State Bd. of Elections*, 393 U.S. 544, 556, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969) ("The achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."). Congress solved this problem with fee-shifting provisions. In other words,

Congress enacted fee-shifting provisions to encourage victims of discrimination to invest the resources needed to litigate civil rights violations and to distribute the cost of successful enforcement among lawbreakers. Because the prevailing parties in *Piggie Park* had acted as "the chosen instrument of Congress," *Christiansburg Garment*, 434 U.S. at 418, by helping to "secur[e] broad compliance" with Title II, *Piggie Park*, 390 U.S. at 401, they were entitled to fees.

Decades ago, we held that the *Piggie Park* standard also governs claims for attorneys' fees under the VRA. *See Donnell v. United States*, 682 F.2d 240, 245, 220 U.S. App. D.C. 405 (D.C. Cir. 1982) ("'Congress depends heavily upon private citizens to enforce the fundamental rights involved [in the Voting Rights Act]. [Fee] awards are a necessary means of enabling private citizens to vindicate these Federal rights.'" (quoting S. Rep. No. 94-295, at 40 (1975))). Shelby County insists that it is entitled to fees under *Piggie Park*. We disagree. Shelby County is not entitled to fees because its challenge to the constitutionality of the coverage formula did not help "secur[e] broad compliance with" the VRA. *Piggie Park*, 390 U.S. at 401.

As a general matter, a plaintiff who prevails in a lawsuit in connection with a civil rights statute typically will have helped enforce that statute exactly as Congress hoped and so will usually be entitled to fees under *Piggie Park*. *See Piggie Park*, 390 U.S. at 402 ("[O]ne who succeeds in obtaining an injunction under [Title II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."). But the Court has

made very clear that success in a lawsuit alone does not resolve the separate question of whether the successful party is entitled to fees. *See Christiansburg Garment*, 434 U.S. at 418 (explaining that merely prevailing in an action under Title VII "provide[s] no indication whatever of the circumstances under which [the prevailing party] should be *entitled* to attorney's fees." (emphasis added)). Instead, entitlement turns on whether the prevailing party's success advanced the purposes Congress meant to promote by making fees available--in particular, under the *Piggie Park* standard, whether the prevailing party helped "secur[e] broad compliance" with the civil rights statute in question. *Piggie Park*, 390 U.S. at 401.

For example, in *Christiansburg Garment*, an employer was accused of wrongful discrimination in violation of Title VII of the Civil Rights Act of 1964. 434 U.S. at 414. The defendant employer prevailed in the subsequent litigation, proving that it had not discriminated unlawfully. Having prevailed in a Title VII suit, the defendant was thus eligible for fees under the text of the statute's fee-shifting provision. The defendant insisted that it was also entitled to fees under *Piggie Park* for the same reason: It had won in court and so should receive fees. The Court rejected this argument. The *Piggie Park* standard entitles parties to receive fees for which they may be eligible only when they shoulder the burden of acting as "the chosen instrument of Congress" and "vindicate 'a policy that Congress considered of the highest priority'" by enforcing compliance with a statute. *Id.* at 418 (quoting *Piggie Park*, 390 U.S. at 402). The defendant employer in *Christiansburg Garment* did nothing more than prove

it had not engaged in the alleged misconduct. Therefore, even though the defendant prevailed and was eligible for fees, it was not entitled to them under the *Piggie Park* standard.

The Court came to effectively the same conclusion in a different context in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 109 S. Ct. 2732, 105 L. Ed. 2d 639 (1989). In *Zipes*, an intervenor union opposed the settlement of a Title VII class action by a class of employees against their employer, arguing that the collective bargaining agreement should preclude the employer from agreeing to the settlement. After the employees won judicial approval for the settlement of their class action, they argued that they were entitled to have the intervenor pay their fees. Just as in *Christiansburg Garment*, the Court found that the plaintiffs were not entitled to fees, even though they had prevailed, because Congress did not mean to use fee-shifting provisions as a general reward for victory. *Id.* at 761-64. Instead, fee-shifting provisions are designed to further the "central purpose" of civil rights statutes--"vindicating the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law." *Id.* at 761. The plaintiffs in *Zipes* had not helped enforce compliance with Title VII by fighting with the intervenor union over which of the employer's legal obligations would take precedence. Therefore they were not entitled to fees from the intervenor under the *Piggie Park* standard.

In both *Christiansburg Garment* and *Zipes*, the Court also explained that Congress intended fee-shifting

provisions in civil rights statutes to require parties who took "frivolous" or "unreasonable" positions to pay the fees of their successful opponents. *Christiansburg Garment*, 434 U.S. at 421; *Zipes*, 491 U.S. at 761. In both cases, the Court relied on this secondary rationale to craft a separate standard for fee awards to a party that successfully defeats such vexatious arguments. But in neither case could the prevailing parties rely on the *Piggie Park* standard because, though each party had won an action brought under a civil rights statute, neither had helped ensure compliance with the civil rights laws.[2]

B

1

Section 14(e) of the VRA permits district courts to award fees to a party who prevailed in an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). To show that it is eligible for fees under the statute, Shelby County must demonstrate that it prevailed in an action to enforce the voting guarantees of the Reconstruction Amendments. The Government concedes that Shelby County is a "prevailing party," but argues that it is nonetheless not eligible for fees because its lawsuit did not enforce the "voting guarantees" of the Reconstruction Amendments. As it turns out, this is

2. In both *Christiansburg Garment* and *Zipes*, the Court went on to conclude that the prevailing plaintiffs were not entitled to fees under the alternative frivolous litigation standard.

a difficult question. The Government submits that the only "voting guarantees" secured by those amendments are individual voting rights and that Shelby County's lawsuit was aimed instead at vindicating the structural rights of states and other political jurisdictions. Shelby County insists to the contrary that the Reconstruction Amendments "reflect guarantees to individuals and states alike: to individuals, to be free from discrimination; and to states, to be free from unwarranted regulation." To settle this dispute we would need to determine what voting rights the Reconstruction Amendments actually guarantee.

However, Shelby County could not win fees even if it were correct about the contours of the Reconstruction Amendments. Section 14(e) serves only to identify those *eligible* for fees. As we have explained, the prevailing party must also show that it is *entitled* to fees. *See Christiansburg Garment*, 434 U.S. at 418 ("The terms of [the fee-shifting provision in Title VII] provide no indication whatever of the circumstances under which [a prevailing party] should be *entitled* to attorney's fees." (emphasis added)); *cf. Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 710, 182 U.S. App. D.C. 83 (D.C. Cir. 1977) (explaining that a prevailing party's "*eligibility* for an award of attorney fees does not mean that it is necessarily *entitled* to such an award" (emphasis added)).

As we will explain below, Shelby County is not entitled to attorneys' fees because its lawsuit did not advance any of the purposes that Congress meant to promote by making fees available. Therefore we do not need to

determine whether Shelby County or the Government is correct about what "voting guarantees" are secured by the Reconstruction Amendments. Resolving that question is immaterial to the outcome of this case. And because we need not answer that constitutional question, we will not do so. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (advising courts "to guard jealously and exercise rarely our power to make constitutional pronouncements"); *PDK Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[T]he cardinal principle of judicial restraint--if it is not necessary to decide more, it is necessary not to decide more--counsels us to go no further.").

2

We agree with the district court that Shelby County is not entitled to fees under *Piggie Park*. Shelby County's argument boils down to the proposition that Congress introduced the fee-shifting provision into the VRA in 1975 with the express goal of inducing a private party to bring a lawsuit to neuter the Act's central tool. But that makes no sense. As we know from numerous statements by the Supreme Court, Congress enacted fee-shifting provisions in civil rights statutes to "secur[e] broad compliance" with those statutes, not to immobilize them. *Piggie Park*, 390 U.S at 401. Nor did Congress need to enlist private suits to challenge the constitutionality of the coverage formula in the way that it needed to rely on private parties to pursue individual enforcement litigation. *See id.* ("[T]he

Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."); *see also Allen*, 393 U.S. at 556 ("The achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."). To the contrary, Congress carefully preserved the power to invalidate the coverage formula by repeatedly including a sunset provision that would ensure the formula's expiration at some point in the future absent new authorization. Because of these successive sunset clauses, invalidating provisions of the Act did not even require both houses of Congress and the President to agree. Either house of the legislature could have refused to pass reauthorizing legislation, or the President could have refused to sign it, and thereby invalidated the coverage formula or forced alteration to the provision by insisting on revisions before agreeing to reauthorization legislation.

In other words, Shelby County's lawsuit neither advanced Congress's purpose nor performed some service Congress needed help to accomplish. It defies common sense and ignores the structure and history of the Act to think otherwise. Therefore we conclude that Shelby County is not entitled to fees under the *Piggie Park* standard.

Shelby County tries to justify its entitlement to fees by relying on a number of counterarguments. None persuade us. Most importantly, Shelby County points to section 14(b) of the Act, which provides that "[n]o court other than the District Court for the District of Columbia

shall have jurisdiction to issue any declaratory judgment . . . or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision" of the VRA. 52 U.S.C. § 10310(b). Shelby County argues that section 14(b) created a new cause of action authorizing constitutional challenges to the VRA. Therefore, the argument goes, Congress must have meant to encourage constitutional challenges. If not, it would have had no reason to establish a cause of action allowing private parties to bring such challenges. And if so, Shelby County insists that its success in striking down section 4 advanced Congress's purposes after all. On this peg Shelby County has hung its hopes.

But it is by no means clear that section 14(b) creates a new cause of action. The more natural reading is that the provision simply limits jurisdiction over constitutional challenges to the VRA to the District Court for the District of Columbia. The available evidence supports this view. To begin with, Congress had no need to create a new cause of action. The grants of jurisdiction in 28 U.S.C. § 1331 and in the Declaratory Judgment Act, 28 U.S.C. § 2201, provide adequate authorization for any attack on the VRA's constitutionality. Because parties already had all the authorization they needed to mount lawsuits arguing that the Act was not constitutional, Congress had no need to create a new cause of action for such suits. We also note that Attorney General Katzenbach's testimony during the Senate hearings on the VRA strongly suggests that section 14(b) is a venue provision.[3]

3. Attorney General Katzenbach was one of the principal drafters of the VRA. *See Dougherty Cnty., Ga., Bd. of Ed. v.*

During the Senate hearings, General Katzenbach was asked the purpose of section 14(b). He explained that it would channel all significant VRA litigation, enforcement suits and constitutional challenges alike, into one court, and prevent multiple parallel constitutional challenges unfolding in courts throughout the country. *To Enforce the 15th Amendment to the Constitution of the United States: Hearing on S.1564 Before the S. Comm. on the Judiciary*, 89th Cong. at 144 (1965) (statement of Nicholas Katzenbach, Attorney General of the United States) ("[T]he [preclearance] determinations are to be made in the three-judge court in the District of Columbia . . . . And it seems to us that if the integrity of that practice were to be preserved, then you had to have a corresponding provision here, otherwise you are going to have the act tested in a variety of different courts. So it seemed to us that the important thing was to get this act tested, to get it tested in one court, and not to interfere with the *jurisdiction* of that court, and provide an appeal to the Supreme Court." (emphasis added)). General Katzenbach said nothing about encouraging or authorizing constitutional challenges.

The Supreme Court seems to have put this issue to rest in *Allen v. State Board of Elections*, 393 U.S. 544, 89

White, 439 U.S. 32, 37, 99 S. Ct. 368, 58 L. Ed. 2d 269 (1978). The Court has often relied on his testimony to Congress regarding the Act to help illuminate the statute's terms. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 376, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000); *McCain v. Lybrand*, 465 U.S. 236, 247, 104 S. Ct. 1037, 79 L. Ed. 2d 271 (1984); *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 128 n.15, 142-46, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978); *Allen*, 393 U.S. at 567.

S. Ct. 817, 22 L. Ed. 2d 1 (1969). In *Allen*, the Court held that private citizens can sue for declaratory judgment that a jurisdiction must obtain preclearance for any change in voting practices. The Court also held that citizens could file such actions anywhere in the country, not only in the District of Columbia. In reaching this conclusion the Court explained that section 14(b) imposed a "*restriction*" on lawsuits authorized by some other cause of action; it never suggested that the provision authorized or created a cause of action for suits. *Id.* at 560 (emphasis added). The Court also noted that section 14(b) presented a "question involving the *jurisdiction* of the district courts," not involving the right of parties to bring lawsuits. *Id.* at 557 (emphasis added). The discussion in *Allen* strongly indicates that section 14(b) is only a venue provision. And a number of other Supreme Court cases that mention section 14(b) in passing also uniformly refer to it as a venue provision, not as a cause of action. *See Shaw v. Reno*, 509 U.S. 630, 637, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (noting that section 14(b) "vests the District Court for the District of Columbia with exclusive jurisdiction to issue injunctions against the execution of the Act"); *Hathorn v. Lovorn*, 457 U.S. 255, 267, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982) (noting that section 14(b) raised a "jurisdictional" issue); *Katzenbach v. Morgan*, 384 U.S. 641, 645, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) (noting that, "[p]ursuant to [section] 14(b)," parties challenging the VRA's constitutionality had "commenced [their] proceeding in the District Court for the District of Columbia").[4]

4. The Fifth and Ninth Circuits have also referred to section 14(b) solely as a venue provision. *See Brown v. City of Shreveport*, 158 F.3d 583, *1 [published in full-text format at 1998 U.S. App.

Shelby County points to a single sentence in *Allen*, in which the Court referred to section 14(b) as one of the "Act's enforcement provisions" and said that a suit of the kind identified in section 14(b) "would involve an attack on the constitutionality of the Act itself." 393 U.S. at 558. We do not understand why Shelby County thinks this remark helps its case. Given that section 14(b) requires any attack on the constitutionality of a VRA provision to be filed in federal court in the District of Columbia, all such cases necessarily come under the heading of a "section 14(b) injunctive action," irrespective of whether that section also serves to create a cause of action. The Court's remark in *Allen* therefore proves nothing either way.[5] And as we have just said, the rest of the Court's discussion of section 14(b) in *Allen* suggests much more strongly that the section is a jurisdictional venue provision, not a cause of action.

LEXIS 39629] (5th Cir. 1998) (per curiam) (unpublished) (citing section 14(b) to explain that "[t]he district court for the District of Columbia has exclusive jurisdiction over actions against federal officers or employees challenging the enforcement of the Voting Rights Act"); *Reich v. Larson*, 695 F.2d 1147, 1149 (9th Cir. 1983) (holding that, under section 14(b), constitutional challenges to the VRA "can only be brought in the District of Columbia district court").

5. Shelby County also insists that the Supreme Court understood section 14(b) to create a cause of action when it mentioned in *Katzenbach v. Morgan* that "[p]ursuant to [section] 14(b)," the parties challenging the VRA's constitutionality in that case had "commenced [the] proceeding in the District Court for the District of Columbia." 384 U.S. at 645. Shelby County's reliance on *Katzenbach* is even more mystifying than its reliance on *Allen*. As we have already said, this remark apparently indicates that the Court in *Katzenbach* perceived section 14(b) as no more than a venue provision.

In any event, even if Shelby County were right that section 14(b) creates a cause of action--a dubious proposition given the evidence--the County still would not be entitled to fees under the *Piggie Park* standard. *Piggie Park* does not ask whether Congress intended to authorize Shelby County's challenge. The only question under *Piggie Park* is whether Congress intended to encourage constitutional challenges to the VRA as a way of "securing broad compliance" with the statute, *Piggie Park*, 390 U.S. at 401, and thus made attorneys' fees available to promote such challenges. Shelby County has not given us any reason to believe that Congress did so. Shelby County's lawsuit did not facilitate enforcement of the VRA; it made enforcing the VRA's preclearance regime impossible. And as we have already explained, Congress did not need to rely on private challenges to the Act's constitutionality. The fact that Congress may have created a cause of action permitting such a suit does nothing to persuade us, in the face of these other considerations, that Congress also intended to use fees to encourage suits that sought to strike down its own carefully crafted enforcement program. Therefore Shelby County's insistence that section 14(b) creates a cause of action is irrelevant.

Shelby County tries to bolster its argument by explaining all the reasons why Congress might have regarded constitutional challenges to the VRA as socially beneficial. But as we have already said, the *Piggie Park* standard does not determine fee entitlement based on whether Congress would applaud or condemn an individual litigant. Instead, entitlement under *Piggie Park* turns

on whether Congress intended to use fees to encourage the prevailing party's litigation as part of a program for ensuring compliance with the Act. Though Shelby County may have vindicated other values, invalidating one of the VRA's central provisions did not promote compliance with the Act.

Shelby County's other arguments are no more persuasive. For example, Shelby County insists we must find it entitled to fees because winning this lawsuit enforced the voting guarantees of the Reconstruction Amendments. This argument thoroughly misses the point. Whether Shelby County defended the rights secured in the Reconstruction Amendments is relevant to whether the County is *eligible* for fees, not whether it is *entitled* to them. We do not decide whether Shelby County is right about the contours of those Amendments because we do not need to do so. Shelby County did not help secure compliance with the VRA by convincing the Court to strike down the VRA's signature statutory device. Therefore Shelby County is not entitled to fees under *Piggie Park*.

Shelby County also points out that "nothing in the legislative history suggests that Congress was disavowing promotion of other types of litigation authorized under the statute . . . ." Perhaps, but the legislative history does make clear that Congress intended for courts to award fees under the VRA, pursuant to the *Piggie Park* standard, when prevailing parties helped secure compliance with the statute. Most notably, the Senate Report explains that Congress was adopting section 14(e) because the Nation "depends heavily on private citizens to enforce" the Act.

S. Rep. No. 94-295, at 40 (1975). Shelby County cannot plausibly argue that Congress "depend[ed] heavily on private citizens" to bring constitutional challenges to the coverage formula, especially because the sunset provision empowered even one house of the legislature to invalidate section 4 by refusing to support reauthorization.

Shelby County insists that if it is not entitled to fees, the incentives to bring VRA actions would be distorted. Other jurisdictions seeking to invalidate provisions of the VRA on constitutional grounds in the future would have to bear the costs of litigating those challenges, while facing the prospect, if they lost, of fee liability to private parties that intervened on the Government's behalf. The distorted incentives of which Shelby County warns seem at best hypothetical. Shelby County has not identified any case in which an intervenor-defendant has obtained fees from a plaintiff jurisdiction for helping the Government defend the VRA's constitutionality, nor have we found such a case ourselves. Thus Shelby County's fear that future unsuccessful challengers would face the prospect of paying the fees of intervenor-defendants is mere speculation. Moreover, Shelby County does not seem to believe that these distorted incentives would actually materialize. In its reply brief Shelby County maintained that it would not have been liable for fees as to the intervenor-defendants in this case had Shelby County lost. But more to the point, even if we accepted Shelby County's prognostication and overlooked the internal contradictions of its argument, this issue is not relevant to our decision here. We need not decide whether our legal conclusion would actually create unequal litigation incentives or weigh the undesirability of

that consequence as a matter of policy. Such considerations are the province of Congress, not the courts.

Shelby County also argues that finding it not entitled to fees would merely constitute punishment because we dislike the results of Shelby County's success even though "unsympathetic litigants" routinely win fees when they prevail under civil rights statutes. Appellant's Br. 33-34. As an initial matter, we reject Shelby County's premise. Our decision in no way rests on any assessment of the social value of Shelby County's suit. Nor do we find Shelby County not entitled to fees based on the assumption that it brought this suit as an "opponent of individual voting rights." *Id.* at 43.

What is more, Shelby County misapprehends the cases on which this argument relies. The "unsympathetic" litigants Shelby County identifies won fee awards when they helped to enforce the statute in question, irrespective of whether the legal theory or practical effect of that suit was universally appealing. Some observers may be surprised, puzzled, or even upset when, pursuant to a fee-shifting provision, a court awards fees to a Caucasian man in a VRA suit, *see Maloney v. City of Marietta*, 822 F.2d 1023, 1026 (11th Cir. 1987), or a large corporation in a § 1983 suit, *see Sable Commc'ns of Cal. Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 193 (9th Cir. 1989), or even wealthy plaintiffs who sued a state government, *see Lavin v. Husted*, 764 F.3d 646, 650-51 (6th Cir. 2014). But when prevailing parties--no matter who they are--help enforce a civil rights statute, they are entitled to fees. Shelby County's problem here is not that this lawsuit may have

upset some observers. We find Shelby County not entitled because its lawsuit did not enforce compliance with the VRA and because Congress did not intend to use fees to encourage the invalidation of the Act's provisions.

In the same vein, Shelby County argues that we should be guided here by the analysis that persuaded the court to grant fees in *Lawrence v. Bowsher*, 931 F.2d 1579, 289 U.S. App. D.C. 346 (D.C. Cir. 1991). In that case, the district court dismissed a former federal employee's claim that he had been unlawfully discharged from his job, finding that he had not first exhausted the administrative remedies required under Title VII. *Id.* at 1580. The plaintiff successfully argued to us that Title VII did not apply to his class of federal employees and so he was not subject to an exhaustion requirement. *Id.* As a result, other federal employees who belonged to the same category as the plaintiff were then excluded from the scope of Title VII and no longer benefitted from its protections. *Id.* After prevailing, the plaintiff sought attorneys' fees under Title VII. *Id.* The district court refused to grant fees, concluding that a plaintiff whose lawsuit "was positively harmful to the civil rights of others" should not receive a fee award under a civil rights statute. *Id.* (internal quotation marks omitted). We disagreed, holding that "[a] district court may not deny fees to a prevailing plaintiff simply because his litigating position, although a correct interpretation of the law, does not comport with the court's vision of a position that would, in a broad sense, protect civil rights." *Id.* (internal quotation marks omitted). Shelby County submits that this case is exactly analogous to *Lawrence v. Bowsher*: We should not deny

fees simply because some observers find the invalidation of the coverage formula undesirable as a matter of policy. We disagree with Shelby County's reading of *Lawrence v. Bowsher*. We think that case helps illustrate exactly how Shelby County's suit differs from those in which prevailing parties are entitled to fees. The plaintiff there contributed to enforcement of Title VII by defining the category of individuals that Congress intended to protect, ensuring that the actions Congress meant to prohibit--and no other actions--would be prosecuted. That is precisely the kind of private enforcement action Congress meant the fee-shifting provision to encourage. Not so here. Shelby County defeated Congress's plans for enforcement of the VRA by invalidating the coverage formula and immobilizing section 5. Of course, as we have learned, Congress's plans violated the Constitution. But Shelby County's suit, unlike the suit in *Lawrence v. Bowsher*, did not contribute to enforcement of the VRA. For that reason Shelby County is not entitled to fees.

Finally, Shelby County argues that the approach we have taken to understanding section 14(e) is in error. Shelby County accepts that the Supreme Court has several times, in *Piggie Park, Christiansburg Garment*, and *Zipes*, discussed and relied on the purposes Congress intended to advance through fee awards. And Shelby County admits that in those cases the Court explained that prevailing parties are entitled to fees when their lawsuits advanced one or another purpose that Congress planned to advance by enacting the fee-shifting provision. Shelby County even acknowledges that we have adopted the *Piggie Park* standard to govern fee entitlement under

section 14(e). *See Donnell*, 682 F.2d at 245. Yet Shelby County insists nonetheless that neither we nor the Court has ever taken the additional step of determining the specific kind of plaintiff, argument, or motivation that Congress had intended to reward with fees. But we have not based our approach on such considerations. Rather, we have applied the *Piggie Park* standard as directed by the Court and as urged by Shelby County. Under that standard, we have considered whether the outcome of Shelby County's suit--the invalidation of the coverage formula of the VRA--was the kind of outcome that Congress thought would enhance enforcement of the VRA and made fees available to promote. We think it was not. Therefore Shelby County is not entitled to fees.

C

Even though Shelby County has based its argument for fees entirely on *Piggie Park*, the district court considered whether Shelby County might also be entitled to fees under the *Christiansburg Garment* standard, which would allow a fee award only if the Government's defense of the coverage formula's constitutionality was frivolous or without foundation. *See Shelby County*, 43 F. Supp. 3d at 68-71. But since Shelby County has never maintained that it could even theoretically obtain fees under that standard, we do not believe we should resolve whether *Christiansburg Garment* should sometimes apply in cases like this one. It is enough to resolve this fee dispute by holding that Shelby County is not entitled to fees under the only standard it has urged us to apply.

III

For the foregoing reasons, we affirm the district court's denial of Shelby County's application for attorneys' fees.

Appendix A

TATEL, *Circuit Judge*, concurring: Although I agree with Judge Griffith that Shelby County is not entitled to recover attorneys' fees, I find nothing at all "difficult" about the question whether the County is even *eligible* for fees under section 14(e) of the Voting Rights Act. *See* Op. at 14. Resolving this case on that threshold issue, moreover, would not require us "to decide more . . . [than] necessary," *id.* at 15 (internal quotation marks omitted)--or, for that matter, *any* new question of law.

Recall that Shelby County is eligible for fees only if its lawsuit--an action to invalidate the VRA's preclearance regime--qualifies as an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). As filed and briefed, the County's suit does not meet this standard. Neither in its complaint nor in any brief filed in the district court, this court, or the Supreme Court did Shelby County even hint that its suit would protect any voting right guaranteed by the Fourteenth or Fifteenth Amendment. Instead, as Judge Bates recognized in rejecting the County's request for fees, Shelby County expressly and repeatedly stated that it sought to enforce the *Tenth Amendment* by "vindicat[ing] federalism interests and the 'fundamental principle of equal sovereignty' among the states." *Shelby County, Alabama v. Holder*, 43 F. Supp. 3d 47, 57 (D.D.C. 2014) (quoting Compl. ¶ 43); *see also* Br. for Shelby County at 23, *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) (contending that VRA preclearance provisions "encroach[ed] on Tenth Amendment rights"). Indeed, in its cert petition, Shelby County framed the relevant question as whether

Congress's reauthorization of Section 5 of the Voting Rights Act "exceeded its authority under the Fifteenth Amendment *and thus* violated the Tenth Amendment and Article IV of the United States Constitution," and it was on this issue that the County ultimately prevailed. *See Shelby County*, 133 S. Ct. at 2623, 2631 (invalidating VRA's preclearance coverage formula under Tenth Amendment). But now seeking to qualify for fees under section 14(e), the County has changed its tune, claiming that its suit in fact sought to enforce the Fourteenth and Fifteenth Amendments' "voting guarantees," 52 U.S.C. § 10310(e), by vindicating what it calls those Amendments' "guarantee of local voting autonomy," Appellant's Reply Br. 3. This claim is meritless.

Anyone wishing to discover what "voting guarantees" the Fourteenth and Fifteenth Amendments protect must begin with the Amendments' text. Section One of the Fifteenth Amendment provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section One of the Fourteenth Amendment declares, among other things, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Obviously, neither of these provisions includes any guarantee of state autonomy over voting. By its plain terms, the Fifteenth Amendment enshrines only one "voting guarantee," i.e., the "right of citizens of the United States to vote" free from discrimination based on "race, color, or previous condition of servitude."

Furthermore, and contrary to Shelby County's claim that the Amendment protects "state autonomy over voting," Appellant's Reply Br. 14, the Amendment's prohibition against discrimination is expressly directed at the states. And although the Fourteenth Amendment says nothing about "voting guarantees"--indeed, as adopted, the Amendment did not even protect the right to vote--the Supreme Court has subsequently interpreted the Amendment's Equal Protection Clause as "guarantee[ing] the opportunity for equal participation by all voters." *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Like the Fifteenth Amendment, moreover, it secures that right against the states. The two Amendments thus "guarantee" not state autonomy, but rather the right of citizens to vote, and they expressly guarantee that right against state interference.

Shelby County, however, claims to have found a "concomitant guarantee[]" of local voting autonomy lurking in the two Amendments' enforcement provisions. Appellant's Br. 14. That Congress may enforce the Amendments only by "appropriate" legislation, the County insists, means that the enforcement provisions guarantee "the constitutional right of sovereign States . . . to regulate state and local elections as they see fit." *Id.* at 43. But this claim finds no support in the constitutional text. Section Two of the Fifteenth Amendment provides that "[t]he Congress shall have power to enforce this article by appropriate legislation." Using virtually identical language, Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

By their plain text, neither clause "guarantees" any right, voting or otherwise. Rather, they give Congress power to enforce the "articles," i.e., equal protection of the laws (Fourteenth Amendment) and the right of citizens to vote free from discrimination based on race (Fifteenth Amendment).

Shelby County cites nothing to support its argument that the two enforcement clauses somehow also protect state autonomy, and for good reason. Added to the Constitution in the wake of this nation's bloody civil war to "take away all possibility of oppression by law because of race or color," *Ex parte Virginia*, 100 U.S. 339, 345, 25 L. Ed. 676 (1880), the Amendments were intended to *limit* state autonomy, not protect it. Owing largely to their enforcement provisions, *see id.*, they "establish[ed] . . . the federal government as the main protector of citizens' rights," granting "the national state the authority to intervene in local affairs to protect the basic rights of all American citizens," Eric Foner, *The Supreme Court and the History of Reconstruction--and Vice Versa*, 112 Columbia L. Rev. 1585, 1587 (2012).

The Supreme Court has long recognized this proposition. In *Ex parte Virginia*, decided just years after the Fifteenth Amendment's ratification, the Court declared that the Reconstruction Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." 100 U.S. at 345. With respect to Congress's power to enforce the Amendments, the Court explained:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws *against State denial or invasion*, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46 (emphasis added). In *Fitzpatrick v. Bitzer*, the Court, elucidating Congress's authority to enforce the substantive guarantees of the Fourteenth Amendment, recognized that the Amendment "quite clearly contemplates limitations on [the states'] authority." 427 U.S. 445, 453, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). And in *City of Boerne v. Flores*, the Court, harkening back to *Ex parte Virginia*, emphasized that the Reconstruction Amendments' enforcement provisions ensure that Congress has "the power to make the [Amendments'] substantive constitutional prohibitions against the States effective." 521 U.S. 507, 522, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). The Court explained that they constitute a "positive grant of legislative power to Congress," authorizing "[l]egislation which deters or remedies constitutional violations . . . even if in the process it . . . intrudes into legislative spheres of autonomy previously reserved to the States." *Id.* at 517-18 (internal quotation marks omitted).

Given this century and a half of precedent, rejecting Shelby County's argument hardly requires that we

"make constitutional pronouncements," Op. at 15 (internal quotation marks omitted), or otherwise attempt to delimit, once and for all, the precise contours of the Reconstruction Amendments, *see id.* at 14, 21. It suffices to recognize, as the Supreme Court has time and again, that the Fourteenth and Fifteenth Amendments protect not state autonomy, but rather individual rights "against State denial or invasion." *Ex parte Virginia*, 100 U.S. at 346.

Of course, Congress's remedial authority under the Fourteenth and Fifteenth Amendments is "not unlimited," as it "extends only to *enforcing* the provisions of [those] Amendment[s]." *City of Boerne*, 521 U.S. at 518-19 (emphasis added) (internal quotation marks and alteration omitted). But when Congress oversteps the limits of that power, it does not, as Shelby County contends, violate any "guarantee" of the Fourteenth or Fifteenth Amendment. Instead, as always happens when Congress exceeds its enumerated authority and breaches the bounds of federalism, it violates the Tenth Amendment, which reserves to the states all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 919, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); *New York v. United States*, 505 U.S. 144, 177, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Indeed, as noted above, such was the basis for Shelby County's original complaint in this very case, as well as for the Supreme Court's decision in the County's favor. Put in terms of the VRA's fee-shifting provision, then, Shelby County brought this case to enforce the *federalism* "guarantees" of the Tenth Amendment, not the "voting guarantees" of the

Fourteenth or Fifteenth Amendment. Shelby County is thus ineligible for attorneys' fees.

Finally, I agree with Judge Silberman that Shelby County would have been eligible for fees had it prevailed in a suit brought on behalf of voters to vindicate their Fourteenth and Fifteenth Amendment rights to be free from discrimination in voting. But that is not the case the County filed.

SILBERMAN, *Senior Circuit Judge*, concurring in the judgment: At oral argument, I asked counsel for the NAACP (originally the intervenor) the following hypothetical. Suppose a new Congress were to pass a version of the Voting Rights Act that was discriminatory to African-American voters. If you sued and prevailed on grounds that the new statute violated both the "right to vote" under the Fifteenth Amendment (which protects against interference by both the states *and the United States*), as well as the right to vote pursuant to the equal protection clause of the Fourteenth Amendment, *see Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), would you be entitled to attorney's fees under the Voting Rights Act. The answer was unequivocally yes, and I think that is correct.

But that dialogue demonstrates two logical flaws in the court's opinion. The first is that the attorney's fees provision does not speak to suits to enforce the Voting Rights Act, similar to prior cases dealing with civil rights statutes, but "rather an action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments." In other words, a suit that challenges the constitutionality of a version of the Voting Rights Act can not be rejected merely because it challenges the Voting Rights Act. Therefore, much of the court's discussion on this point is irrelevant.

The second logical flaw, similar to the first, which the district court and Judge Griffith's opinion emphasize, is that it is allegedly inconceivable that any Congress would authorize attorney's fees for an action challenging the

legality of the *very* statute in which attorney's fees are authorized. The problem is that the statute authorizing attorney's fees was passed in 1975, whereas the recent statute challenged in this case was passed in 2006.[1] So, whether attorney's fees are allowed depends not on the view of the recent Congress, but rather on the words of the 1975 Congress.

I also disagree with the government that Shelby County could not have recovered fees because its lawsuit was inherently one on behalf of state autonomy. Actually, the original case could have been framed as one protecting the rights of *individual* voters in governed jurisdictions not to be discriminated against under the Fourteenth and Fifteenth Amendments. After all, the Section 5 procedure did limit the ability of voters to expeditiously change various voting practices and insofar as the formula for inclusion of covered jurisdictions was arbitrary, it was discriminatory. (Indeed, Section 2 of the Fourteenth Amendment actually speaks of preventing the right to vote of anyone being in any way "abridged."[2])

Nevertheless, I concur in the judgment in this case because I agree with Judge Tatel that the original suit was not brought on behalf of the individual voting rights

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1. Section 14(e) was originally codified as 42 U.S.C. §1973l(e), but was later recodified with the Voting Rights Act as a whole into Title 52.

2. Although a specific remedy is provided. It is not clear whether, and if so, how, it may be implemented by statute; in any event, it was not relied upon by Shelby County.

of the citizens of Shelby County. Whether this goes to eligibility or entitlement -- the concepts are interrelated in the court's opinion -- it is sufficient to conclude the action was *not* brought to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. It is simply not enough to rely, as does Shelby County, on their original argument that the statute was not "appropriate" within the meaning of those amendments, because its claim of inappropriateness -- at least originally -- was only based on precepts of federalism of the Tenth Amendment, not individual voting guarantees.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MAY 28, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-651 (JDB)

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States,

Defendant,

EARL CUNNINGHAM, *et al.*,

Defendant-Intervenors.

May 28, 2014, Decided
May 28, 2014, Filed

MEMORANDUM OPINION

Before the Court is [94] plaintiff Shelby County, Alabama's ("Shelby County") motion for attorney's fees. Shelby County seeks $2,000,000 in fees under 42 U.S.C. § 1973*l*(e), a provision of the Voting Rights Act ("VRA")

that permits an award of reasonable attorney's fees, in a district court's discretion, to the prevailing party in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." The United States and defendant-intervenors oppose the requested fee award. Both Shelby County's fee petition and section 1973*l*(e) present a series of interpretive challenges, for which there is often little or no binding precedent. But ultimately, for the reasons set forth below, the Court will deny Shelby County's motion for attorney's fees. Shelby County's attorneys won an impressive victory before the U.S. Supreme Court. But as is true in most litigation, that victory came at a price. Shelby County and its attorneys, not the American taxpayer, must foot the bill.

BACKGROUND

Shelby County brought this action against the Attorney General as a facial challenge to the constitutionality of Section 4(b) and Section 5 of the Voting Rights Act of 1965. Section 5 of the VRA "required States to obtain federal permission before enacting any law related to voting," and Section 4(b) created a coverage formula that "applied that requirement only to some States." *Shelby Cnty., Ala. v. Holder,* 133 S. Ct. 2612, 2618, 186 L. Ed. 2d 651 (2013). Shelby County alleged that Section 4(b)'s coverage formula and Section 5's preclearance obligation for covered jurisdictions violated the principle of "equal sovereignty" embodied in the Tenth Amendment and Article IV of the United States Constitution, and that it exceeded Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. *See* Compl.

[ECF No. 1] ¶¶ 36-43. Shelby County included a request for "reasonable attorneys' fees and costs" in the prayer for relief in its complaint. *Id.* ¶ 44(c).

Defendant-intervenors—a group of voters from Shelby County, Alabama who believed in the constitutionality of the challenged provisions of the VRA—intervened on the side of the Attorney General. Together, both the Attorney General and defendant-intervenors pointed to "the extensive 15,000-page legislative record that Congress amassed in support of its 2006 reauthorization of Section 5 and Section 4(b)," *Shelby Cnty., Ala. v. Holder,* 811 F. Supp. 2d 424, 428 (D.D.C. 2011), as evidence that the challenged provisions remained "justified by current needs," *Nw. Austin Mun. Util. Dist. No. 1 v. Holder,* 557 U.S. 193, 203, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). After a review of the legislative record, extensive briefing, and oral argument, this Court agreed, holding that the challenged provisions "remain[ed] a congruent and proportional remedy to the 21st century problem of voting discrimination in covered jurisdictions," and granted summary judgment in favor of the United States. *Shelby County,* 811 F. Supp. 2d at 428 (internal quotation marks omitted).

The Court of Appeals for the District of Columbia Circuit affirmed. Judge Tatel, writing for himself and Judge Griffith, acknowledged that "[t]he legislative record is by no means unambiguous," but ultimately held that "Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments" in reauthorizing

the challenged provisions. *Shelby Cnty., Ala. v. Holder,* 679 F.3d 848, 884, 400 U.S. App. D.C. 367 (D.C. Cir. 2012). Judge Williams dissented. Troubled by Section 4(b)'s reliance on aging data, he concluded that Section 4(b)'s coverage formula was "irrational" and, therefore, unconstitutional. *Id.* at 885 (Williams, J., dissenting).

The United States Supreme Court reversed. Chief Justice Roberts, writing for a five-justice majority, first acknowledged that "voting discrimination still exists; no one doubts that." *Shelby County,* 133 S. Ct. at 2619. Nevertheless, the Chief Justice repeated the Supreme Court's earlier admonition that the VRA "imposes current burdens and must be justified by current needs.'" *Id.* (quoting *Northwest Austin,* 557 U.S. at 203). Ultimately, the Court held that the Section 4(b) coverage formula—"an extraordinary departure from the traditional course of relations between the States and the Federal Government," *id.* at 2631—was unconstitutional. Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan) dissented, claiming that the majority "err[ed] egregiously by overriding Congress' decision." *Id.* at 2652 (Ginsburg, J., dissenting).

After the mandates issued from the courts above, this Court entered a final judgment in Shelby County's favor on October 11, 2013. *See* Oct. 11, 2013 Order [ECF No. 92]. Shelby County filed its motion for attorney's fees two weeks later, within the timeline provided for by the Federal Rules. *See* Fed. R. Civ. P. 54(d)(2)(B)(i). Shelby County asked for $2,000,000 in fees and $10,000 in costs. Shortly thereafter, the parties—acknowledging that

Shelby County's motion "appears to present a legal issue of first impression"—filed a joint motion to bifurcate the issues of fee entitlement (that is, whether Shelby County is entitled to any attorney's fees) and fee amount (that is, assuming Shelby County is entitled to a fee award, what the proper size of that fee award is). Joint Mot. for Bifurcation [ECF No. 96]. This Court granted the motion, delaying resolution of the "fee amount" question until after resolution of the "fee entitlement" issue. *See* Nov. 5, 2013 Order [ECF No. 98]. The United States opposed Shelby County's fee request, arguing (1) that sovereign immunity barred the claim, (2) that this was not the sort of "action or proceeding" in which the VRA authorized a fee award, and (3) that even if it were, Shelby County was not entitled to a fee award. Defendant-intervenors mostly agreed with the arguments advanced by the United States. After full briefing, the Court held a motions hearing on February 14, 2014.

LEGAL STANDARD

The fee-shifting provision of the Voting Rights Act provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

42 U.S.C. § 1973*l*(e).

Appendix B

DISCUSSION

All agree that this fee petition presents several challenging legal questions, some of which are issues of first impression. After a careful review of the parties' briefs, their presentations at oral argument, and the entire record in this case, and for the reasons discussed below, the Court holds that the United States waived its sovereign immunity in the Equal Access to Justice Act, but that Shelby County is not entitled to a fee award—even if this is the sort of "action or proceeding" in which the Court could award fees (a question the Court does not decide). Despite Shelby County's creative efforts to show otherwise, its fee petition is too square a peg for section 1973*l*(e)'s round hole.

I. The United States Waived Its Sovereign Immunity.

The first matter to be resolved is the issue of sovereign immunity, because "[j]urisdiction must be established before a federal court may proceed to any other question," *Galvan v. Fed. Prison Indus., Inc.,* 199 F.3d 461, 463, 339 U.S. App. D.C. 248 (D.C. Cir. 1999) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)), and the issue of "[s]overeign immunity is jurisdictional: a court's jurisdiction to entertain a suit against the sovereign is circumscribed by the limits of the legislature's waiver of sovereign immunity." *In re Al Fayed,* 91 F. Supp. 2d 137, 138 (D.D.C. 2000); accord *United States v. Mitchell,* 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("It is axiomatic that the United States may not be sued

without its consent and that the existence of consent is a prerequisite for jurisdiction."). Although this fee petition presents several novel and challenging questions of law, the question of sovereign immunity is not one of them: the United States plainly waived its sovereign immunity for attorney's fees claims in section 2412(b) of the Equal Access to Justice Act.

A. Shelby County did not forfeit the argument that the United States has waived its sovereign immunity.

The United States takes the aggressive position that because "Shelby County's [opening] brief is completely silent on the essential question of the sovereign immunity," Shelby County has forfeited any argument that the United States has waived sovereign immunity, which "by itself, is a fatal defect that must lead to denial of Shelby County's fee petition."[1] Gov't's Opp'n to Pl.'s Mot. for Attorney's Fees ("Gov't's Opp'n") [ECF No. 103-1] at 5-6; *see also id.* at 5 ("The United States should not be required to guess about the possible arguments Shelby County might have made but did not make."). In response, Shelby County points out that "sovereign immunity is a defense, and Shelby County is under no obligation to anticipate a defense and raise it on behalf of the United States." Pl.'s Reply [ECF No. 104] at 14 n.5.

1. Of course, sovereign immunity would not bar a fee award against defendant-intervenors.

Shelby County is correct. The D.C. Circuit has consistently (and intuitively) classified sovereign immunity as a "defense." *See, e.g.*, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.10, 353 U.S. App. D.C. 147 (D.C. Cir. 2002) (analyzing "the defense of sovereign immunity"). A plaintiff seeking relief has no obligation to anticipate and negate a possible affirmative defense by the defendant. *See, e.g.*, *Flying Food Grp., Inc. v. NLRB,* 471 F.3d 178, 183, 374 U.S. App. D.C. 55 (D.C. Cir. 2006). That general principle applies to a sovereign immunity defense. *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 104 (D.D.C. 2006) ("Because sovereign immunity is in the nature of an affirmative defense, the plaintiff need not prove the absence of sovereign immunity in the first instance; rather, the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.") (internal quotation marks and emphasis omitted), *aff'd*, 531 F.3d 884, 382 U.S. App. D.C. 155 (D.C. Cir. 2008). Likewise, a party seeking attorney's fees against the government has no obligation to address the issue of sovereign immunity unless and until the government raises it.

Here, the government raised a sovereign immunity defense in its opposition brief. Gov't's Opp'n at 5. Shelby County timely responded in its next filing. Pl.'s Reply at 12. Because Shelby County had no obligation to preemptively respond to a possible affirmative defense that the government might (or might not) choose to raise, Shelby County has not forfeited the argument that the United States waived sovereign immunity.[2]

2. When pressed at oral argument, counsel for the United States came close to—but ultimately stopped short of—conceding

B. The United States waived its sovereign immunity from attorney's fees claims in the Equal Access to Justice Act.

"[T]he United States may not be sued without its consent," *Mitchell,* 463 U.S. at 212, so, "[e]xcept to the extent it has waived its immunity, the Government is immune from claims for attorney's fees" under general principles of sovereign immunity.[3] *Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983). The Equal Access to Justice Act ("EAJA") includes a generic waiver of sovereign immunity by the United States for attorney's fees claims: sovereign immunity is waived wherever the United States would have been liable for fees at common law or under some other statute, but for the doctrine of sovereign immunity. The relevant provision reads:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court

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this argument. *See* Feb. 14, 2014 Hr'g Tr. ("Hr'g Tr.") [ECF No. 106] at 30 ("[W]hile it was mentioned in the brief, we would not rest our hat on that point.").

3. Because Shelby County sued the Attorney General of the United States in his official capacity, this case is treated as a suit against the United States for purposes of sovereign immunity. *See Kentucky v. Graham,* 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

> having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b). This provision "eliminated the absolute sovereign immunity bar to attorney fee awards against the government. . . . [T]he plain meaning of the EAJA is that an attorney fees award is not barred or made less likely simply because the offending party is the government." *Aero Corp. v. Dep't of the Navy,* 558 F. Supp. 404, 419 (D.D.C. 1983); *see also Unification Church v. INS,* 762 F.2d 1077, 1080, 246 U.S. App. D.C. 98 (D.C. Cir. 1985) (accepting the government's argument that "[t]he usual grant of sovereign immunity to the United States from fees awarded under a particular statute would . . . now be waived even in the absence of a particular provision in the fees statute to that effect").[4]

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4. Section 2412(b) of the EAJA is used less often than its better known cousin, section 2412(d)(1)(A), which provides for a fee award to a party prevailing against the United States in most civil cases, with the important caveat that the United States can escape a fee award under that provision if it can show that its (losing) position was "substantially justified." *See Am. Hosp. Ass'n v. Sullivan,* 938 F.2d 216, 219, 290 U.S. App. D.C. 397 (D.C. Cir. 1991) ("[The EAJA] waived the sovereign immunity of the United States against attorneys' fees in two distinct manners. Most EAJA litigation arises under 28 U.S.C. § 2412(d)(1)(A), which provides for the award of fees against the United States in most types of civil litigation unless the court finds that the position of the United States was substantially justified . . . . There is, however, a lesser

A quick read of the statute would seem to decide the waiver question in Shelby County's favor, but the United States resists. To begin with, it concedes that "Section 2412(b) works a partial waiver of sovereign immunity through application to the United States of certain other federal fee-shifting statutes that allow fees to prevailing parties." Gov't's Opp'n at 8. It then offers a two-part test, claiming that "Section 2412(b) authorizes reasonable attorney's fees against the United States under the terms of any statute that: (1) expressly permits suit against the United States for its violation of the statute, and (2) also provides for the award of attorney's fees against the losing party without mentioning the United States." *Id.* So both parties agree that sovereign immunity is waived by the EAJA when read in conjunction with generally applicable fee-shifting provisions in other statutes. And both agree that "Section 1973*l*(e) of the VRA constitutes a fee-shifting provision that does not expressly prohibit obtaining fees from the United States." *Id.* at 9. Nonetheless, the United States insists that sovereign immunity still shields it from fee liability in this case, relying on the first prong of its proposed test. *See id.* (asserting that the EAJA waives sovereign immunity only for a statute that "expressly permits suit against the United States for its violation of the statute"). None of the government's arguments on this score are persuasive.

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used waiver of sovereign immunity against attorneys' fees in 28 U.S.C. § 2412(b). That section makes '[t]he United States . . . liable for [attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.'").

Appendix B

The United States claims that Shelby County's lawsuit fails its proposed test for a waiver of sovereign immunity under section 2412(b) of the EAJA because there is no "merits liability in this case by the United States for violations of the voting guarantees of the constitution or the statutes that enforce them," and, similarly, because "fee liability runs with merits liability." *Id.* at 9-10 (citing *Graham,* 473 U.S. at 168). Shelby County responds by pointing out, first, that the government cites no authority for its supposed requirement that the statute containing the secondary fee-shifting provision "expressly permits suit against the United States." Pl.'s Reply at 13. Shelby County also argues that, even if there were such a requirement, it "is of course met here—Section 1973*l*(b) [of the VRA] expressly authorized this suit against the United States." *Id.*

Again, Shelby County has the better of this argument. Shelby County cited 42 U.S.C. § 1973*l* in its complaint as one of the bases for subject-matter jurisdiction in this Court. Compl. ¶ 4. And section 1973l(b) provides for exclusive jurisdiction in the U.S. District Court for the District of Columbia for "any declaratory judgment" or "any restraining order or temporary or permanent injunction against the execution or enforcement of any provision" of the Voting Rights Act. Shelby County filed its suit pursuant to the terms of the Voting Rights Act, and it prevailed, so the government's argument that the Voting Rights Act does not "permit[] suit against the United States," Gov't's Opp'n at 9, and that there can be

no merits liability for the United States, is disproved by this very lawsuit.[5]

Further support for this conclusion comes from the Supreme Court's decision in *Allen v. State Board of Elections,* 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). There, the Supreme Court called section 1973*l*(b) one of the Voting Rights Act's "enforcement provisions," even though this type of "injunctive action is one aimed at prohibiting enforcement of the provisions of the Voting Rights Act, and would involve an attack on the constitutionality of the Act itself." *Id.* at 558; *see also Katzenbach v. Morgan,* 384 U.S. 641, 645, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) (noting that section 1973*l*(b) provides exclusive jurisdiction in the U.S. District Court for the District of Columbia for such actions). For this reason, even if the Court accepted the government's (unsupported) assertion that sovereign immunity is not waived under the EAJA without another statutory provision that "expressly permits" a lawsuit against the United States, there is such a provision here,

5. The government makes an unforced error in asserting that "the United States cannot be held substantively liable under [the] voting guarantees of the Fourteenth or Fifteenth Amendments themselves or under any of the statutes that enforce the voting guarantees" because they "regulate the conduct of voting by states (and localities like Shelby County), not the United States." Gov't's Opp'n at 10-11. As Shelby County correctly responds, the text of "[t]he Fifteenth Amendment itself conclusively refutes the Government's contention: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state . . . .'" Pl.'s Reply at 3 (quoting U.S. Const. amend. XV). And section 1973*l*(b) authorizes a declaratory judgment action against the Attorney General under the VRA.

and Shelby County sued under it. Put another way, even though "fee liability runs with merits liability," the United States lost this case on the merits. Hence, sovereign immunity is no bar to Shelby County's motion.

II. Fee Eligibility: Was This an "Action or Proceeding to Enforce the Voting Guarantees of the Fourteenth or Fifteenth Amendment"?

Section 1973*l*(e) gives a district court discretion to award attorney's fees only in certain cases. Specifically, the district court's "discretion" to award attorney's fees to the "prevailing party"[6] is limited to "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment."[7] 42 U.S.C. § 1973*l*(e). The problem is this. In any given "action or proceeding," the plaintiff and the defendant may have vastly different goals—indeed, they are often diametrically opposed. For example, in a murder prosecution, the government is "enforcing" the legal prohibition on murder, but the criminal defendant is not. In a constitutional tort action, a victim of government abuse is "enforcing" individual rights protections in the Constitution or 42 U.S.C. § 1983, but the state-official defendant is not. Section 1973*l*(e),

6. The United States concedes that Shelby County is the "prevailing party."

7. Individual amendments to the United States Constitution are typically capitalized. *See The Bluebook: A Uniform System of Citation* R. 8(c)(ii), at 85 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). For whatever reason, in section 1973*l*(e), they are not. In this opinion, the Court will (mostly) adopt the statute's convention.

however, seemingly requires the Court to describe an "action or proceeding"—rather than a party—as either "enforc[ing] the voting guarantees" of the relevant amendments, or not.

There are three plausible ways to interpret this ambiguous statutory language: (1) a "plaintiff-specific" interpretation, which would ask whether the plaintiff filed the lawsuit "to enforce the voting guarantees of the fourteenth or fifteenth amendment"; (2) a "party-specific" interpretation, which would ask whether the party seeking attorney's fees was participating in the lawsuit "to enforce the voting guarantees of the fourteenth or fifteenth amendment"; or (3) a "neutral" interpretation, in which the Court would assess whether, overall, the "action or proceeding" was "to enforce the voting guarantees of the fourteenth or fifteenth amendment." The Court will consider each of these three possibilities in turn.

A. The Plaintiff-Specific Interpretation

Conceptually, it is difficult to assess whether a particular "action or proceeding" was one "to enforce" the relevant amendments without thinking about who filed it. The character of a lawsuit, after all, is shaped most significantly by the plaintiff's complaint. *Cf. Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."). Recognizing this, the plaintiff-specific interpretation would call on a court to ask whether the *plaintiff* filed the

lawsuit in order to "enforce the voting guarantees of the fourteenth or fifteenth amendment." If so, the "action or proceeding" is the type envisioned by the statute, and the "prevailing party" is eligible for attorney's fees (subject to the district court's "discretion," *see infra* Section III).

To illustrate: under the plaintiff-specific interpretation, Shelby County would not be eligible for attorney's fees, because the plaintiff, Shelby County, did not file this lawsuit in an attempt "to enforce the voting guarantees of the fourteenth or fifteenth amendment." Instead, it filed this lawsuit to enforce "the Tenth Amendment and Article IV of the Constitution," Compl. ¶ 39, and to vindicate federalism interests and the "fundamental principle of equal sovereignty," *id.* ¶ 43, among the states. Those were the bases for Shelby County's arguments in this Court, before the D.C. Circuit, and ultimately before the Supreme Court.

To be sure, Shelby County has always argued that Section 5 and Section 4(b) of the VRA "exceed[ed] Congress's enforcement authority under the Fourteenth and Fifteenth Amendments." *Id.* ¶¶ 39, 43. So in support of its motion, Shelby County argues that these arguments show that its lawsuit was indeed designed to "enforce" those amendments. *See* Pl.'s Mot. at 6 ("Shelby County enforced the 'appropriate legislation' limitation that the Fourteenth and Fifteenth Amendments include to ensure individual liberty and protect meaningful participation in the electoral process."); *see also id.* at 3 ("The ordinary meaning of 'enforce' is 'to compel obedience to.' That is precisely what Shelby County has done here: it has

compelled the Government's obedience to the outer limits of congressional enforcement authority under the Fourteenth and Fifteenth Amendments . . . .") (internal citation omitted).

A clever argument, but it misses the mark. The fee-shifting provision in the VRA requires that the "action or proceeding" be designed to enforce "the *voting guarantees* of the fourteenth or fifteenth amendment," not just "the fourteenth or fifteenth amendment." By using the phrase "voting guarantees," Congress made clear that it was referring to the individual voting rights protections that appear explicitly in the Fifteenth Amendment, *see* U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."), and implicitly in the Fourteenth Amendment, *see* U.S. Const. amend. XIV (Equal Protection Clause). By contrast, the limitations on Congress's enforcement powers under those amendments—which is what Shelby County's challenge to the VRA rested on—are not individual "voting guarantees"; they address the power of Congress. *See* U.S. Const. amend. XV ("The Congress shall have power to enforce this article by appropriate legislation."); U.S. Const. amend. XIV ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). For this reason, though Shelby County argues at length that its lawsuit was designed to "ensure individual liberty and protect meaningful participation in the electoral process," Pl.'s Mot. at 6, its interpretation essentially reads the words "voting guarantees" out of the statute.

Furthermore, Shelby County cites no case for the proposition that there is a generic constitutional right to "meaningful participation in the electoral process." In fact, the "voting guarantees" of the Fourteenth and Fifteenth Amendments are targeted at a narrower, more specific set of individual voting rights—none of which Shelby County was seeking to enforce through its federalism-based, Tenth Amendment facial challenge to the VRA. Shelby County did not file this lawsuit to "enforce" the "voting guarantees" of the Fourteenth and Fifteenth Amendments; in fact, it restricted Congress's ability to legislate protections for those guarantees.[8]

In any event, the plaintiff-specific interpretation has much to recommend it—most notably, its consistency with the statutory text and its relative administrability. But despite those advantages, it runs into one major hitch: three D.C. Circuit decisions implicitly reject this approach. Although none of these cases actually considered this precise issue, their logic makes it difficult for this Court to adopt the plaintiff-specific interpretation.

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8. Shelby County cites heavily to Supreme Court opinions extolling the virtues of federalism and its connection to individual liberty. *See, e.g.*, Pl.'s Mot. at 5 (quoting *Bond v. United States,* 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269 (2011) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.")). The Court has no quarrel with the proposition that federalism protects individual liberty. But even so, that does not mean that Shelby County's federalism-based lawsuit was filed "to enforce" the "voting guarantees of the fourteenth or fifteenth amendment." Once again, those "voting guarantees" refer to a narrower set of rights than the broad notions of "individual liberty" referenced in Shelby County's brief.

Appendix B

In 1980, "the Commissioners of Medina County, Texas . . . instituted a declaratory judgment action against the United States pursuant to Section 5" of the VRA, seeking "a declaration that two redistricting plans . . . which had failed to obtain preclearance from the Attorney General" were legal. *Comm'rs Court of Medina Cnty., Tex. v. United States,* 683 F.2d 435, 437-38, 221 U.S. App. D.C. 116 (D.C. Cir. 1982). Three "Mexican-American citizens residing and registered to vote in Medina County[] intervened as party defendants in the County's suit against the United States." *Id.* at 438. The United States and the defendant-intervenors prevailed in part when the County decided to abandon its plan, and the defendant-intervenors moved for fees. *See id.* The D.C. Circuit ultimately remanded for further analysis of the question of whether the defendant-intervenors were "prevailing parties." But its analysis rests entirely on the assumption that had they truly "prevailed," they would be entitled to attorney's fees. *See id.* at 444.

Similarly, in *Donnell v. United States,* 682 F.2d 240, 220 U.S. App. D.C. 405 (D.C. Cir. 1982), the D.C. Circuit cabined the discretion of a district court to award attorney's fees to defendant-intervenors in a preclearance declaratory judgment action under Section 5 of the VRA. But in doing so, it held that prevailing defendant-intervenors can be awarded attorney's fees, even in a VRA "action or proceeding" filed by a covered jurisdiction seeking to obtain preclearance for a plan opposed by the Attorney General. *See, e.g., id.* at 248-49 ("[A]n intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation."). Finally, in

a third example, the D.C. Circuit reaffirmed *Donnell* and *Medina County* in 1996. *See Castro County v. Crespin,* 101 F.3d 121, 126, 322 U.S. App. D.C. 11 (D.C. Cir. 1996) (holding that "a party intervening as a defendant in a section 5 action may be a prevailing party," and thus, may be entitled to attorney's fees) (citing *Medina County,* 683 F.2d at 439-40).

Although none of these opinions explicitly analyzed the issue of how to describe a particular "action or proceeding" under section 1973*l*(e), all three make clear that in the D.C. Circuit, defendant-intervenors may be entitled to attorney's fees if they prevail in a lawsuit filed under Section 5 of the VRA, by a covered jurisdiction, against the Attorney General—that is, in a lawsuit that was not filed to vindicate individual voting rights. And because the fee-shifting provision of the VRA allows for attorney's fees only in an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment," logic dictates that each of those lawsuits must have been, in the eyes of the D.C. Circuit, an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." Were they not, no fees could have been awarded; under the "American Rule," courts generally may not award attorney's fees without some specific congressional authorization. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

Hence, a district court in the D.C. Circuit cannot adopt the plaintiff-specific interpretation, whatever its merits. None of the complaints in *Medina County*, *Donnell*, or *Castro County* were filed for the purpose of enforcing "the voting guarantees" of the Fourteenth or Fifteenth Amendments. Like this one, those cases were filed by those who sought to *oppose* enforcement of those individual voting rights protections, in favor of other interests, like federalism and local sovereignty—legitimate interests that are, importantly, beyond the scope of section 1973*l*(e). Nevertheless, the D.C. Circuit was not troubled by the prospect of awarding fees to a prevailing party. So although the D.C. Circuit has never expressly rejected the plaintiff-specific approach, those holdings seriously undermine its viability.

B. The Party-Specific Interpretation

The next alternative is the "party-specific" interpretation, in which a court would ask whether the *party seeking attorney's fees* was participating in the "action or proceeding" in order "to enforce the voting guarantees" of the relevant amendments.[9] Unlike the plaintiff-specific interpretation, this one is not foreclosed by D.C. Circuit case law, since all three of the D.C. Circuit cases on this issue involved a fee request from defendant-intervenors who were supporting the enforcement of individual voting rights. Of course, none of those cases actually discussed the issue, so they do not offer strong support for either conclusion.

9. For the same reasons discussed above with respect to the plaintiff-specific interpretation, Shelby County would not be eligible for fees under the party-specific interpretation.

Although this interpretation may not be foreclosed by D.C. Circuit precedent, it has other problems. Most importantly, it is in strong tension with the text of the statute. Section 1973*l*(e) calls for a determination about a particular "action or proceeding"—that is, whether the "action or proceeding" was "to enforce the voting guarantees" of the relevant amendments—rather than a determination about the intent of the "prevailing party." As Shelby County puts it, the text of the statute calls for two distinct questions: (1) what type of "action or proceeding" was this, and (2) which party prevailed? The plaintiff-specific interpretation and the neutral interpretation (discussed below) are faithful to this feature of the statute (the plaintiff-specific interpretation, by analyzing the lawsuit at the moment of filing, is still about describing the "action or proceeding" ex ante, rather than asking who is the "prevailing party," *ex post*). The party-specific interpretation is not: it asks for an *ex post* determination about one of the litigants, rather than an ex ante determination about the "action or proceeding."

A hypothetical illustrates this flaw in the party-specific interpretation. Imagine that one vote had switched at the Supreme Court, and the challenged provisions of the VRA had been upheld. Then, as prevailing parties, defendant-intervenors would likely have sought attorney's fees.[10] They

10. Counsel for defendant-intervenors refused to make this concession at oral argument. *See* Hr'g Tr. at 45-46. The Court notes that similarly situated defendant-intervenors—represented by many of the same attorneys at the NAACP Legal Defense Fund, the ACLU, and the Lawyers Committee for Civil Rights as these defendant-intervenors are—indicated their intent to do so after

would have been eligible for such fees under established D.C. Circuit precedent. *See, e.g.*, *Crespin,* 101 F.3d at 126. And this Court presumably would have awarded fees, if it determined that defendant-intervenors "contributed substantially to the success of the litigation." *Donnell,* 682 F.2d at 248-249.[11] By awarding fees, however, the Court would necessarily be deciding that this lawsuit was an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment"—otherwise, there would be no legal basis for the fee award. *See Alyeska,* 421 U.S. at 247. Shelby County puts it sharply: if this lawsuit "is an 'action or proceeding' under Section 1973*l*(e) when the defendants or defendant-intervenors prevail, it also must be [such] an 'action or proceeding' when the plaintiff prevails." Pl.'s Reply at 7 n.3. Describing an "action or proceeding" differently based on who prevailed after the fact does violence to the statutory text. Either the "action or proceeding" was "to enforce the voting guarantees" of the amendments, or it was not. That question cannot turn on which party is seeking attorney's fees, determinable only after years of litigation. Thus, the party-specific interpretation does not hold up well under scrutiny.

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prevailing in a previous challenge to the constitutionality of Section 5 of the VRA. *See Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, No. 06-1384, ECF No. 136 (D.D.C. June 13, 2008).

11. This standard is unique to prevailing defendant-intervenors in VRA litigation, and will be discussed in more detail below in the course of analyzing how Supreme Court and D.C. Circuit precedent cabin district court discretion to award fees under the statute. *See infra* Section III.

C. The Neutral Interpretation

Finally, the neutral interpretation would permit a fee award to any prevailing party, as long as the *lawsuit* could be described as "an action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment"—without regard to who filed the case or who was seeking fees. This interpretation has much to offer.

Most importantly, it is faithful to the statutory text. As discussed above, section 1973*l*(e) calls for a determination about the "action or proceeding," not about a particular litigant. The neutral interpretation is congruent with that textual command, which is an advantage over the party-specific interpretation. When Congress wishes to favor particular litigants in an attorney's fee provision, it knows how to do so: many statutes explicitly limit fee eligibility to certain favored litigants. *See* Pl.'s Mot. at 8 n.3 (collecting examples). Section 1973*l*(e) is written from a neutral perspective with respect to the "prevailing party," so it should be treated that way. And the neutral interpretation is also consistent with circuit precedent. Unlike the plaintiff-specific interpretation, no D.C. Circuit cases foreclose it.

Further, the only other federal court to have interpreted the "action or proceeding" language adopted the neutral interpretation. In that case, plaintiffs had proposed a ballot initiative for which no Spanish translation would be provided to voters. *In re Cnty. of Monterey Initiative Matter*, 2007 U.S. Dist. LEXIS 39557, 2007 WL 1455869 (N.D. Cal. May 17, 2007). The County

of Monterey refused to put the initiative on the ballot, arguing that failing to include a version for Spanish-speakers would violate the County's obligations under the VRA. 2007 U.S. Dist. LEXIS 39557, [WL] at *1. The plaintiffs prevailed when the court found that the VRA did not prevent it from putting the referendum on the ballot. 2007 U.S. Dist. LEXIS 39557, [WL] at *2.

When the plaintiffs sought attorney's fees under section 1973*l*(e), the County resisted on the grounds "that the Plaintiffs did not bring an action to enforce voting guarantees." *Id.* The court rejected the County's argument, and awarded fees to the proponent of the English-only ballot initiative. 2007 U.S. Dist. LEXIS 39557, [WL] at *3. The court acknowledged that plaintiffs had not initially filed the suit with the VRA in mind and that, indeed, it was the County that first injected federal voting rights into the litigation. *Id.* Even so, the court held that "[w]hen the County invoked the Voting Rights Act, the . . . actions became actions to enforce the voting guarantees of the Fourteenth Amendment. Accordingly, as the prevailing parties, Plaintiffs are entitled to reasonable fees and costs." *Id.*

In awarding fees to the proponents of the English-only ballot initiative, the *County of Monterey* court necessarily adopted the neutral interpretation, because the plaintiffs unquestionably had not been the ones "enforcing" individual voting rights. Indeed, voting rights were irrelevant to the litigation until the County used the VRA as a justification for its refusal to put the referendum on the ballot. So the only court to have considered the issue adopted the neutral interpretation.

This is not to say that the neutral interpretation is perfect. One flaw is that it presents a difficult interpretive task: how should a court decide whether a particular "action or proceeding" was "to enforce the voting guarantees" of the relevant amendments without considering who filed the lawsuit and who is seeking attorney's fees? The best answer, as suggested by *County of Monterey*, is to label any "action or proceeding" in which *at least one* of the litigants is seeking "to enforce the voting guarantees" of the relevant amendments as an "action or proceeding" that triggers fee eligibility for the prevailing party.[12] *See id.* At that point, the court could move on to an assessment of fee entitlement. That approach solves the administrability problem and is still consistent with the neutrally-written statutory text.

* * *

As the above analysis demonstrates, interpreting the phrase "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment" presents a host of difficulties—some due to inartful statutory drafting, some due to D.C. Circuit opinions that, with the benefit of hindsight, appear not to have grappled with the full logical implications of their holdings. But this interpretive puzzle can be left for another day. As discussed below, even if this is the sort of "action

12. Under this interpretation, Shelby County would be eligible for fees as the "prevailing party" in an "action or proceeding" in which the United States and defendant-intervenors were seeking "to enforce the voting guarantees of the fourteenth or fifteenth amendment."

or proceeding" in which Shelby County is *eligible* for attorney's fees, the Court, in its discretion, holds that Shelby County is not *entitled* to attorney's fees under the circumstances of this case.

III. Fee Entitlement: Is Shelby County Entitled To Attorney's Fees as a Matter of "Discretion"?

Even in the right sort of "action or proceeding," no prevailing party is guaranteed a fee award under section 1973*l*(e). Instead, "the court, in its discretion, may" award fees. 42 U.S.C. § 1973*l*(e). The text appears to offer broad discretion to a district court to award attorney's fees as it sees fit. But a long line of Supreme Court and D.C. Circuit precedent indicates that this discretion is far more limited. Specifically, those courts have examined the broad purposes of the relevant statute—frequently in the civil rights context—and concluded that Congress intended attorney's fees to be awarded only in circumstances consistent with the statute's purpose. Although this is a question of first impression, that line of cases strongly suggests that the demanding *Christiansburg* standard should apply in this case, under which Shelby County may recover fees only if its opponents' position was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). Today, the Court so holds.

To reach this conclusion, the Court will begin by exploring the Supreme Court and the D.C. Circuit case law adopting purposive interpretations of discretionary, textually neutral fee-shifting provisions—particularly,

those found in federal civil rights statutes. Next, following the lead of this precedent, the Court will consider the purpose of section 1973*l*(e), the fee-shifting provision in the Voting Rights Act. Then, with this statutory purpose in mind, the Court will select the appropriate legal standard to apply when exercising discretion in considering Shelby County's fee petition. And finally, the Court will apply that standard to this case, and decide whether Shelby County is entitled to a discretionary award of attorney's fees.

Ultimately, the Court finds that the purpose of section 1973*l*(e) is to encourage private attorneys general to bring lawsuits vindicating individual voting rights. Shelby County does not fit that statutory paradigm, so it cannot recover attorney's fees unless it meets a higher bar: the Christiansburg standard, under which it may recover fees only if it can show that the position taken by its opponents was frivolous or unreasonable. And because Shelby County cannot make that showing, it is not entitled to a discretionary award of attorney's fees.

A. The Supreme Court and the D.C. Circuit have repeatedly used purposive considerations to cabin district court discretion in awarding attorney's fees.

Although the text of section 1973*l*(e) "does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Indep. Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 758, 109 S. Ct. 2732, 105 L. Ed. 2d 639 (1989). The Supreme Court and the D.C. Circuit have cabined

this discretion by considering "the large objectives" of the relevant statute, *id.* at 759, and have endorsed "the practice of using 'several nonexclusive factors' in determining whether to award attorneys' fees so long as the factors are faithful to the statutory purpose." *Eddy v. Colonial Life Ins. Co. of Am.,* 59 F.3d 201, 204, 313 U.S. App. D.C. 205 (D.C. Cir. 1995) (quoting *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 534 n.19, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)). This is particularly common for statutes that protect individual civil rights, and the D.C. Circuit has used this approach in applying this very fee-shifting provision, section 1973*l*(e) of the VRA. *See Medina County,* 683 F.2d at 435; *Donnell,* 682 F.3d at 240. This Court will follow suit.

The first example of the Supreme Court adding an interpretive gloss on statutory "discretion" to award attorney's fees came in 1968 (before the 1975 enactment of the VRA's fee-shifting provision). In *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968), the Court interpreted the fee-shifting provision of Title II of the Civil Rights Act of 1964, which provides that: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . ." *Id.* at 401 n.1 (quoting 42 U.S.C. 2000a-3(b)). That provision is even more neutral, on its face, than the fee-shifting provision of the VRA. Nevertheless, finding that Congress intended "to encourage individuals injured by racial discrimination to seek judicial relief," the Supreme Court held that any prevailing plaintiff "should ordinarily recover attorney's

fees unless special circumstances would render such an award unjust." *Id.* at 402. In doing so, the Supreme Court reduced district court discretion to deny attorney's fees to prevailing plaintiffs who were victims of racial discrimination—even though the statute is written neutrally with respect to "the prevailing party." *See id.* at 401-02. And it did so based on purposive considerations and a value judgment about the subjective intent of Congress.

The Supreme Court reaffirmed this approach in 1973, with respect to an identically worded fee-shifting provision in the Emergency School Aid Act of 1972, under which plaintiffs had prevailed in "litigation aimed at desegregating the public schools of Memphis, Tennessee." *Northcross v. Bd. of Educ. of the Memphis City Schs.*, 412 U.S. 427, 427, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973). The Court, in a step that it would repeat in later cases, noted that the "similarity of language" in the statute and the fee-shifting provision in the Civil Rights Act was "a strong indication that the two statutes should be interpreted *pari passu*." *Id.* at 428. It then explained that "plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—'to encourage individuals injured by racial discrimination to seek judicial relief.'" *Id.* (quoting *Piggie Park*, 390 U.S. at 402). For this reason, it held that prevailing plaintiffs "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Id.* (quoting *Piggie Park*, 390 U.S. at 402).

Appendix B

In 1978, the Supreme Court, for the first time, had occasion to apply this methodology to a prevailing defendant in a civil rights case—that is, to a party that was opposing enforcement of the principles that the statute was designed to vindicate. In Christiansburg Garment Co. v. EEOC, an employer-defendant prevailed in a race discrimination suit under Title VII of the Civil Rights Act. 434 U.S. at 414. As "the prevailing party" in "an action or proceeding under" Title VII, the defendant sought attorney's fees. *Id.* at 414-15.

In rejecting the defendant's fee claim, the Supreme Court first described the set of statutes that had become subject to this purposive interpretive methodology:

> Some of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. But many of the statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts. Section 706(k) of Title VII of the Civil Rights Act of 1964 falls into this last category, providing as it does that a district court may in its discretion allow an attorney's fee to the prevailing party.

Id. at 415-16.

Next, the Supreme Court proceeded to outline the process by which the district courts should carry out this "effectuation of the statutory policy" in interpreting a discretionary fee-shifting provision. *Id.* It acknowledged candidly that the text of the statute itself "provide[s] no indication whatever of the circumstances under which a plaintiff *or* a defendant should be entitled to attorney's fees," but then noted that "a moment's reflection reveals that there are at least two strong equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant." *Id.* at 418. First, a Title VII "plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* (quoting *Piggie Park*, 390 U.S. at 402). "Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.*

For these reasons, the Supreme Court insulated unsuccessful Title VII plaintiffs from most attorney's fee claims, holding that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case" only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421. The Court reasoned that if fees were too readily available to prevailing Title VII defendants, it "would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* at 422.

The *Christiansburg* interpretive approach was reaffirmed by the Supreme Court in the 1989 decision in

Appendix B

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S. Ct. 2732, 105 L. Ed. 2d 639 (1989). In Zipes, Justice Scalia's opinion for the Court opens with a strong endorsement of the general practice of purposive, judge-made tests to cabin district court discretion in awarding attorney's fees under the federal civil rights laws:

> Although the text of [Title VII's fee-shifting] provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits. In the case of [Title VII] and other federal fee-shifting statutes . . . , we have found limits in "the large objectives" of the relevant Act, which embrace certain "equitable considerations."

Id. at 758-59 (quoting *Christiansburg,* 434 U.S. at 418) (internal citations omitted).

Zipes involved a fee request against a "losing" defendant-intervenor in a Title VII case. Following the lead of *Christiansburg*, the Supreme Court examined the role of an intervenor in a Title VII suit, pointing out that "assessing fees against blameless intervenors . . . is not essential to [the] purpose" of Title VII's fee-shifting provision, which is "to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law—assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery." *Id.* at 761. Furthermore, "losing intervenors . . . have not

been found to have violated anyone's civil rights," and "[a] warding attorney's fees against such an intervenor would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices." *Id.* at 762. Thus, the Court reasoned, a party seeking attorney's fees against a Title VII defendant-intervenor must meet a high bar before obtaining a fee award; it must satisfy the *Christiansburg* standard, by demonstrating that "the intervenors' action was frivolous, unreasonable, or without foundation." *Id.* at 761.[13]

In contrast to the purposive analysis it conducts when interpreting fee-shifting provisions in the civil rights laws, the Supreme Court has taken a slightly different

13. To be sure, in recent years some have criticized this approach as outdated and inappropriately based on atextual considerations. *See, e.g.*, *Fogerty,* 510 U.S. at 538 (Thomas, J., concurring) ("The Court goes astray, in my view, by attempting to reconcile this case with *Christiansburg.* Rather, it should acknowledge that *Christiansburg mistakenly cast aside the statutory language to give effect to equitable considerations*.") (emphasis in original); *Eddy,* 59 F.3d at 212 (Randolph, J., dissenting) ("Instead of giving deference, it usurps the district court's discretion. And instead of applying § 1132(g)(1) in a neutral fashion, . . . it tilts decidedly in favor of the plaintiffs' side of these controversies."). But finding these criticisms only in concurring and dissenting opinions implies the continued legitimacy of the approach, as understood by majorities of both the Supreme Court and D.C. Circuit panels to have considered the issue. In addition, at least with respect to section 1973*l*(e) of the VRA, the explicit statutory grant of "discretion" to a district court in considering a fee petition offers a textual basis for this approach.

approach when faced with fee-shifting provisions in purely economic statues. In *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994), the Court interpreted the fee-shifting provision in the Copyright Act. It ultimately held that all prevailing parties under the Copyright Act should be treated equally—but in doing so, relied on the differences between a purely economic statute like the Copyright Act and the civil rights statutes it normally subjects to a purposive value judgment. The Supreme Court explained that "in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources." *Id.* at 524. And despite the textually neutral fee-shifting provision in the Civil Rights Act, it justified the Christiansburg decision as follows: "Congress sought to . . . provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees." *Id.* Although the Supreme Court's use of the words "plaintiff" and "defendant" in this context seems a bit imprecise, *see, e.g.*, *Zipes,* 491 U.S. at 761 (protecting defendant-intervenors from most fee requests based on the same purposive considerations), the Court reaffirmed its purposive methodology in interpreting textually neutral fee-shifting provisions in federal civil rights statutes.[14]

14. After oral argument on Shelby County's motion, the Supreme Court decided another case interpreting a fee-shifting provision, this time in the Patent Act. It relied primarily on the plain text of the relevant fee-shifting provision to define the nature of an "exceptional" patent case in which fee-shifting was warranted. *See Octane Fitness, LLC v. ICON Health & Fitness,*

The D.C. Circuit has followed the Supreme Court's lead, and has used this purposive methodology on several occasions to interpret neutrally worded fee-shifting provisions—including the fee-shifting provision in the VRA. First, in Donnell, the D.C. Circuit crafted a standard to apply when a prevailing defendant-intervenor, who is seeking to enforce individual voting rights by opposing an allegedly discriminatory voting plan submitted by a covered jurisdiction, seeks attorney's fees. The D.C. Circuit noted that "the purpose of this provision," that is, the fee-shifting provision of the VRA, section 1973*l*(e), "is the familiar one of encouraging private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws." *Donnell,* 682 F.2d at 245. The court then pointed out the unusual procedural posture, noting that "[h]ad this been a successful suit by these intervenors as plaintiffs against the [covered jurisdiction],

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Inc., 134 S. Ct. 1749, 1755, 188 L. Ed. 2d 816 (2014) ("Our analysis begins and ends with the text of § 285."). Although Shelby County might read Octane Fitness as a rejection of purposive considerations when interpreting fee-shifting provisions, it can also be read consistently with the Supreme Court's distinction between statutes—like the Patent Act and the Copyright Act—that merely reshuffle economic burdens and benefits, and statutes—like the Civil Rights Act and the Voting Rights Act—that protect individual civil rights. *Octane Fitness*, a brief and unanimous decision, contains no hint that the Supreme Court intended to overrule or modify cases like Christiansburg and *Piggie Park sub silentio*; indeed, both opinions are cited favorably. *See Octane Fitness,* 134 S. Ct. at 1758 (citing *Christiansburg,* 434 U.S. at 419; *Piggie Park*, 390 U.S. at 402 n.4). Unless and until the Supreme Court or the D.C. Circuit suggests otherwise, this Court will continue to treat the *Christiansburg* line of cases as good law.

then, their entitlement to attorneys' fees would hardly be in doubt." *Id.* This was because "[t]he result of the litigation furthered the purpose of the Voting Rights Act." *Id.* Ultimately, the D.C. Circuit concluded that Congress intended an award of fees to successful intervenors to be made "only if [the intervenor] contributed substantially to the success of the litigation," *id.* at 248-49, reasoning that the Attorney General was already available in such cases to vindicate voting rights, and fearful that "private litigants [would] ride the back of the Justice Department to an easy award of attorneys' fees." *Id.* at 249. Although the particulars of the role of a prevailing defendant-intervenor are not critical to resolving this fee dispute (defendant-intervenors lost this case), the interpretive method employed by the D.C. Circuit is instructive: the Donnell decision rests on reading section 1973*l*(e) with a heavy purposive gloss.

Medina County offers additional elaboration on how to apply the Supreme Court's purposive methodology in interpreting fee-shifting statutes—specifically, section 1973*l*(e) of the VRA. There, the D.C. Circuit quoted approvingly a district court decision holding that "'the attorneys' fees statute [in the VRA] is to be liberally construed to effectuate its purposes,'" and that "'the procedural posture of the case should not be dispositive.'" *Medina County,* 683 F.2d at 439 (quoting *Baker v. City of Detroit,* 504 F. Supp. 841, 850 (E.D. Mich. 1980)). In other words, a court should look beyond the simplistic labels of "plaintiff" and "defendant" in determining how freely to award attorney's fees to a prevailing party. The D.C. Circuit concluded: "It is thus clear from the case

law and the legislative history that when the procedural posture of a case places the party who seeks to vindicate rights guaranteed by the Constitution in the position of defendant, the restrictive *Christiansburg Garment* rule is not applicable," *id.* at 440, when that party seeks attorney's fees.

Finally, arguably going one step further than the Supreme Court has, the D.C. Circuit has employed this purposive approach even in economic statutes outside of the civil rights context. *See, e.g.*, *Eddy,* 59 F.3d at 204 (adopting a multi-factor balancing test constraining district court discretion in awarding attorney's fees under ERISA, noting that "[t]he Supreme Court recently validated the practice of using 'several nonexclusive factors' in determining whether to award attorneys' fees so long as the factors are faithful to the statutory purpose." (quoting *Fogerty,* 510 U.S. at 517 n.19)); *Metropolitan Wash. Coal. for Clean Air v. District of Columbia,* 639 F.2d 802, 804, 205 U.S. App. D.C. 280 (D.C. Cir. 1981) (noting that the key consideration in awarding fees under the Clean Air Act is "whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision"). These cases provide strong support for the use of this purposive methodology when interpreting the VRA in this Circuit, because the Supreme Court has shown greater caution in expanding this approach beyond the civil rights laws. *See Fogerty,* 510 U.S. at 524 (contrasting purposive interpretation of fee-shifting provisions under civil rights statutes with neutral interpretation of fee-shifting provision under the Copyright Act); *see also Octane Fitness,* 134 S. Ct.

at 1755-56 (employing a textually focused analysis of the fee-shifting provision in the Patent Act).

To summarize: "*Christiansburg* teaches that even a neutrally-worded fee statute does not necessarily have an identical application to every prevailing party. Rather, when the statute establishes a flexible standard, a consideration of policy and congressional intent must guide the determination of the circumstances under which a particular party, or class of parties (such as plaintiffs or defendants), is entitled to fees." *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund of Phila. & Vicinity,* 799 F.2d 45, 49 (3d Cir. 1986). The Court will now apply the teachings of the *Christiansburg* line of cases to section 1973*l*(e).

B. The purpose of section 1973*l*(e) is to encourage private attorneys general to bring lawsuits vindicating individual voting rights.

To carry out the preferred approach of the Supreme Court and the D.C. Circuit in interpreting discretionary fee-shifting provisions in civil rights statutes, this Court must consider the purpose of the VRA's fee-shifting provision, 42 U.S.C. § 1973*l*(e). Unlike for the other questions in this case, the case law offers substantial guidance here. "The purpose of this provision . . . is the familiar one of encouraging private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws." *Donnell,* 682 F.2d at 245; *accord King v. Ill. State Bd. of Elections,* 410 F.3d 404, 412 (7th Cir. 2005) ("The purpose of § 1973*l*(e) . . . is to ensure effective access

to the judicial process for persons with . . . voting rights grievances.") (internal quotation marks omitted); *Francia v. White,* 594 F.2d 778, 781 n.1 (10th Cir. 1979) ("All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.").

As confirmation of this common-sense understanding of the purpose of the provision, "the legislative history of section[] 1973*l*(e) . . . emphasizes over and over again the critical goal of enabling private citizens to serve as 'private attorneys general' in bringing suits to vindicate the civil rights laws." *Donnell,* 682 F.2d at 246. The 1975 Senate Committee Report discussed the "private attorneys general" rationale at length, and called on the judiciary to adopt similar standards as had already been adopted with respect to the fee-shifting provisions in other civil rights laws:

> [Section 1973*l*(e)] allows a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the voting guarantees of the Fourteenth and Fifteenth amendments, and statutes enacted under those amendments. . . . Such a provision is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily on private citizens to enforce the fundamental rights involved. Fee awards are a necessary

> means of enabling private citizens to vindicate these federal rights. . . . [P]rivate attorneys general should not be deterred from bringing meritorious actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.

S. Rep. 94-295, at 40-41 (1975). This point is largely undisputed. *See* Pl.'s Reply at 18 n.7 (acknowledging that the Senate Report reflects "Congress's acceptance of both the Piggie Park and Christiansburg Garment standards," but maintaining that the Senate Report "does not indicate which standard should apply in this instance").

C. Shelby County must satisfy the *Christiansburg* standard to obtain a fee award.

With the well-settled purpose of section 1973*l*(e) in mind—that is, incentivizing private attorneys general to bring lawsuits vindicating individual voting rights—the Court now turns to the question of how Shelby County fits within that paradigm. Unfortunately for Shelby County, its lawsuit was about as far as possible from the lawsuit the drafters of section 1973*l*(e) were hoping to incentivize. Accordingly, for the reasons discussed below, as a result of Shelby County's failure to fit the statute's preferred profile, the Court concludes that to obtain a fee award in this case, Shelby County will need to satisfy a higher bar: the *Christiansburg* standard.

Appendix B

In most VRA lawsuits, an individual plaintiff, perhaps with the assistance of the Attorney General, is suing a state government entity for taking an action that violates the plaintiff's individual voting rights. These suits fall squarely within the wheelhouse of the VRA fee-shifting provision, so in such a case, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Donnell,* 682 F.2d at 245 (quoting *Piggie Park,* 390 U.S. at 402). Similarly, in such a typical case, "[g]enerally, a defendant may not recover attorneys' fees unless the court finds that the plaintiff's suit was frivolous, vexatious, or without foundation." *Medina County,* 683 F.2d at 439 (citing *Christiansburg*, 434 U.S. at 421-22).

But not all cases are "typical," and sometimes, the plaintiff/defendant lineup is more complex—or is wholly reversed. In the words of the D.C. Circuit in *Medina County*, it is "clear from the case law and the legislative history that when the procedural posture of a case places the party who seeks to vindicate rights guaranteed by the Constitution in the position of defendant, the restrictive *Christiansburg Garment* rule is not applicable." *Id.* at 440. By the same token, "when the procedural posture of a case places the party who seeks to" *oppose* enforcement of individual voting rights "in the position of" a plaintiff, "the restrictive *Christiansburg Garment* rule" *is* applicable, *id.*, when that party seeks attorney's fees. That, of course, is the situation here.[15]

15. To be precise, the *Medina County* language quoted above uses the phrase "rights guaranteed by the Constitution," *Medina County,* 683 F.2d at 440, and Shelby County's facial challenge

In fact, section 1973*l*(e)'s legislative history—relied upon heavily by the D.C. Circuit in Medina County—specifically addresses a scenario that is highly analogous to this litigation. After explaining that prevailing plaintiffs are typically entitled to attorney's fees under the lenient Piggie Park standard—that is, they should recover fees "unless special circumstances would render such an award unjust," 390 U.S. at 402—the report explains that this rule should be interpreted pragmatically by looking at the actual motivations of the plaintiff and the defendant in a particular case. "In the large majority of cases the party or parties seeking to enforce [voting] rights will be the plaintiffs. . . . However, in the procedural posture of some cases (e.g., a declaratory judgment suit under Sec. 5 of the [VRA]) the parties seeking to enforce such rights may be the defendants and/or defendant intervenors." S. Rep. 94-295, at 40 n.42 (1975) (quoted in *Medina County,* 683 F.2d at 439-40). This passage provides powerful support for the conclusion that plaintiff/defendant labels are not dispositive: the key question is whether a party is seeking to enforce individual voting rights.

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did, of course, rely on the Constitution. But context makes clear that the constitutional rights the D.C. Circuit was concerned about in Medina County are the individual "voting guarantees" of the Fourteenth and Fifteenth Amendments, rather than the federalism-based, Tenth Amendment interests vindicated by Shelby County in this case. *See id.* at 439-40 (quoting the Senate Report's example of defendant-intervenors being the party "seeking to enforce" voting rights in a Section 5 declaratory judgment action brought by a covered jurisdiction). Importantly, and as discussed at length above, those constitutional interests—while equally legitimate—are not mentioned in section 1973l(e).

Cases from outside the D.C. Circuit also provide support, relying on this legislative history. *See, e.g., King,* 410 F.3d at 413 ("The legislative histor[y] of § 1973*l*(e) . . . reflect[s] Congress' expectation that, in some circumstances, defendants or defendant-intervenors would be prevailing parties entitled to attorneys' fees."); *League of United Latin-American Citizens Council No. 4434 v. Clements,* 923 F.2d 365, 368, 368 n.2 (5th Cir. 1991) (*en banc*) ("Given the Supreme Court's apparent rationale for applying different standards to plaintiffs and defendants, any such reclassification of a party's role must hinge upon whether the parties in question acted as private attorneys general *within the scope* of the statutes under which Congress provided fee entitlement. . . . For example, in section 5 declaratory judgment actions under the [VRA], the parties positioned as 'defendants' may actually be the parties charging civil rights violations and seeking to assert their civil rights.").

Finally, *Christiansburg* itself offers support. The Supreme Court in *Christiansburg* drew a distinction between the classic Title VII plaintiff—the "chosen instrument of Congress to vindicate a 'policy that Congress considered of the highest priority,'" *Christiansburg,* 434 U.S. at 418 (quoting *Piggie Park*, 390 U.S. at 402)—and a prevailing Title VII defendant. It pointed out that "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.* Despite Shelby County's best efforts to argue the contrary, a fee award in this case would not run "against a violator of federal law" in the manner contemplated by *Christiansburg.* To be sure, the Constitution is "federal

law," and Supreme Court held in this case that Congress exceeded its constitutional authority in passing the latest Voting Rights Act reauthorization. But *Christiansburg's* reference to a "violator of federal law" is a reference to a violator of individual civil rights (in that case, Title VII)—not the passage of a federal statute through the normal legislative process. Counsel for Shelby County essentially conceded as much at oral argument. *See* Hr'g Tr. at 17-18 ("[W]e are not saying the Attorney General was departing from the statutory framework. He was constrained by the statute to exercise preclearance. There is no question about that. . . That's why we sued him in his official capacity. . . . We're not saying Mr. Holder was a maverick . . . ."). Put another way, "in contrast to losing Title VII defendants who are held presumptively liable for attorney's fees, losing" parties like the United States and the defendant-intervenors in this case "have not been found to have violated anyone's civil rights." *Zipes,* 491 U.S. at 762 (citing *Christiansburg*, 434 U.S. at 418).

Although *Shelby County v. Holder* was in many ways a unique case, it was not entirely unprecedented; as in other VRA cases, "the parties positioned as 'defendants'" and defendant-intervenors were "actually . . . the parties charging civil rights violations and seeking to assert their civil rights." *Clements,* 923 F.2d at 368 n.2. And Shelby County, the plaintiff, was not acting as a "private attorney general" seeking to vindicate individual voting rights. Instead, Shelby County was essentially the opposite of the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" *Christiansburg,* 434 U.S. at 418 (quoting *Piggie Park,* 390

U.S. at 402)—its position was openly hostile to Congress's policy choices, attacking them as unconstitutional.

True, those attacks were successful. But that does not mean that Congress would have wanted attorney's fees to be easily available to someone bringing such a challenge.[16] And congressional intent governs here, even though, on the merits, the Supreme Court found that Congress had overreached in other, unrelated provisions of the statute. Shelby County pejoratively refers to such an inference about congressional preferences as impermissibly creating a "judge-made ranking of rights"—an approach it claims was outlawed by Justice Scalia's opinion in Zipes. *See* Pl.'s Reply at 15 (quoting *Zipes,* 491 U.S. at 763 n.4). But Shelby County ignores the rest of Justice Scalia's footnote, which ultimately (and candidly) acknowledges that "[h]ere, as elsewhere, the judicial role is to reconcile competing rights that Congress has established and *competing interests* that it normally takes into account." *Zipes,* 491 U.S. at 763 n.4 (emphasis added). The Court has done so here and, accordingly, will hold Shelby County to the *Christiansburg* standard, under which the Court, "in its discretion," will

16. Counsel for Shelby County seems aware of this flaw in the argument. *See* Hr'g Tr. at 26 (acknowledging that Congress "might well have considered, look, yes, we pass laws; we usually don't incentivize people to overturn laws we pass"). Shelby County's response—that "a responsible Congress would say that these laws need to be tested under the amendments," *id.*—is wishful thinking. Even if correct as a normative matter, it seems highly implausible, as a descriptive matter, that Congress would have wanted to incentivize lawsuits like this one with the prospect of a fee award.

award fees only if Shelby County can demonstrate that the United States or defendant-intervenors took positions that were "frivolous, unreasonable, or without foundation." *Christiansburg,* 434 U.S. at 421.[17]

D. Shelby County cannot satisfy the *Christiansburg* standard.

To its credit, Shelby County does not argue that the United States (or defendant-intervenors) took a position in this case that was "frivolous, unreasonable, or without foundation." *See* Hr'g Tr. at 20 ("I don't think we claimed the government's conduct met the standard of *Christiansburg.* That's not our claim."). That concession was appropriate: this Court, two judges on the D.C. Circuit, and four Justices of the U.S. Supreme Court agreed with the position advanced by the Attorney General, and the challenged provisions of the VRA had been upheld in previous decisions of the Supreme Court.

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17. Shelby County's final argument to avoid the application of *Christiansburg* is an attempt to show that there is an "exception" to the *Christiansburg* standard when the party seeking attorney's fees "'has vindicated a constitutional right or benefitted a large number of people.'" Pl.'s Mot. at 9 (quoting *Dorn's,* 799 F.2d at 50 n.6). But neither the Supreme Court nor the D.C. Circuit has ever hinted at the existence of such an exception, and the primary support for it comes from a passing dictum in a footnote of a Third Circuit ERISA decision—a decision that not only applied the *Christiansburg* standard, *see id.* at *50*, but, more importantly, predates the Supreme Court's suggestion that civil rights fee-shifting provisions should be interpreted differently than those found in economic statutes like ERISA, *see Fogerty,* 510 U.S. at 524.

Hence, the Court will deny fees to Shelby County "in its discretion," 42 U.S.C. § 1973*l*(e), for failure to satisfy the *Christiansburg* standard.

CONCLUSION

For the reasons set forth above, the Court will deny Shelby County's motion for attorney's fees. A separate order accompanies this Memorandum Opinion.

/s/
JOHN D. BATES
United States District Judge

Dated: May 28, 2014