NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 14-5138

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

SHELBY COUNTY, ALABAMA,

Appellant

v.

ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Appellees

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

BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellee Eric H. Holder, Jr., certifies as follows:

(A) Parties And Amici

All parties, intervenors, and amici appearing before the district court are listed in the Appellant's Certificate as to Parties, Rulings, and Related Cases.

(B) Rulings Under Review

Reference to the ruling at issue appears in the Appellant's Certificate as to Parties, Rulings, and Related Cases.

(C) Related Cases

Reference to previous decisions in this case by this Court and the Supreme Court appears in the Appellant's Certificate as to Parties, Rulings, and Related Cases. Counsel is unaware of any currently pending related cases.

TABLE OF CONTENTS

PAGE

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

GLOSSARY

INTRODUCTION 1

STATEMENT OF JURISDICTION..3

STATEMENT OF THE ISSUES...3

STATUTES AND REGULATIONS 4

STATEMENT OF THE CASE..4

SUMMARY OF THE ARGUMENT 9

ARGUMENT

I THIS COURT SHOULD SUMMARILY AFFIRM BECAUSE SHELBY COUNTY HAS FORFEITED THE CENTRAL ISSUE OF WHETHER IT IS ELIGIBLE FOR ATTORNEY'S FEES UNDER 52 U.S.C. 10310(e) 12

II SHELBY COUNTY IS NOT ELIGIBLE FOR ATTORNEY'S FEES UNDER 52 U.S.C. 10310(e) 15

A. *Shelby County's Facial Challenge Did Not Seek "To Enforce The Voting Guarantees Of The Fourteenth Or Fifteenth Amendment"*...16

B. *Neither The United States Nor Defendant-Intervenors Were Seeking In This Litigation "To Enforce The Voting Guarantees Of The Fourteenth Or Fifteenth Amendment"*...19

TABLE OF CONTENTS (continued): **PAGE**

C. Although Shelby County's Opening Brief Contains No Developed Argument On Fee Eligibility, It Does Misconstrue Section 10310(e)..21

III EVEN IF SHELBY COUNTY WERE ELIGIBLE FOR ATTORNEY'S FEES UNDER SECTION 10310(e), IT IS NOT ENTITLED TO ANY FEES 24

A. Legal Framework..24

B. The Christiansburg Garment *Standard Applies Here* 26

C. Shelby County Did Not Act As A Chosen Instrument Of Congress In This Case 27

1. Shelby County's Entitlement Arguments Conflict With Section 10310(e)'s Plain Language 27

2. Shelby County's Entitlement Arguments Conflict With Section 10310(e)'s Legislative History 30

3. Shelby County's Attorney's Fees Entitlement Argument Conflicts With This Court's Precedent..........35

D. Shelby County's Remaining Arguments Fail............................39

CONCLUSION...44

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 17

American Wildlands v. *Kempthorne*, 530 F.3d 991 (D.C. Cir. 2008) 13

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 3, 12

**Christiansburg Garment Co.* v. *Equal Empl't Opportunity Comm'n*,
434 U.S. 412 (1978) 3, 11, 24-25, 27, 38

Coal River Energy, LLC v. *Jewell*, 751 F.3d 659 (D.C. Cir. 2014) 14

**Commissioners Court of Medina Cnty.* v. *United States*,
683 F.2d 440 (D.C. Cir. 1982) 35-36

**Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982),
cert. denied, 459 U.S. 1204 (1983) 26, 36

Environmental Def. Fund, Inc. v. *Costle*, 657 F.2d 275 (D.C. Cir. 1981) 14

Independent Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989) 25-26

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 17

King v. *Illinois State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005) 36-37

Lawrence v. *Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) 40

Maloney v. *City of Marietta*, 822 F.2d 1023 (11th Cir. 1987) 39

McBride v. *Merrell Dow & Pharm., Inc.*, 800 F.2d 1208 (D.C. Cir. 1986) 15

**Newman* v. *Piggie Park Enters., Inc.*,
390 U.S. 400 (1968) (per curiam) 11, 24-26, 33, 38

Northcross v. *Board of Educ. of the Memphis City Sch.*,
412 U.S. 427 (1973) (per curiam) 24, 26

CASES (continued): **PAGE**

Shelby Cnty. v. *Holder*, 133 S. Ct. 2612 (2013) 5

Shelby Cnty. v. *Holder*, 679 F.3d 848 (D.C. Cir. 2012) 5

Shelby Cnty. v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) 5

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 41

United States Envtl. Prot. Agency v. *City of Green Forest*,
921 F.2d 1394 (8th Cir. 1990), cert. denied, 502 U.S. 956 (1991) 30

United States Steel v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974)................33

STATUTES:

Voting Rights Act (VRA),
52 U.S.C. 10302(a) 18
52 U.S.C. 10302(b) 18
52 U.S.C. 10302(c) 18
52 U.S.C. 10310(b) 3, 28-29
*52 U.S.C. 10310(e) 2-5, 9-10, 15, 22-23, 27

28 U.S.C. 1291 3

28 U.S.C. 1331 3

28 U.S.C. 2201 ....10, 29, 41

28 U.S.C. 2202 ....10, 29, 41

42 U.S.C. 1981 40

42 U.S.C. 1988(b) 40

LEGISLATIVE HISTORY: **PAGE**

*121 Cong. Rec. 16,269 (1975) 23, 32, 35

*S. Rep. No. 295, 94th Cong., 1st Sess. (1975) 31-34

GLOSSARY

VRA: Voting Rights Act

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE

INTRODUCTION

The district court in this case denied Shelby County's motion for attorney's fees. Shelby County asks this Court to vacate and remand "with the direction [to the district court] to declare Shelby County fee-eligible and to proceed to consideration of the 'reasonable' fee amount to be awarded to Shelby County." Br.

46.[1] This Court cannot do that without addressing, and deciding in Shelby County's favor, an issue Shelby County has not briefed. This Court can order the district court to impose reasonable attorney's fees only if it concludes (1) that Shelby County is eligible for attorney's fees under 52 U.S.C. 10310(e), and (2) that Shelby County is entitled to attorney's fees under the precedent that defines courts' discretion over whether to award fees to an eligible party. Shelby County may *not* obtain attorney's fees if it is either statutorily ineligible for such an award or fee-eligible but not entitled to fees under governing precedent.

In its opening brief, Shelby County has not argued that it is statutorily eligible for attorney's fees. Shelby County did offer an argument on that point in the district court, and the district court rejected it. Yet the district court ultimately did not resolve the statutory eligibility issue and assumed *arguendo* Shelby County's eligibility for fees based on arguments Shelby County had not made.

Now, on appeal, Shelby County has failed either to reassert the statutory eligibility argument it made below or to adopt the alternative statutory eligibility theory held open by the district court. Nevertheless, resolution in this Court of both the eligibility and entitlement issues is required before any attorney's fees can legally be awarded. Because Shelby County has elected not to offer argument on an issue whose resolution is necessary to the relief it is seeking, and therefore has

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[1] "Br. _" refers to Shelby County's opening brief filed on October 29, 2014.

forfeited any argument on that issue, this Court should summarily affirm the district court's denial of fees. See *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (declining to entertain appellant's claim where resolution of the claim "require[d] a determination" of a statutory interpretation issue that appellant failed to adequately brief).

We nonetheless address Shelby County's statutory eligibility for attorney's fees. Under a correct reading of 52 U.S.C. 10310(e), Shelby County is not eligible for attorney's fees. The statutory eligibility argument Shelby County made below is meritless. In addition, the alternative eligibility theory the district court held open is also erroneous and, in any event, Shelby County has disavowed it (Br. 44). The district court correctly applied the restrictive fee-entitlement standard set out in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412 (1978).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 52 U.S.C. 10310(b). This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether this Court should summarily affirm because Shelby County has forfeited the central issue of whether it is eligible for attorney's fees under the language of 52 U.S.C. 10310(e).

2. Whether Shelby County is eligible for attorney's fees under 52 U.S.C. 10310(e).

3. Assuming (contrary to fact) that Shelby County is statutorily eligible for attorney's fees, whether the district court erred in applying the *Christiansburg Garment* fee-entitlement standard and ruling that Shelby County was not entitled to fees.

STATUTES AND REGULATIONS

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

> 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

Shelby County filed suit against the Attorney General to challenge the constitutionality of Sections 4(b) and 5 of the Voting Rights Act of 1965 on their face. JA 62.[2] The Attorney General had not brought any enforcement action against Shelby County and no particular voting change by Shelby County was at issue. JA 37-38.

Shelby County argued that Section 4(b)'s coverage formula and Section 5's preclearance requirements violated Article IV of the Constitution and the Tenth

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[2] "JA _" refers to the "Joint Appendix" filed on October 29, 2014.

Amendment and exceeded Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. JA 62. The Attorney General, and a group of Shelby County voters and the Alabama State Conference of the NAACP who intervened in the case, defended the statute's constitutionality. JA 62.

The district court rejected Shelby County's claims and upheld the constitutionality of both Sections 4(b) and 5 of the VRA. *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011). This Court affirmed the district court's ruling. *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). Ultimately, Shelby County prevailed when the Supreme Court ruled that Section 4(b)'s coverage formula could not constitutionally be used as a basis for subjecting jurisdictions to Section 5 preclearance. JA 63. The Court did not reach Section 5's constitutionality. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013).

On remand, after the district court issued a final judgment in its favor, Shelby County filed a motion seeking $2,000,000 in attorney's fees and $10,000 in costs. JA 63-64. Shelby County claimed fees under 52 U.S.C. 10310(e), the Voting Rights Act's fee-shifting provision. The district court granted the parties' joint motion to bifurcate the issues of Shelby County's entitlement to fees and the amount of any fees. JA 64.

After briefing and argument, the district court ruled that Shelby County is not entitled to attorney's fees. JA 64-65. In so doing, the district court considered

both whether Shelby County was statutorily eligible to receive attorney's fees (the eligibility issue), as well as whether it was entitled to fees even if eligible (the entitlement issue).[3] JA 70-95.

The court first considered the eligibility issue. It analyzed three plausible interpretations of Section 10310(e)'s phrase "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." JA 71. The court first analyzed a "plaintiff-specific interpretation" under which eligibility for attorney's fees would be triggered only if the plaintiff filed the lawsuit in order, in the words of the statute, "to enforce the voting guarantees of the fourteenth or fifteenth amendment." JA 71. Under this interpretation of the statute, the district court concluded, Shelby County is ineligible for fees because it filed its lawsuit to enforce the Tenth Amendment and Article IV of the Constitution rather than "to enforce the voting guarantees of the fourteenth or fifteenth amendment." JA 72.

The court rejected Shelby County's argument that it satisfied Section 10310(e)'s language because it was enforcing the constitutional limits on Congress's Fourteenth and Fifteenth Amendment authority. The court explained that "[b]y using the phrase 'voting guarantees,' Congress made clear that it was

[3] The district court also concluded that the United States "waived its sovereign immunity for attorney's fees claims in section 2412(b) of the Equal Access to Justice Act." JA 65. The United States is not asserting any sovereign immunity defense in this appeal.

referring to the individual voting rights" protected by the Fourteenth and Fifteenth Amendments; that phrase plainly did not refer to the constitutional limits on Congress's power to enforce those amendments. JA 72-73. The district court ultimately rejected the "plaintiff-specific interpretation" of Section 10310(e) as inconsistent with this Court's precedent. JA 74-75.

The district court next analyzed a "party-specific interpretation" of Section 10310(e), under which the key question would be whether the prevailing party was seeking "to enforce the voting guarantees" of the Fourteenth or Fifteenth Amendments. JA 76-77. But the court concluded that this interpretation is in significant tension with Section 10310(e)'s language. That language asks not whether the prevailing party was seeking "to enforce the voting guarantees" of the Fourteenth or Fifteenth Amendments, but instead whether the lawsuit itself was an "action or proceeding" to enforce those voting guarantees. JA 76. The court determined that the nature of an "action or proceeding" cannot turn merely on who ultimately prevails. JA 77.

Finally, the district court considered what it called a "neutral interpretation" of Section 10310(e). Under that theory, the prevailing party would be eligible for fees if "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." JA 78. The lawsuit could properly

be so described if at least one of the litigants was seeking "to enforce the voting guarantees" of the Fourteenth or Fifteenth Amendments. The court explained that the neutral interpretation is faithful to the statutory text and has been adopted by at least one other court. JA 78. The district court opined that "[u]nder [the neutral] 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.'" JA 80 n.12.

After reviewing three different interpretations of the phrase "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment," the Court concluded that the eligibility issue presented an "interpretive puzzle" that "c[ould] be left for another day." JA 80. Instead, the district court moved on to the question of entitlement to attorney's fees and ruled that Shelby County would not be entitled to attorney's fees even if it were statutorily eligible for attorney's fees. JA 80.

The district court reached that conclusion by applying a body of case law from the Supreme Court and this Court "adopting purposive interpretations of discretionary, textually neutral fee-shifting provisions – particularly, those found in federal civil rights statutes." JA 81. Under this "purposive" analysis, those parties who seek to enforce the specific rights that Congress sought to promote by

enacting the fees provision at issue are normally entitled to attorney's fees. But parties not seeking to enforce those rights must meet a far more restrictive standard to obtain fees.

The court then concluded that Congress enacted Section 10310(e) to incentivize "private attorneys general to bring lawsuits vindicating individual voting rights." JA 90. It determined that "Shelby County * * * was not acting as a 'private attorney general' seeking to vindicate individual voting rights." JA 94. Rather, Shelby County was "openly *hostile* to Congress's policy choices [*i.e.*, the policy choices Section 10310(e) was enacted to further], attacking them as unconstitutional." JA 94. Thus, the district court held, Shelby County was entitled to attorney's fees only if it met the *Christiansburg Garment* standard. JA 95. Under that standard, Shelby County must "demonstrate that the United States or defendant-intervenors took positions that were 'frivolous, unreasonable, or without foundation.'" JA 95. Shelby County conceded that it could not meet that standard. JA 95.

SUMMARY OF THE ARGUMENT

Shelby County asks this Court to order the district court to award attorney's fees. Before this Court can do that, it must determine whether Shelby County is even eligible for attorney's fees under 52 U.S.C. 10310(e). And yet, Shelby County has elected not to include any fee-eligibility argument in its opening brief.

It has accordingly forfeited the opportunity to offer argument on that essential point, and this Court should summarily affirm.

In the event that this Court elects to reach the merits of the fee-eligibility issue, it should conclude that Shelby County is not fee-eligible under Section 10310(e) because this case is not an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." See 52 U.S.C. 10310(e). Shelby County brought this action under 28 U.S.C. 2201 and 2202 not to enforce "voting guarantees," but rather to urge the court to "[d]eclare Section 4(b) and Section 5 of the VRA unconstitutional." JA 56. It argued that those provisions "violate[] the Tenth Amendment and Article IV of the Constitution" and also "exceed[] Congress's enforcement authority under the Fourteenth and Fifteenth Amendments." See JA 52-56. It did not seek "to enforce the voting guarantees of the fourteenth or fifteenth amendment." See 52 U.S.C. 10310(e).

As the district court correctly concluded (JA 72-73), seeking to ensure that Congress does not exceed its constitutional authority does not establish fee-eligibility under Section 10310(e). To conclude otherwise would be to read the words "voting guarantees" out of the statute. Moreover, the VRA's use of the "voting guarantees" language in other provisions confirm that the district court correctly rejected Shelby County's argument that it was seeking to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments here.

This Court also should *not* conclude that Shelby County is fee-eligible because the government or defendant-intervenors were seeking "to enforce" the relevant voting guarantees. In reality, no party in this litigation was seeking to enforce individual voting rights. Moreover, Shelby County has disavowed this basis for fee-eligibility.

If this Court reaches the issue, it should conclude that even if Shelby County were eligible for attorney's fees under Section 10310(e), Shelby County would not be *entitled* to fees. Applicable precedent establishes a dual-standard system for neutral fee-shifting provisions like Section 10310(e). Under that system, parties who are the "chosen instruments of Congress" in seeking to enforce the rights that the fee-shifting provision was enacted to promote should normally obtain attorney's fees – under the *Piggie Park* standard – when they prevail. Those same parties are liable for attorney's fees when they lose only if their claims are frivolous or unreasonable. Conversely, parties on the other side of the case may obtain attorney's fees – under the *Christiansburg Garment* standard – when they prevail only if their opponent's case is frivolous or unreasonable, and are presumptively liable for fees if they lose. See *Christiansburg Garment Co.* v. *Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 418 (1978) (citing *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

Section 10310(e)'s plain language and legislative history show that it was enacted to encourage individuals to vindicate the rights to be free of discrimination in voting guaranteed by the Fourteenth and Fifteenth Amendments. Shelby County plainly did not seek to further that purpose in this litigation. Moreover, Section 10310(e)'s legislative history reveals, and this Court has indicated, that Congress specifically intended the *Christiansburg Garment* fee-entitlement standard, not the *Piggie Park* standard, to apply to plaintiff jurisdictions in fee-eligible declaratory judgment actions. Thus (assuming contrary to fact that the parties here are eligible for attorney's fees under Section 10310(e)) the more restrictive *Christiansburg Garment* standard applies. Shelby County does not claim, and could not reasonably claim, that it is entitled to attorney's fees under that standard.

ARGUMENT

I

THIS COURT SHOULD SUMMARILY AFFIRM BECAUSE SHELBY COUNTY HAS FORFEITED THE CENTRAL ISSUE OF WHETHER IT IS ELIGIBLE FOR ATTORNEY'S FEES UNDER 52 U.S.C. 10310(e)

As explained in the introduction to this brief, Shelby County has elected not to provide (and thus has forfeited) any argument on the essential issue of its statutory eligibility for fees. Because this Court cannot grant the relief Shelby County is seeking in this appeal without addressing that issue, this Court should summarily affirm. See *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

Though the district court did not finally resolve the fee-eligibility issue, Shelby County is obliged to address it here. Shelby County is asking this Court to order the district court to award it attorney's fees under Section 10310(e). Necessarily then, Shelby County is asking this Court to rule that this case is "an action or proceeding" that meets the requirements of Section 10310(e). Yet Shelby County's opening brief does not offer argument on, and thus has forfeited, that essential point. See, *e.g.*, *American Wildlands* v. *Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) (arguments not made in an appellant's opening brief are forfeited). We are accordingly left to wonder what theory Shelby County will rely on to try to establish eligibility for attorney's fees under the language of Section 10310(e).

It may be that Shelby County has made a tactical decision to wait for its Reply Brief to unveil its fee-eligibility argument. Though the district court avoided ruling on the eligibility issue, it discussed and held open an alternative theory of fee eligibility that Shelby County had not advanced. JA 80 n.12. The district court, however, expressly rejected the fee-eligibility argument Shelby County did advance (JA 73-74) – a critical determination Shelby County does not challenge here. It seems that Shelby County has decided to avoid focusing this Court's attention on the fee-eligibility argument the district court rejected – that Shelby County's effort to ensure that Congress does not exceed its authority to

enforce the Fourteenth and Fifteenth Amendments amounts to enforcing the "voting guarantees" of those amendments. But Shelby County also does not want to embrace – and in fact has disavowed (Br. 44) – the alternative statutory eligibility theory the district court held open.[4]

Shelby County should not be allowed to develop its fee-eligibility argument for the first time in a reply brief, to which the government will have no ability to respond. This Court has *repeatedly* held that arguments made for the first time in a reply brief are forfeited. See, *e.g.*, *Coal River Energy, LLC* v. *Jewell*, 751 F.3d 659, 663 n.3 (D.C. Cir. 2014). To consider such arguments would deprive the appellee of "full and fair opportunity to adequately respond." See *Environmental Def. Fund, Inc.* v. *Costle*, 657 F.2d 275, 284 n.32 (D.C. Cir. 1981). Moreover, "[c]onsidering an argument advanced for the first time in a reply brief * * * is

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[4] Under that alternative theory, the criteria of Section 10310(e) are met not because the plaintiff, Shelby County, was seeking "to enforce the voting guarantees of the fourteenth or fifteenth amendment," but instead because the government and defendant-intervenors were seeking to enforce those voting guarantees. As we explain below, pp. 19-20, *infra*, that theory is incorrect. But the reason Shelby County does not want to embrace it is very likely that it realizes that embracing that theory would have adverse implications for Shelby County's fee-entitlement argument. Clearly, if the defendants in this case (namely, the Attorney General and the private defendant-intervenors) are the parties seeking to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment, then the defendants are also the "instruments of Congress" for purposes of the dual-standard fee-entitlement framework that would apply if (contrary to fact) the parties in this case were eligible for attorney's fees. See pp. 33-38, *infra*. As a consequence, Shelby County would have to overcome the *Christianburg Garment* standard to obtain fees under that scenario.

not only unfair to an appellee, * * * but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *McBride* v. *Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986). This Court should thus hold that the central issue of Shelby County's eligibility for attorney's fees under Section 10310(e) is forfeited, and should accordingly affirm the district court's denial of Shelby County's motion for attorney's fees.

We nonetheless address both the fee-eligibility and fee-entitlement issues, in case this Court should choose to address them.

II

SHELBY COUNTY IS NOT ELIGIBLE FOR ATTORNEY'S FEES UNDER 52 U.S.C. 10310(e)

The VRA's fee shifting provision, 52 U.S.C. 10310(e), states:

> 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.

The key merits question in this case is whether the case is an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment."

A. *Shelby County's Facial Challenge Did Not Seek "To Enforce The Voting Guarantees Of The Fourteenth Or Fifteenth Amendment"*

In the district court, Shelby County argued that it had brought the kind of "action or proceeding" Section 10310(e) contemplates because it had sought "to enforce the voting guarantees of the fourteenth or fifteenth amendment." See JA 72-73 (internal quotation marks omitted). Yet, in its complaint Shelby County made no reference to the voting guarantees of the Fourteenth or Fifteenth Amendments or to any voting guarantees at all. Instead, the complaint asserted that "[b]ecause [Section 4(b) and Section 5] exceed[] Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, [they] violate[] the Tenth Amendment and Article IV of the Constitution." JA 53, 55 (paragraphs 39 and 43 of the Complaint). Shelby County's argument to the district court was that its action fit the text of Section 10310(e) because the lawsuit ensured that Congress did not exceed the limits of its authority to enforce the Fourteenth and Fifteenth Amendments. JA 72. The district court rejected this basis for fees eligibility because, even if ensuring that Congress acts within the limits of its authority under the Fourteenth and Fifteenth Amendments counts as enforcing those amendments, the action clearly is not enforcing the "voting guarantees" of those amendments. JA 72-73. Thus, the district court held, Shelby County "did not file this lawsuit in an attempt 'to enforce the voting guarantees of the fourteenth or fifteenth amendment.'" JA 72.

That conclusion is correct for at least two reasons. First, and most importantly, the "voting guarantees" the statute specifies are the individual voting rights guaranteed by the Fourteenth and Fifteenth Amendments and through federal statutes effectuating those amendments' voting guarantees. The Fifteenth Amendment guarantees that each citizen's right "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." See also *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 556 (1969) (explaining that the VRA "was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens"). The Fourteenth Amendment prohibits States from "deny[ing] to any person * * * the equal protection of the laws," a guarantee that applies to voting. See, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 648 (1966) (Fourteenth Amendment provides Congress authority to prohibit English literacy requirements). As the district court explained, "[b]y using the phrase 'voting guarantees,' Congress made clear that [Section 10310(e)] was referring to the individual voting rights protections that appear explicitly in the Fifteenth Amendment * * * and implicitly in the Fourteenth Amendment [i.e., in the Equal Protection Clause]." JA 72-73.

Shelby County did not assert in its motion below (and could not plausibly assert) that the Attorney General has violated these individual protections against racial discrimination in voting by enforcing the VRA. Instead, Shelby County

sought in this litigation to enforce Article IV and the Tenth Amendment and to confine Congress to the limits of its enforcement authority under the Fourteenth and Fifteenth Amendments. JA 53, 55. To conclude that those litigation objectives make Shelby County eligible for attorney's fees under Section 10310(e) would be, as the district court correctly explained, to "read[] the words 'voting guarantees' out of the statute." JA 73. The requirement that the legislation Congress enacts to enforce the substantive guarantees of the Fourteenth and Fifteenth Amendments must be "appropriate" is not a "voting guarantee."

Second, other VRA provisions confirm the district court's interpretation of Section 10310(e). Specifically, the VRA uses the phrase "to enforce the voting guarantees of the fourteenth or fifteenth amendment" in four different provisions. In addition to its use in the attorney's fees provision at issue here, the VRA uses that phrase to describe the sort of "proceeding" in which federal election observers may be authorized (52 U.S.C. 10302(a)), in which courts may suspend a test or device that has been used to deny or abridge the right "to vote on account of race or color [or membership in a language minority group]" (52 U.S.C. 10302(b)), and in which a court may "bail in" a jurisdiction to require preclearance of changes to its voting practices (52 U.S.C. 10302(c)). In each of these VRA provisions, the "proceeding" described as one "to enforce the voting guarantees of the fourteenth or fifteenth amendment" is clearly a proceeding to enforce individual voting rights;

that is, to prevent denial or abridgment of those rights on the basis of race or color or membership in a language minority group. These VRA provisions each authorize courts to implement appropriate remedies in such proceedings. The same remedies would certainly not make sense in a facial constitutional challenge to a particular VRA provision. In short, Congress used the "voting guarantees" phrase in other parts of the VRA in ways that exclude the kind of "proceeding" – a constitutional challenge to invalidate parts of the VRA – that Shelby County has prosecuted here.

B. Neither The United States Nor Defendant-Intervenors Were Seeking In This Litigation "To Enforce The Voting Guarantees Of The Fourteenth Or Fifteenth Amendment"

The district court could have (and in our view should have) denied Shelby County's motion for attorney's fees when it rejected the arguments Shelby County advanced in support of its statutory eligibility for attorney's fees (see JA 72-73). Instead, the court considered whether Shelby County might be eligible for fees under a "neutral interpretation" of the VRA's fee provision because the United States and defendant-intervenors had sought "to enforce" the specified "voting guarantees." JA 80 n.12.

Shelby County has disavowed this basis for statutory eligibility in its opening brief. In the context of its attorney's fees entitlement argument (the only argument it makes), Shelby County argues that the district court "misconstrued the

Government's and Defendant-Intervenors' positions in this litigation." Br. 44. Specifically, Shelby County argues that the United States and defendant-intervenors did not charge Shelby County with civil rights violations but instead merely attempted to defend the constitutionality of the challenged VRA provisions by arguing "that Congress had acted within its authority when it reauthorized Section 5 using the coverage formula set out in Section 4(b)." Br. 44.

We agree. This case did not involve any particular attempt *to enforce* the challenged law. The case accordingly did not involve any allegation that Shelby County or any other party violated "the voting guarantees of the fourteenth or fifteenth amendment." Thus, no party to this litigation was seeking "to enforce" those "voting guarantees."

This Court accordingly should not conclude that Shelby County is statutorily eligible for attorney's fees under the alternative fee-eligibility theory the district court posited. See JA 80 n.12. That theory is incorrect. Moreover, even if this Court were to elect to consider the statutory fee-eligibility issue Shelby County has decided not to address in its opening brief, it should certainly not consider an alternative ground for fee-eligibility that Shelby County did not pursue below and has now disavowed on appeal.

C. Although Shelby County's Opening Brief Contains No Developed Argument On Fee Eligibility, It Does Misconstrue Section 10310(e)

Although Shelby County's opening brief does not directly address statutory eligibility or contain any developed argument on that essential point, it does include inaccurate descriptions of Section 10310(e). In one part of its fee-entitlement argument, Shelby County describes the statute as "a broadly worded fee provision that on its face provided an economic incentive to assert *all* types of voting-related claims under the VRA, including Section 14(b) claims challenging the constitutionality of the VRA itself." Br. 36. This assertion is incorrect. In reality, the statute expressly does not cover "all types of voting-related claims." By its terms, it applies only where the action can be described as an "action or proceeding to enforce" a very specific set of voting rights – those voting rights that are included within the "voting guarantees of the fourteenth or fifteenth amendment." As we have explained, a facial challenge to the constitutionality of key VRA provisions is not such an action.

Shelby County also subtly obfuscates the statute's plain meaning when, at the end of its Summary of Argument, it describes this case as "a dispute brought directly under the VRA concerning how best to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments." Br. 15. This passage uses the words of the statute but distorts their meaning by modifying them with "concerning how best." Of course, what the statute actually says is "any action or proceeding to

enforce," not "any action or proceeding concerning how best to enforce." See 52 U.S.C. 10310(e). The plain terms of the statute require, as the district court correctly concluded (JA 79), at least one party in the action or proceeding to be seeking in that action or proceeding "to enforce" the relevant "voting guarantees."

Nothing in the text of Section 10310(e) supports the claim that parties are eligible for attorney's fees in a case where neither party is attempting *to enforce* the voting guarantees of the Fourteenth or Fifteenth Amendments, but questions about "how best to enforce" those guarantees nonetheless arise. Moreover, this case was not about "how best to enforce" the relevant voting guarantees. Shelby County was not advancing some sort of alternative policy proposal for how the voting guarantees of the Fourteenth and Fifteenth Amendments should be enforced. Instead, this case was an effort to eliminate statutes enacted to enforce those voting guarantees.

Finally, Shelby County repeatedly states that it brought this action "under" the VRA. See, *e.g.*, Br. 13, 15, 17, 24-25, 30- 31. Then, in arguing that awarding fees here would be in accord with the incentives Congress intended to create, Shelby County asserts that the fact that it sued "directly under the VRA * * * brings this action within the literal bounds of [Section 10310(e)]." Br. 24.

That is wrong. Section 10310(e) *does not* say that the court may grant fees to a prevailing party who sues under the VRA; it instead says that the court may

grant fees "in any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10310(e). That means that parties in an action or proceeding, even if brought under the VRA, do not qualify for attorney's fees unless one of the parties is seeking "to enforce" the specified "voting guarantees." It also means that, as Congress anticipated, litigants in certain non-VRA actions or proceedings "to enforce" the specified "voting guarantees" do qualify for fees under Section 10310(e). See 121 Cong. Rec. 16,269 (1975) (statement of Congressman Drinan) (explaining that Section 10310(e) would permit an award of attorney's fees in "any action to enforce the voting guarantees of the 14th or 15th amendment" including "suits based directly on those amendments" and also "cases based on statutes passed pursuant to them, such as 42 U.S.C. 1971, 1973, and 1983"). In other words, whether Shelby County sued under the VRA is irrelevant (but, as we explain below, p. 29, *infra*, Shelby County did not sue under the VRA). No matter what statute an action was filed under if, as here, no party in the litigation seeks "to enforce" the "voting guarantees of the fourteenth or fifteenth amendment," then no party is eligible for fees under Section 10310(e).

III

EVEN IF SHELBY COUNTY WERE ELIGIBLE FOR ATTORNEY'S FEES UNDER SECTION 10310(e), IT IS NOT ENTITLED TO ANY FEES

A. Legal Framework

On its face, Section 10310(e) gives the district court discretion to award attorney's fees to a prevailing party in any "action or proceeding" that meets the statute's eligibility requirements. But Supreme Court decisions and decisions of this Court limit that discretion. That body of law (which the district court analyzed in detail (see JA 80-95)) offers a choice between two standards that may apply to determine whether a court should award any attorney's fees to a prevailing party.

First, a less-restrictive attorney's fees entitlement standard (the *Piggie Park* standard) applies when the prevailing party "is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" See *Christiansburg Garment Co.* v. *Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 418 (1978) (citing *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam)). More specifically, the Supreme Court recognized that Congress's intent in enacting the fees provision at issue in *Piggie Park*, 42 U.S.C. 2000a-3(b), and in enacting other similar civil rights fees provisions (like the one at issue here) was "to encourage individuals injured by racial discrimination to seek judicial relief." *Northcross* v. *Board of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (citation omitted). Under this standard, a prevailing party

"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Piggie Park*, 390 U.S. at 402.

Second, a far more restrictive attorney's fees standard (the *Christiansburg Garment* standard) applies in situations where the prevailing party is not Congress's "chosen instrument" to vindicate high-priority goals such as remedying race-based discrimination. For such a prevailing party – for example, a successful defendant in an employment discrimination suit – a neutral attorney's fees provision permits an award of attorney's fees only if the position of the opposing party "was frivolous, unreasonable, or without foundation." See *Christiansburg Garment*, 434 U.S. at 421.

In sum, a party that is the "chosen instrument of Congress" is awarded attorney's fees under the *Piggie Park* standard when successful, and is liable for fees under the *Christiansburg Garment* standard when unsuccessful. Conversely, a party that is not Congress's chosen instrument is awarded attorney's fees under the *Christiansburg Garment* standard when successful and is liable for fees under the *Piggie Park* standard when unsuccessful.[5] Thus, the *Piggie Park*/*Christiansburg*

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[5] The category of party that falls outside this framework is an intervenor who is not enforcing the rights Congress was seeking to promote when it enacted the applicable attorney's fees provision. If such an intervenor is also not alleged to have violated rights, then that intervenor is liable for attorney's fees only under the *Christiansburg Garment* standard. See *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 761-764 (1989). That does not mean, however, that such an

(continued…)

Garment framework encourages parties to enforce the rights Congress intended the fee provision to promote, but also offers some protection to parties on the other side from frivolous or unreasonable claims. This balancing of incentives and deterrents depends on a complementary set of presumptions about which standard to apply; if the same fee-entitlement standard applied to parties on both sides of the litigation, the framework would break down.

B. The Christiansburg Garment *Standard Applies Here*

To decide which standard applies, courts must first determine "[t]he purpose of [the attorney's fees] provision," and then decide whether the prevailing party was advancing that purpose. See *Donnell* v. *United States*, 682 F.2d 240, 245 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); see also *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 761 (1989) (declining to award fees where a fees award would not advance "central purpose of" the applicable attorney's fees provision). Congress enacted Section 10310(e) for the same reason it enacted the civil rights attorney's fees provisions considered in the cases cited above: "to encourage individuals injured by racial discrimination to seek judicial relief." See *Piggie Park*, 390 U.S. at 402; *Northcross*, 412 U.S. at 428. More specifically, Congress wanted to encourage individuals "to enforce the voting

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(…continued)
intervenor can obtain attorney's fees under the *Piggie Park* standard from the party in the litigation advancing the goals of Congress.

guarantees of the fourteenth [and] fifteenth amendment[s]." 52 U.S.C. 10310(e). In other words, Congress wanted to encourage individuals to vindicate the individual voting rights – particularly the right to be free of racial discrimination in voting – that those amendments, and legislation enforcing those amendments, provide.

As explained above, pp. 16-19, *supra*, Shelby County did not file this case to vindicate those "voting guarantees" and surely was not acting to vindicate the priorities Congress intended to advance in enacting Section 10310(e). That means that, assuming (contrary to fact) that Shelby County is eligible for fees, the district court could award Shelby County attorney's fees only if the position of the United States or that of the defendant-intervenors "was frivolous, unreasonable, or without foundation." See *Christiansburg Garment*, 434 U.S. at 421. Quite obviously, the position of the United States and defendant-intervenors in this litigation was neither frivolous nor unreasonable, nor without foundation – and indeed Shelby County has not claimed that it was.

C. Shelby County Did Not Act As A Chosen Instrument Of Congress In This Case

1. Shelby County's Entitlement Arguments Conflict With Section 10310(e)'s Plain Language

The mantle of "chosen instrument of Congress" (Br. 19 (citation omitted)) simply does not fit Shelby County in this case. Shelby County begins its fees

entitlement argument by claiming that it filed this case under the VRA and solely for that reason it is a case "that Congress acknowledged and facilitated." Br. 16-17. Shelby County hammers the filed "under the VRA" point repeatedly. See, *e.g.*, Br. 13, 15, 17, 24-25, 30-31. The point is both irrelevant and incorrect.

a. First, it is irrelevant because even if this case was filed under the VRA, that would not make this case one that vindicates Congress's purposes in enacting Section 10310(e). As we have explained, pp. 22-23, *supra*, the purpose of Section 10310(e) is to incentivize parties to vindicate the "voting guarantees of the fourteenth or fifteenth amendment" in "any action or proceeding," whether or not that action or proceeding is filed under the VRA. So even if the VRA provision (Section 10310(b)) that required this action to be filed in the District Court for the District of Columbia,[6] could properly be viewed as "facilitat[ing]" facial constitutional challenges to the VRA (and it cannot), that would not be probative of Section 10310(e)'s purpose.

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[6] Section 10310(b) provides:

> No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

b. Second, Shelby County's claim that this case was filed under the VRA is incorrect. Section 10310(b) is a jurisdictional provision. It does not create a cause of action to challenge the VRA's constitutionality. Instead, it requires that a constitutional challenge that (as Shelby County expressly admits (Br. 36 n.10)) could otherwise be filed in any court of competent jurisdiction must be filed in the District Court for the District of Columbia. See 52 U.S.C. 10310(b).

Moreover, when Shelby County filed this case, it did not cite Section 10310(b) as the statute that established the cause of action the case was being filed under. It instead stated in its complaint that it "seeks a declaratory judgment and injunctive relief pursuant to 28 U.S.C. § 2201and 28 U.S.C. § 2202."[7] JA 38. Shelby County cited Section 10310 (which was then 42 U.S.C. 1973*l*) as one of the statutory provisions that established "jurisdiction" and "venue" in the District Court for the District of Columbia. JA 38. That was the correct understanding of Section 10310(b); it is a provision that limits jurisdiction and venue to a particular court, not one that establishes a cause of action to challenge the constitutionality of the VRA.

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[7] Subject to certain limitations, these statutes give "any court of the United States" authority to enter a declaratory judgment and order other necessary relief in a case in which the court has jurisdiction. See 28 U.S.C. 2201, 2202.

2. *Shelby County's Entitlement Arguments Conflict With Section 10310(e)'s Legislative History*

Section 10310(e)'s legislative history confirms that Shelby County is not the "chosen instrument of Congress." In addition to its misplaced reliance on its claim that it sued under the VRA, Shelby County leans heavily on its "plaintiff" status and its claim that it has functioned as a "private attorney general" in this litigation. See, *e.g.*, Br. 13-14, 16-17, 21, 24-25, 37-38, 45. The legislative history of Section 10310(e) shows, however, that (1) Congress did not intend to promote all types of VRA suits but rather intended only to promote suits to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments – *i.e.*, individual rights to be free of discrimination in voting that those amendments protect, (2) Shelby County is (if a "private attorney general" at all[8]) not the sort of "private attorney general" Congress enacted Section 10310(e) to encourage, (3) Congress intended that application of the *Piggie Park*/*Christiansburg Garment* dual-standard

[8] The concept of a "private attorney general" is based at least in part on the idea that a private party is in some sense standing in the shoes of the Attorney General of the United States by enforcing laws that the Attorney General also enforces. Such a party provides a public service because the Attorney General does not have the resources to bring a suit to remedy every violation of the laws the Attorney General enforces. See, *e.g.*, *United States Envtl. Prot. Agency* v. *City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990) (explaining that the Clean Water Act "allows citizens acting as private attorneys general to fill the void" when the government has not taken action) (citation omitted), cert. denied, 502 U.S. 956 (1991). This aspect of the "private attorney general" concept does not apply to litigants who sue the Attorney General of the United States.

framework would not depend on whether the prevailing party was a plaintiff or defendant, and (4), most importantly, Congress expressly indicated that the *Christiansburg Garment* standard would apply to plaintiffs that are governmental jurisdictions, like Shelby County, in declaratory judgment actions like this one.

First, the Senate Committee Report on the bill that enacted the attorney's fees provision now codified in Section 10310(e), like the statute's plain language, reveals that the provision's purpose was not to incentivize all cases filed under the VRA, but was instead to encourage individuals to vindicate the federal rights to be free of discrimination in voting secured by the Fourteenth or Fifteenth Amendments' "voting guarantees." The Senate Report explained that the proposed fees provision "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."[9] S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975). The Senate Report went on to say that this fees provision "is appropriate in voting rights cases because there, as in

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[9] Shelby County selectively quotes this sentence and asserts that it indicates "an intention to promote enforcement of 'statutes enacted under' the Fourteenth and Fifteenth Amendments." Br. 38 n.12. Reading the sentence as a whole, it is apparent that "voting guarantees of" modifies "statutes enacted under those amendments [i.e., under the Fourteenth and Fifteenth Amendments]." The sentence thus reveals that Congress's intent was to promote enforcement of the Fourteenth and Fifteenth Amendments' voting guarantees and statutes that enacted to enforce those guarantees.

employment and public accommodations cases, and other civil rights cases, Congress depends heavily on private citizens to enforce the fundamental rights involved [*i.e.*, the specified voting guarantees]." *Ibid.* Emphasizing that same point, the Report's next sentence says that "[f]ee awards are a necessary means of enabling private citizens to vindicate *these* Federal rights [*i.e.*, the specified voting guarantees]." *Ibid.* (emphasis added). Moreover, Congressman Robert Drinan, a sponsor of the House version of the bill, explained that the attorney's fees provision would permit an award of attorney's fees in "any action to enforce the voting guarantees of the 14th or 15th amendment" including "suits based directly on those amendments" and also "cases based on statutes passed pursuant to them, such as 42 U.S.C. 1971, 1973, and 1983." 121 Cong. Rec. 16,269 (1975).

Second, the legislative history shows that Shelby County is not the kind of private attorney general Section 10310(e) was designed to incentivize. Shelby County's private attorney general argument works only if one (wrongly) assumes that the purpose of Section 10310(e) is to encourage all types of VRA claims and that Shelby County filed a VRA claim here. Because Section 10310(e) actually encourages only specific types of VRA claims (as well as non-VRA claims), and Shelby County has not filed one of those specific types of claims, its "private attorney general" status is immaterial. Confirming this, the Senate Report expresses Congress's intent to encourage "private attorneys general" who are

"seeking to enforce" protected rights – that is, those seeking to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975).

Third, legislative history demonstrates that Congress intended the more permissive *Piggie Park* standard to apply to a party seeking to enforce the specified voting guarantees irrespective of the party's status as plaintiff or defendant. Discussing "the standards for awarding fees," the report did not talk about standards that apply to plaintiffs and defendants. It instead explained that "[a] party seeking to enforce" the rights Congress intended to protect may obtain fees under the permissive *Piggie Park* standard. S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) (citing *Piggie Park*). If, however, a party seeking to enforce protected rights loses, that party "should be assessed his opponent's fee where it is shown that his suit was frivolous, vexatious, or brought for harassment purposes." *Id.* at 41 (citing *United States Steel* v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974), a case that, in essence, anticipated the Supreme Court's holding in *Christiansburg Garment*).

Fourth, and most importantly, the legislative history plainly indicates that plaintiff jurisdictions in declaratory judgment actions would be entitled to attorney's fees (if at all) only under the *Christiansburg Garment* standard.

The Senate Report explained:

> In the large majority of cases the party or parties seeking to enforce such rights [*i.e.*, the rights the fees provision is designed to protect] will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases (e.g. a declaratory judgment suit under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendants and/or defendant intervenors.

S. Rep. No. 295, 94th Cong., 1st Sess. 40 n.42 (1975). The Senate Report thus makes clear first that parties "seeking to enforce" the federally protected voting rights Section 10310(e) was enacted to promote are awarded fees under *Piggie Park* and are assessed fees under *Christiansburg Garment*, and second that defendants and defendant-intervenors *in VRA declaratory judgment actions* are "parties seeking to enforce such rights." *Id.* at 40-41 & n.42. That means that in a VRA declaratory judgment action in which Section 10310(e)'s eligibility requirements are met, it is the parties on the defendant side of the action – not the plaintiff jurisdiction – who can be awarded fees under the *Piggie Park* standard.[10] Thus, the plaintiff jurisdiction in such an action (here Shelby County, assuming – contrary to fact – that Section 10310(e)'s eligibility requirements are met) may be awarded fees only under the *Christiansburg Garment* standard.

Congressman Drinan's statements confirm this. Discussing Section 10310(e) on the House floor, he sometimes used the typical party designations to discuss the appropriate standard for awarding attorney's fees. But he explained

[10] Typically, in such cases, this means private parties who intervene as defendants, since the United States is not eligible for fees under Section 10310(e).

both that private parties who intervene to successfully defend a bailout action under Section 4(a) of the VRA should recover attorney's fees under the *Piggie Park* standard, and also "that a much more restricted test [should] be applied when the 'prevailing party' is a State or political subdivision, or its officials." 121 Cong. Rec. 16,269 (1975).

In short, the legislative history of Section 10310(e) is very far from being, as Shelby County asserts, "in equipoise" (Br. 38 n.12) on whether a jurisdiction should get attorney's fees under the *Piggie Park* standard in a declaratory judgment action like this one. It quite plainly reveals that Congress intended the *Christiansburg Garment* standard to apply to plaintiff jurisdictions in such cases, and thus to Shelby County here if (contrary to fact) this were a case in which the parties are eligible for fees under Section 10310(e).

3. Shelby County's Attorney's Fees Entitlement Argument Conflicts With This Court's Precedent

In two cases, this Court has concluded that defendant-intervenors in a VRA declaratory judgment action may obtain attorney's fees under the more permissive *Piggie Park* standard. In *Commissioners Court of Medina County* v. *United States*, this Court determined that 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." 683 F.2d 435, 440 (D.C. Cir.

1982). As the district court in this case explained (JA 91 n.15 (quoting *Medina County*)), in saying "rights guaranteed by the Constitution," *Medina County* was referring specifically to the voting guarantees of the Fourteenth and Fifteenth Amendments, not to any and all constitutional rights. This Court ultimately remanded the case to the district court for a determination of whether the defendant-intervenors were prevailing parties, making clear that if the defendant-intervenors were prevailing parties they should get fees under the *Piggie Park* standard. *Medina County*, 683 F.2d at 444. This Court reached the same conclusion in *Donnell*, where it explained that the purpose of Section 10310(e) is "the familiar one of encouraging private litigants to act as 'private attorneys general' *in seeking to vindicate the civil rights laws*." 682 F.2d at 245 (emphasis added).

Other courts of appeals have followed this Court's lead in analogous circumstances. In *King* v. *Illinois State Board of Elections*, 410 F.3d 404, 419 (7th Cir. 2005), the court held that defendant-intervenors were entitled to attorney's fees under the *Piggie Park* standard where they "successfully protected rights guaranteed to them under the Constitution of the United States and the Voting Rights Act" because awarding attorney's fees "promotes the underlying goals of the fee-shifting statutes [both Section 10310(e) and 42 U.S.C. 1988(b)]." The court of appeals also explained that "[t]he purpose of § 1973l (e) * * * is to

ensure effective access to the judicial process for persons with civil rights or voting rights grievances." *Id.* at 412. See also *id.* at 417-419 (collecting cases in which courts have looked beyond party designation of a fee claimant and instead relied on whether the claimant had pursued the goals Congress sought to promote when it enacted the relevant fee-shifting statute).

Thus, this Court has ruled that it is the defendant-intervenors in VRA declaratory judgment actions who are the parties seeking to vindicate the rights Section 10310(e) was designed to protect. That plainly means, as the district court concluded (JA 91), that the plaintiff jurisdiction in such cases (here, Shelby County) is *not* the party seeking to vindicate the rights Section 10310(e) was designed to protect. Such a party should be awarded attorney's fees only under the *Christiansburg Garment* standard.

Shelby County appears to concede that it would be liable for attorney's fees under the *Piggie Park* standard to the defendant-intervenors in this case had it lost. See Br. 26-27 & n.4 (stating that defendant-intervenors "would almost certainly receive attorney's fees under the *Piggie Park* standard" if they had won, and that "[t]here is no doubt that Shelby County would have been handed a massive bill had the Supreme Court gone the other way on the merits"). It seems that Shelby County has failed to recognize that a party liable for attorney's fees under the *Piggie Park* standard when it loses is also entitled to attorney's fees only under the

Christiansburg Garment standard when it wins. That, as the district court recognized (JA 91), is the logical implication of this Court's decisions.

This logical inference, that the district court correctly drew (JA 91) from *Medina County* and *Donnell*, is fully consistent with relevant Supreme Court precedent. Though the Supreme Court has at times talked about standards applicable to plaintiffs and defendants, it has always been clear that it is not the party designation that matters. Instead, what matters is whether the party "is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" See *Christiansburg Garment*, 434 U.S. at 418 (citing *Piggie Park*, 390 U.S. at 402).

It is also manifestly what Congress intended. See, pp. 33-35, *supra*. It is true that plaintiffs, more commonly than defendants, are in the position of being Congress's "chosen instrument" to enforce rights. In some contexts, like employment discrimination, that is nearly always true. As Congress expressly recognized, however, see pp. 33-35, *supra*, voting cases can often place parties seeking to vindicate the rights that Section 10310(e) was designed to promote on the defendant side of the case. Given Congress's clear intent, it cannot reasonably be maintained that the "general rule" in VRA cases is that anyone who is a plaintiff gets fees under the *Piggie Park* standard. See Br. 22.

D. Shelby County's Remaining Arguments Fail

1. Shelby County argues (Br. 32) that the district court should not have looked beyond Congress's general purpose of encouraging plaintiffs to bring VRA causes of action. But, as we have explained, indiscriminately encouraging plaintiffs to bring VRA causes of action was not Congress's purpose in enacting Section 10310(e). Where, as here, a fees provision provides fees only for certain kinds of claims, a court needs to determine whether the claim for which a plaintiff is seeking fees is among those kinds of claims.

For that reason, Shelby County is not at all analogous to the "unsympathetic litigants" (Br. 33) it tries to compare itself to. The very first case in Shelby County's list of cases (Br. 33) in which "unsympathetic litigants" received attorney's fees awards is *Maloney* v. *City of Marietta*, 822 F.2d 1023 (11th Cir. 1987), a case in which a white candidate for office successfully challenged a residency requirement under Section 5 of the VRA. In *Maloney*, the court of appeals ruled that a "plaintiff who *successfully vindicates the requirements of section 5* should be considered a prevailing party, without regard to the plaintiff's race or motives for bringing the action." *Id.* at 1026 (emphasis added). The contrast to this case could hardly be more stark: the plaintiff in *Maloney* sought to *vindicate* the requirements of Section 5, while Shelby County sought to *eliminate* those requirements. The Eleventh Circuit was correct that neither the plaintiff's

race nor subjective motivation for suing were relevant; what was relevant was that the plaintiff vindicated voting rights that Section 10310(e) was enacted to protect. Shelby County's aim in this litigation was precisely the opposite.

2. Shelby County also argues (Br. 34-35) that this Court's decision in *Lawrence* v. *Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991), supports its claim. In reality, *Lawrence* simply applied the rule that a prevailing party who vindicates rights the applicable fees provision was enacted to protect should normally be awarded fees. The plaintiff in *Lawrence* was seeking to vindicate his right, under 42 U.S.C. 1981, to be free of race-based employment discrimination. The applicable attorney's fees provision in that case, 42 U.S.C. 1988(b), provides in relevant part that courts may award attorney's fees to a prevailing party "[i]n any action or proceeding to enforce a provision of section[] 1981." That meant, absent "special circumstances," the plaintiff was entitled to attorney's fees. See *Lawrence*, 931 F.2d at 1580. What was unusual in *Lawrence* was that one of the arguments the plaintiff used to overcome one of the defendant's defenses had the potential to undermine the claims of future plaintiffs suing under a different civil rights law. *Ibid.* This Court ruled that the district court had erred in determining that this fact was a special circumstance that could provide a basis for denying an attorney's fees award. *Ibid.*

The "special circumstances" exception is not at issue here, and *Lawrence* does not help Shelby County. The district court here correctly denied Shelby County's attorney's fees request not because Shelby County's arguments might harm future civil rights plaintiffs. Rather, it denied Shelby County's attorney's fees request because Shelby County's claim was not the sort of claim that Congress sought to promote when it enacted Section 10310(e). See JA 94.

3. Additionally, Shelby County argues (Br. 40-42) that the district court was wrong to find it improbable that Congress would want to reward with attorney's fees parties who successfully eliminate portions of the Voting Rights Act by convincing courts that they are unconstitutional. This argument opens with Shelby County describing the VRA provision (Section 10310(b)) that required this action to be filed in the District Court for the District of Columbia as a "'self-destruct' mechanism." Br. 40. As explained above, p. 29, *supra*, Section 10310(b) is a jurisdictional provision, and indeed Shelby County brought this action under 28 U.S.C. 2201 and 28 U.S.C. 2202. JA 38. In Section 10310(b), Congress simply confined the venue for certain types of litigation – preclearance, bailout, and constitutional challenges – to the D.C. Court. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332 (1966).

That Congress limited jurisdiction over constitutional challenges to the VRA certainly does not suggest Congress wanted jurisdictions that succeeded in getting

parts of the VRA declared unconstitutional to get attorney's fees. Instead, the history of the VRA, legislative history, and common sense all support the district court's conclusion that such a congressional intent would be "highly implausible." See JA 94 n.16. Indeed, Shelby County essentially conceded the implausibility of this claim during the district court hearing, admitting that Congress "usually [does not] incentivize people to overturn laws [it] pass[es]." See JA 94 n.16 (quoting Hearing Transcript). Shelby County has now identified (Br. 41-42) a couple of instances where attorney's fees have been available in cases in which the constitutionality of a federal law was challenged. But that does not make the notion that Congress would have wanted to provide attorney's fees to a jurisdiction that succeeded in getting key parts of the VRA overturned any more plausible.

4. Finally, several of Shelby County's arguments focus on the fact that Shelby County brought this case as a facial challenge and thus was not seeking to avoid Section 5 liability in this case. We agree that there are relevant differences between this case and a Section 5 declaratory judgment suit in which the jurisdiction is attempting to preclear a particular voting change. As explained above, pp. 19-20, *supra*, the distinction between these types of cases is part of the reason Section 10310(e) simply does not apply here. But when the district court assumed *arguendo* that Section 10310(e) does apply here (JA 80), it did so based upon the (incorrect) assumption that this case is on all fours with Section 5

declaratory judgment actions like *Medina County* and *Donnell* where the Justice Department had objected to a specific voting change and the jurisdiction was seeking a determination by the court that the change did not violate the law. Since that was the assumption that led the district court to analyze the fee-entitlement issue at all, this Court should not credit Shelby County's arguments that run directly contrary to that assumption.

So, while it is true that "Shelby County was not prompted to bring [this] action to avoid DOJ enforcement against a particular practice" (Br. 24) and thus that the government has not accused Shelby County of violating the VRA, that is *not* an appropriate basis for concluding that Shelby County is entitled to attorney's fees under Section 10310(e). It is instead a clear reason that Section 10310(e) does not apply in this case, since no party in this litigation was seeking to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments.

Moreover, Shelby County's efforts to resist the assumption that allowed the district court to consider the entitlement issue at all reveal that, if this case really were on all fours with *Medina County* and *Donnell*, the *Christiansburg Garment* standard would certainly apply. Specifically, if (as in *Medina County* and *Donnell*) the reason a case is fee-eligible is that the government and defendant-intervenors – not the plaintiff-jurisdiction – are furthering Congress's purposes by seeking to enforce the specified "voting guarantees," that means the plaintiff-jurisdiction

(here Shelby County) may be awarded fees only under the *Christiansburg Garment* standard.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 10,025 words of proportionately spaced text.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

s/ Nathaniel S. Pollock
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Dated: December 12, 2014

CERTIFICATE OF SERVICE

I certify that on December 12, 2014, I electronically filed this BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE with the Clerk of this Court by means of the appellate CM/ECF system, and that eight paper copies of this brief will be hand delivered to the Clerk of the Court within two business days of this filing.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

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