No. 15-583

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

LORETTA E. LYNCH, IN HER OFFICIAL CAPACITY 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

REPLY BRIEF

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REPLY BRIEF

It is well-settled that this Court has adopted a dual standard to the awarding of attorney's fees to prevailing parties under federal civil rights statutes, that is, a standard that treats prevailing plaintiffs and prevailing defendants differently. When a plaintiff prevails in a civil rights action, that party "should ordinarily … recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). In contrast, a prevailing defendant may only recover if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Here, there is no dispute that the Voting Rights Act awards fees to prevailing parties, that Shelby County is a prevailing plaintiff, and that no "special circumstances" exist that would render an award "unjust."

The court below therefore was able to deny Shelby County's fee application only by breaking sharply with precedent. For the *first* time, a court applied the *Christiansburg* prevailing-defendant rule to a prevailing plaintiff. Not only is that ruling indefensible, Respondents' attempt to rehabilitate the opinion as a routine application of precedent highlights precisely why review is needed. Respondents understand that treating *Piggie Park* and *Christiansburg* as alternative tests that a court has license to choose between—based on judicial notions of whether Congress would have wanted *this* party to recover—is untenable.

Indeed, this case illustrates the broader confusion among the lower courts regarding *Christiansburg*. As the

district court put it, refashioning this narrow exception as an alternative test has led the D.C. Circuit to dispense altogether with the "labels" plaintiff and defendant, and has produced a regime in which fee awards are granted or denied based upon "value judgment[s]." Pet. App. 77a, 70a. The Court should grant the Petition.

I. Respondents Wrongly Attempt To Reframe The D.C. Circuit's Decision As An Application Of *Piggie Park*.

Respondents' mainly argue that the decision below correctly applied *Piggie Park*. Brief in Opposition ("BIO") 10-12, 15-22. That is incorrect. As Respondents concede, "a district court's discretion to deny a fee award to a prevailing plaintiff is narrow," BIO 8-9, because *Piggie Park* adopts a presumption that plaintiffs who prevail in suits under civil rights laws "'should ordinarily … recover an attorney's fee unless special circumstances would render such an award unjust,'" BIO 8 (quoting *Piggie Park*, 390 U.S. at 402). Had the court applied *Piggie Park*, it could have denied fees only if "special circumstances" would have rendered "such an award unjust." *Piggie Park*, 390 U.S. at 402. Because no party made that argument, application of the *Piggie Park* standard could have led to one result: award of fees to Shelby County.

The reason Respondents frame the decision below as applying *Piggie Park*, of course, is because admitting that it did not would require them to grapple with the ruling's unprecedented application of the prevailing-defendant rule to a prevailing plaintiff. Petition ("Pet.") 23-24. Their unwillingness to defend the decision on its own terms is thus an admission that the lower court's refusal to apply

the *Piggie Park* standard to a prevailing civil rights plaintiff is both novel and indefensible.

Viewed for what it is, the ruling below cannot be squared with this Court's precedent and thus warrants review. S. Ct. R. 10(c). Shelby County is a prevailing plaintiff and is entitled to the presumption of fee recoverability for that reason alone. Pet. 25. Moreover, the presumption typically does not apply to prevailing defendants in civil rights cases for two reasons. First, unlike plaintiffs, civil-rights defendants are not akin to a "private attorney general" and, second, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Christiansburg* 434 U.S. at 416, 418. Even if the prevailing-*defendant* rule could ever apply to a prevailing *plaintiff*, then, it would not apply here.

This is a classic "private attorney general" suit. Pet. 25. *Piggie Park* itself explains that a "private attorney general" is one who seeks judicial relief that will deliver a public benefit—either legally or for the practical benefit of a large number of people. 390 U.S. at 402. The Court has repeatedly made the point. *See, e.g.*, *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245-46 (1975); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). Shelby County brought this action to "advance the public interest by invoking the injunctive powers of the federal courts," *Piggie Park*, 390 U.S. at 402, on behalf of itself and thousands of similarly situated jurisdictions and their millions of citizens. It sought to restore constitutional order and to regain for its citizens their fundamental right to run their elections subject to universal constitutional restraints. Succeeding in

declaring a law unconstitutional is an "invaluable public service." *Kulkarni v. Nyquist*, 446 F. Supp. 1274, 1277-78 (N.D.N.Y. 1977); *Lavin v. Husted*, 764 F.3d 646, 651 (6th Cir. 2014).

It cannot seriously be disputed that this is a "private attorney general" suit. Respondents do not even try. They instead try a different tack. In their view, Shelby County's suit did not advance a congressional purpose and Congress did not need Shelby County to vindicate the protections of the Fourteenth and Fifteenth Amendments. BIO 11. Even setting aside their misguided form of purposivism, Pet. 22; *see also W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991), they are wrong on both counts. Testing the constitutionality of the preclearance regime was always a congressional purpose. Indeed, Congress expressly authorized this type of suit in Section 14(b) of the Voting Rights Act. Attorney General Nicholas Katzenbach testified in support of Section 14(b), emphasizing that its purpose was to spur a challenge to the statute. Pet. 29. There can be no doubt, then, that Congress expressly authorized this suit for the purpose of having the constitutionality of the preclearance obligation examined by the courts.

Respondents claim that Section 14(b) is just a venue provision that does not create a cause of action. BIO 15. As an initial matter, that Congress wanted these tests in one venue does not detract from the fact that Congress authorized this specific type of suit. More fundamentally, whether or not the provision creates a cause of action does not detract from Section 14(b)'s purpose of ensuring that the constitutionality of preclearance would be tested in court. Respondents' reliance on *Allen v. State*

Board of Elections, 393 U.S. 544 (1969), is misplaced. *Allen* described the "[Section] 14(b) injunctive action" as authorizing "actions … aimed at prohibiting enforcement of the provisions of the Voting Rights Act, [including] an attack on the constitutionality of the Act itself." *Id.* at 558.[1]

It is equally untenable to suggest that Congress did not need private litigants to enforce the Fourteenth and Fifteenth Amendments. The lower court suggested that Congress intended to sunset the preclearance regime at some point. But that ignores: (1) Congress's rejection of the Court's many attempts to save preclearance from being ruled unconstitutional, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); (2) Congress's near-unanimous vote to reauthorize the preclearance regime, *Shelby County v. Holder*, 133 S. Ct. 2612, 2635 (2013); and (3) Congress's refusal to heed the Court's warning in *Northwest Austin* that Section 4(b)'s coverage formula was constitutionally problematic, 557 U.S. 193, 204 (2009). Coupled with the Attorney General's aggressive enforcement of the

1. Respondents' attempt to frame this suit as not having been brought under Section 14(b) also is wrong (as the district court found, Pet. App. 52a-53a) and makes no sense anyway. Shelby County cited 42 U.S.C. § 1973l (the former code citation for VRA Section 14) in its Complaint as providing a basis for this action, and requested a declaration that Sections 4(b) and 5 were unconstitutional and an injunction against their further enforcement—*i.e.*, the precise relief available under Section 14(b). Pet. App. 52a, 56a. Respondents' theory—that Shelby County brought this case "under" the Declaratory Judgment Act—is thus factually wrong. And it makes no sense because all that act provides is a remedy, not a cause of action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

preclearance regime—over those same warnings and in ways that served only to exacerbate these constitutional problems—the claim that the United States did not need a constitutional challenge to enforce the Fourteenth and Fifteenth Amendment has no basis.

As a consequence, Respondents are left to argue that the United States is not a violator of federal law in order to avoid application of *Piggie Park*. Respondents' indignation aside, BIO 16, they cannot deny that the Attorney General was enforcing an unconstitutional law and because of this case can no longer do so. Moreover, Respondents' contention that they could not be deemed a "violator of federal law" because the Attorney General was merely enforcing the law, BIO 16, is a non-starter. "The Supreme Court has acknowledged that fee awards against enforcement officials are run-of-the mill occurrences." *Turner v. District of Columbia Board of Elections & Ethics*, 354 F.3d 890, 898 (D.C. Cir. 2004) (citing *Sup. Ct. of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739 (1980)). "'Mere' enforcers of unconstitutional laws may be held liable for attorneys' fees." *Id.*

Regardless, Respondents (while they may not have meant to) admit in their brief that they do not believe their own position. Respondents endorse Judge Silberman's view that a successful suit like this one—but framed as protecting the rights of individual voters—would allow the plaintiff to recover its fees under Section 14(e). BIO 21-22 (citing Pet. App. 37a, 39a-40a). But that would not be true if the Attorney General is not a violator of federal law. Respondents cannot have it both ways. Their position on this score highlights the need for review here.

II. Respondents Do Not Deny That Misapplication Of *Christiansburg* Has Resulted In A Tortured Jurisprudence On Fee Recovery In The Lower Courts.

Misapplication of *Christiansburg* has led the lower courts to dispense with this Court's dual approach to fee recovery in favor of a free-wheeling approach whereby courts pick fee-recovery winners and losers based on their own personal preferences. Pet. 20. The district court's decision, which reads *Christiansburg* as authorizing it to make fee-recovery determinations based upon its own "value judgment[s] about the subjective intent of Congress," proves the point. App. 70a. This is no standard at all. And it breaks sharply with *Piggie Park*, which has long been understood to impose limits on district court discretion. Pet. App. 68a-69a. Respondents suggest that Shelby County improperly casts aspersions on the motives of the lower courts. BIO 13. But they miss the point. It is an indictment of *Christiansburg* that the lower courts read it as authorizing them to make fee awards based on their own "value judgments."

Unmoored from the text of Section 14(e) and freed from this Court's dual approach to fee recovery, the lower courts somewhat unsurprisingly have produced results that do not add up when viewed together. Pet. 15-17. For example, the court here viewed Shelby County's lawsuit as unnecessary to patrol the bounds of Congress's authority under the Fourteenth and Fifteenth Amendments. Pet. App. 18a. The same court, however, routinely approves fee awards to parties that intervene as defendants in support of the Attorney General, notwithstanding that she needs no assistance in representing the United States.

Pet. 17. Worse still, the D.C. Circuit recently authorized a seven-figure award of fees to parties that intervened in support of the Attorney General despite the fact that *the defendant-intervenors were not even prevailing parties.* Pet. 16-18 (discussing *Texas v. United States*, 798 F.3d 1108 (D.C. Cir. 2015), cert. pending *sub nom. Texas v. Davis*, No. 15-522 (Oct. 22, 2015).

Respondents can offer no meaningful response, refusing to grapple with the inconsistent outcomes in the lower courts, which can be explained only as resulting from the "value judgments" of individual jurists. All they can say is that those decisions are not relevant here because Shelby County is not a defendant-intervenor. BIO 14. But this is a dodge, and a poor one at that. The lower courts' tortured jurisprudence on fee recovery is of central relevance; it is one of Shelby County's primary rationales for granting certiorari.[2]

The real reason why Respondents do not defend the lower courts' free-wheeling approach to fee determinations is because they can offer no legitimate defense. Given their view that Shelby County should not be awarded fees because its constitutional challenge to the preclearance regime was not necessary to enforce the bounds of the Fourteenth and Fifteenth Amendments, Respondents can hardly defend the necessity of providing fee awards to incentivize interest groups to intervene as defendants in support of the Attorney General in voting rights cases.

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2. Respondents attempt another dodge; they contend that this Court itself has properly applied *Christiansburg* "over the last several decades." BIO 12. But that is no reason to deny certiorari, especially given the conflict between the decision below and *Piggie Park*, *see supra* pp. 2-3, and the lower courts' tortured jurisprudence on fee recovery, *see supra* pp. 7-8.

Nor do Respondents attempt to defend the lower court's decision to deny fees to Shelby County while awarding them to a *losing* defendant-intervenor in *Texas v. United States*. *See* Pet. 16. This, of course, is because there is no defense of an approach that makes winners of losers and losers of winners. *Id*. Respondents' refusal to stand up for the decision below, much less reconcile the result here with *Texas v. United States,* only underscores the need for review. In fact, the Court may wish to grant not only the instant Petition but also the petition for certiorari in *Texas*; doing so would afford the Court the opportunity to provide comprehensive guidance to the lower courts on the proper framework for fee recovery in civil rights cases.

III. Nothing In The Opposition Undermines The Conclusion That Shelby County Is Eligible For Fees.

As previously explained, Pet. 31-34, Shelby County also is *eligible* to recover attorneys fees. *See* 52 U.S.C. § 10310(e) (authorizing fees "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment"). Shelby County is eligible because its lawsuit enforced the Fourteenth and Fifteenth Amendment's voting guarantees that States and their citizens (1) would be free of discriminatory voting practices, and (2) would be free of "inappropriate" federal regulation of its voting practices. Respondents can refute neither argument.

First, Respondents do not dispute that Shelby County's lawsuit enforced the right of its citizens to be free of discriminatory voting practices. For good reason.

"[T]he 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." Pet. App. 39a (Silberman, J., concurring). That is the precise holding of *Shelby County*. 133 S. Ct. at 2631 (finding Section 5 unconstitutional because it was "irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data" and "irrational to base coverage on the use of voting tests 40 years ago").

Respondents' only response is that Shelby County forfeited this argument. BIO 20-21. But that is not true. Shelby County has consistently made this argument at every step of the litigation. *See* Reply Brief at 14-15, *Shelby County v. Holder*, 14-5138 (D.C. Cir.) (Doc. 1532544); *see also* Motion for Attorney's Fees at 5-6, *Shelby County v. Holder*, 10-651 (D.D.C.) (Dkt. 94-1); Reply to Motion for Attorney's Fees at 10-12, *Shelby County v. Holder*, 10-651 (D.D.C.) (Dkt. 104). Indeed, that Shelby County was suffering arbitrary and discriminatory treatment was the entire basis of its lawsuit. *See, e.g.,* Petitioner's Brief at 41, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) ("As voter turnout and registration rates now approach parity, there is no rational basis for Congress' determination that election data from 1964, 1968, and 1972 identifies those jurisdictions likely to discriminate between 2007 and 2031." (alteration omitted)).

Second, Respondents claim that Shelby County did not enforce the voting guarantees of the Fourteenth and Fifteenth Amendments to be free of "inappropriate" regulation because the amendments merely "*diminish[ed]*

States' authority" and did not "guarantee some new right to States." BIO 20. But that is not a proper reading of the Fourteenth and Fifteenth Amendments. In order to eliminate voting discrimination, these amendments authorize the federal government to enact "appropriate" legislation. By implication, the amendments clearly grant States and local governments the right not to be subjected to *in*appropriate legislation.[3]

That a constitutional provision or statute speaks in the negative does not mean that it is not endowing rights. The First Amendment acts as a prohibition on government power, *see* U.S. Const. amend I ("Congress shall make no law … abridging the freedom of speech."), but is universally understood to guarantee individuals with certain constitutional rights, *see, e.g., Herbert v. Lando*, 441 U.S. 153, 159 (1979) ("[T]he First Amendment guarantees … freedom of speech and freedom of press."). So too here. The Fourteenth and Fifteenth Amendments guaranteed that Shelby County would not be subjected to "inappropriate" legislation. That is the guarantee Shelby County enforced.

3. Respondents also wrongly contend that Shelby County sought relief only under the Tenth Amendment. BIO 17-18. Shelby County has consistently argued that Sections 4(b) and 5 of the VRA violated the Fourteenth and Fifteenth Amendments' requirement that enforcement legislation be "appropriate," and the courts repeatedly recognized its argument as such. Pet. 34.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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