No. 15-583

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 14(e) of the Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.*, authorizes an award of attorney's fees to a "prevailing party" in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10310(e). The question presented is:

Whether a plaintiff who succeeds in establishing that a provision of the Voting Rights Act violated the Tenth Amendment and Article IV of the United States Constitution because it exceeded Congress's authority to enforce the Fourteenth and Fifteenth Amendments is entitled to an award of attorney's fees under Section 14(e) of the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 799 F.3d 1173. The opinion of the district court (Pet. App. 41a-88a) is reported at 43 F. Supp. 3d 47.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2015. The petition for a writ of certiorari was filed on November 3, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The Voting Rights Act [of 1965, 52 U.S.C. 10301 *et seq.*,] was designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). As originally enacted, the

Voting Rights Act (VRA) included various temporary provisions, including Sections 4(b) and 5, 52 U.S.C. 10303(b) and 10304. *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). Section 5 applied to jurisdictions identified in Section 4(b), and it prohibited such jurisdictions from adopting or implementing any change in a "standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or the United States District Court for the District of Columbia. 52 U.S.C. 10304. To obtain preclearance, a covered jurisdiction was required to demonstrate that the proposed change did not have the purpose and would not have the effect of discriminating on the basis of race. *Ibid.* As originally enacted, Sections 4(b) and 5 of the VRA were to "sunset" after five years, but Congress reauthorized those provisions in 1970, 1975, 1982, and 2006. *Shelby Cnty.*, 133 S. Ct. at 2620-2621.

In 2010, petitioner filed this action seeking a declaration that Sections 4(b) and 5 of the VRA are facially unconstitutional. *Shelby Cnty.*, 133 S. Ct at 2621-2622. Petitioner argued that, by reauthorizing the temporary provisions of the VRA in 2006, Congress violated the Tenth Amendment and Article IV of the United States Constitution by exceeding its authority to enact legislation to enforce the guarantees of the Fourteenth and Fifteenth Amendments. See *id.* at 2623; see also Pet. App. 31a-32a. After the district court and court of appeals rejected petitioner's arguments, this Court held that Congress exceeded its enumerated powers when, in 2006, it reauthorized the Section 4(b) coverage formula for purpose of requiring pre-

clearance under Section 5. *Shelby Cnty.*, 133 S. Ct. at 2631.

2. On remand to the district court, petitioner filed a motion seeking $2,000,000 in attorney's fees and $10,000 in costs. Pet. App. 44a. Petitioner sought fees under Section 14(e) of the VRA, which 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.

52 U.S.C. 10310(e).

The district court denied the motion for fees. Pet. App. 41a-88a. The district court assumed, without deciding, that petitioner had brought an action "to enforce the voting guarantees of the fourteenth or fifteenth amendment" for purposes of Section 14(e). *Id.* at 54a-67a. The court held, however, that petitioner is not entitled to fees pursuant to this Court's decisions in *Newman* v. *Piggie Park Enterprises., Inc.*, 390 U.S. 400, 402 (1968) (*Piggie Park*) (per curiam), and *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) (*Christiansburg*). Pet. App. 67a-88a.

The district court explained that not every "prevailing party" is entitled to fees, and that the "discretion" given to a district court by Section 14(e), 52 U.S.C. 10310(e) "is far more limited" by decisions of this Court than may be apparent from the text of the statute. Pet. App. 67a. In particular, the district court explained that, "in the civil rights context * * * Congress intended attorney's fees to be awarded only in circumstances consistent with the statute's pur-

pose." *Ibid.* Applying that standard to this case, the district court concluded that petitioner "was not acting as a 'private attorney general' seeking to vindicate individual voting rights," *id.* at 85a, and was therefore not the type of party Congress intended to benefit from Section 14(e). *Id.* at 79a-88a. The court thus concluded that petitioner is not entitled to fees under Section 14(e) unless it can demonstrate "that the United States or defendant-intervenors took positions that were 'frivolous, unreasonable, or without foundation.'" *Id.* at 86a-87a (quoting *Christiansburg*, 434 U.S. at 421). Petitioner had conceded that it could not meet that standard. *Id.* at 87a.

3. The court of appeals affirmed. Pet. App. 1a-40a.

a. In an opinion for the court, Judge Griffith affirmed the district court's conclusion that petitioner is not entitled to fees. Pet. App. 1a-30a. Like the opinion of the district court, Judge Griffith's opinion did not decide whether petitioner had satisfied Section 14(e)'s requirement that petitioner's suit be one to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. *Id.* at 15a-17a. Instead, focusing on this Court's decisions governing the award of attorney's fees in civil rights cases, including *Piggie Park* and *Christiansburg*, *id.* at 10a-15a, the court explained that an eligible "prevailing party" can receive fees only if it "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." *Id.* at 9a-10a. The court of appeals reasoned that fee-award provisions in civil rights statutes are intended to encourage private litigants to enforce federal civil rights laws—and that, "[w]hen a party's success did not advance those goals,

it is not entitled to fees." *Id.* at 10a. Applying that standard, the court of appeals concluded that petitioner "is not entitled to fees under *Piggie Park*." *Id.* at 17a. The court held that petitioner's purpose to invalidate various provisions of the VRA was not among the purposes Congress sought to promote when it enacted Section 14(e). *Id.* at 17a-18a.

The opinion for the court considered and rejected various arguments petitioner made in support of its request for fees. First, the court rejected petitioner's argument that its lawsuit accomplished goals that Congress sought to promote because petitioner's cause of action arose under Section 14(b) of the VRA, 52 U.S.C. 10310(b), which requires that any constitutional challenge to the VRA be filed in the United States District Court for the District of Columbia. Pet. App. 18a-24a. That provision, the court concluded, "is a jurisdictional venue provision, not a cause of action." *Id.* at 22a. Second, the court rejected petitioner's suggestion that Congress sought to promote private parties' constitutional challenges of the VRA, concluding that Congress had decided to rely instead on the VRA's sunset provision as a means to cut back on the scope of the Act. *Id.* at 24a-25a. Third, the court disagreed with petitioner that denying a fee request to a litigant such as petitioner would distort proper incentives and discourage future constitutional litigation, dismissing petitioner's arguments as based on "mere speculation." *Id.* at 25a; *id.* at 25a-26a. Fourth, the court rejected petitioner's contention that a denial of its fees was tantamount to punishment for petitioner's pursuing an unpopular litigating position, explaining that the court's decision did not rest on an assessment of the social value of petitioner's case and

that arguably unsympathetic parties had been awarded fees in other civil rights cases. *Id.* at 26a-28a. Finally, the court of appeals denied that its decision was based on the type of plaintiff involved (or on the plaintiff's argument or motivation), explaining instead that the court looked to the outcome of the case and assessed whether such a result was one that Congress sought to promote with the fees provision in Section 14(e). *Id.* at 28a-29a.

b. Judge Tatel filed a concurring opinion. Pet. App. 31a-37a. Judge Tatel agreed with the holding of Judge Griffith's opinion for the court that petitioner is not entitled to fees. *Id.* at 31a. He wrote separately to express his view that fees were also unavailable to petitioner pursuant to Section 14(e) of the VRA because petitioner's suit was not "an 'action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment.'" *Ibid.* (quoting 52 U.S.C. 10310(e)). Instead, Judge Tatel explained, petitioner sued to enforce the limits of the Tenth Amendment, rather than to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment—and petitioner ultimately prevailed in this Court based on the Tenth Amendment. *Id.* at 31a-32a (citing *Shelby Cnty.*, 133 S. Ct. at 2623, 2631). Judge Tatel rejected petitioner's contention that the Fourteenth and Fifteenth Amendments "guarantee" "local voting autonomy," finding no support for such an argument in the text of the amendments or in this Court's decisions interpreting those amendments. *Id.* at 32a; see *id.* at 32a-36a

c. Judge Silberman filed a separate opinion concurring in the judgment. Pet. App. 38a-40a. In his view, a suit successfully challenging the constitutionality of the VRA could result in fees for the plaintiffs

if it were "framed as one protecting the rights of *individual* voters in governed jurisdictions not to be discriminated against under the Fourteenth and Fifteenth Amendments." *Id.* at 39a. Petitioner's case "could have been framed" that way, Judge Silberman observed, but petitioner chose instead to frame its case as "inherently one on behalf of state autonomy." *Ibid.* Because the case petitioner actually brought "was *not* brought to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment," *id.* at 40a, fees were not available.

ARGUMENT

Petitioner seeks review of the court of appeals' unanimous determination that petitioner cannot recover attorney's fees pursuant to Section 14(e) of the Voting Rights Act, 52 U.S.C. 10310(e). Further review is unwarranted because the court of appeals' decision was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals—and, indeed, no such conflict exists. Petitioner instead argues (Pet. 14-24) that the court of appeals' decision conflicts with this Court's decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam). That contention is incorrect; the court of appeals correctly applied this Court's decision in *Piggie Park*.

a. In *Piggie Park*, the Court considered whether plaintiffs who had successfully obtained an injunction pursuant to Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a), against racial discrimination by various eating establishments were entitled to attorney's fees. 390 U.S. at 400-401. The statute

granted discretion to district courts to award attorney's fees to "the prevailing party," without specifying either how district courts should exercise their discretion or whether all prevailing parties should be treated the same. *Id.* at 401 n.1 (citation omitted). The court of appeals had ordered the district court to award fees to the plaintiffs only to the extent the defendants' defenses had been advanced in bad faith or for purposes of delay. *Id.* at 401. This Court reversed, holding that the district court's discretion whether to award (or deny) fees was limited by whether such an award would "properly effectuate[] the purposes of the counsel-fee provision" of the Civil Rights Act. *Ibid.*

In determining the bounds of the district court's discretion to grant or deny fees, this Court explained that Congress enacted the fees provision in part "to encourage individuals injured by racial discrimination to seek judicial relief under Title II" and, in so doing, to act "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Piggie Park*, 390 U.S. at 402; see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975); *Northcross* v. *Board of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam). Because the suit brought by the plaintiffs in *Piggie Park* was designed to further Congress's goals (just as Congress intended), the Court held that, in exercising its discretion under the fee-award provision, a district court "should ordinarily" order that such a prevailing plaintiff "recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402; see *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 68 (1980) (under *Piggie Park* standard, a district "court's

discretion to deny a fee award to a prevailing plaintiff is narrow"); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 261-262 (1975).

Petitioner contends (Pet. 15) that the *Piggie Park* presumption in favor of the award of fees applies to *every* prevailing plaintiff in a civil rights action simply by virtue of its status as a plaintiff. The court of appeals correctly rejected that argument, Pet. App. 10a-15a, because it finds no support in *Piggie Park*, in this Court's decisions interpreting *Piggie Park*, or in the fee-granting provisions at issue. In determining which of the "prevailing part[ies]" identified by the fee provision at issue in *Piggie Park* should be entitled to a presumption in favor of fees, the Court did not draw a bright line between prevailing plaintiffs and prevailing defendants. Rather, the Court examined Congress's purposes in enacting the fee provision and determined that the plaintiffs before the Court—plaintiffs "who succeed[ed] in obtaining an injunction" to "secur[e] * * * compliance" with Title II, thereby "vindicating a policy that Congress considered of the highest priority"—were, as an exercise of the district court's discretion, entitled to fees absent special circumstances. *Piggie Park*, 390 U.S. at 401-402.

This Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), confirmed that application of the *Piggie Park* presumption depends on whether a particular suit is aligned with Congress's statutory goals—it is not enough simply to "prevail[]." *Id.* at 418. There, the Court considered whether or how to apply the *Piggie Park* standard to a successful *defendant*'s request for attorney's fees in a suit brought pursuant to Title VII of the Civil Rights Act

of 1964, 42 U.S.C. 2000e *et seq.*[1] *Christiansburg*, 434 U.S at 415. If petitioner were correct that the rule in *Piggie Park* by its terms applies to all prevailing parties, the question presented in *Christiansburg* would have been easy to answer—because the party seeking fees had prevailed. But the Court understood the term "prevailing party" to mean something other than what petitioner urges, following the lead of the *Piggie Park* decision by examining whether the party seeking fees was "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418 (citation omitted). Because that could not be said of the prevailing defendant before the Court in *Christiansburg*, *id.* at 419, the Court held that the defendant was entitled to fees only to the extent "a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless," *id.* at 422.

b. Contrary to petitioner's contention (Pet. 14), the court of appeals followed the same analytical roadmap set out in *Piggie Park* (and followed in *Christiansburg*) in determining that petitioner is not entitled to fees under Section 14(e) of the VRA notwithstanding its status as prevailing party. Pet. App. 17a-29a. The Court in *Piggie Park* neither considered nor decided whether a plaintiff successful in seeking a declaration that a civil rights statute is unconstitutional would be entitled to a presumption in favor of a fee award available by virtue of the same statute. But the reasoning of that decision strongly suggests that the answer is no.

As discussed, the Court in *Piggie Park* adopted the presumption in favor of a fee award only after noting

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[1] The Court had previously held that the *Piggie Park* standard applies in Title VII cases. *Albemarle Paper Co.*, 422 U.S. at 415.

that the plaintiffs in that case were acting as private attorneys general to vindicate a federal policy Congress viewed as of the highest priority. 390 U.S. at 401-402. The Court noted that Congress, when enacting the fees provision, understood that enforcement of Title II "would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Id.* at 401. "Congress therefore enacted the provision for counsel fees," the Court explained, "to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* at 402. Because the plaintiffs before the Court fit that description, the Court held that they were presumptively entitled to a fee award. *Ibid.*

Applying the same analysis to the facts of this case, the court of appeals correctly held that, although petitioner is the plaintiff in this action, it is *not* entitled to a presumption in favor of a fee award because petitioner's "lawsuit neither advanced Congress's purpose nor performed some service Congress needed help to accomplish." Pet. App. 18a; see *id.* at 10a ("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."). The court of appeals explained that "[i]t defies common sense and ignores the structure and history of the [Voting Rights] Act" to conclude that Congress enacted Section 14(e) in 1975 in order to encourage jurisdictions covered by Section 4(b) to challenge the constitutionality of the Act. *Id.* at 18a. As with the fee provisions Congress has included in other civil rights statutes, Congress enacted Section 14(e) as a means of bolstering private enforcement of

the Act's ban on discriminatory treatment of individuals. As the court of appeals noted, Congress ensured the ongoing legitimacy of the Act's temporary provisions not by encouraging constitutional challenges, but by automatically terminating those provisions absent further legislative action. By 1975, moreover, the constitutionality of the relevant provisions of the Act had twice been challenged and twice been upheld by this Court. *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-327 (1966). Congress therefore had no basis for believing that challenges of that kind needed the promise of attorney's fees to continue.

Because the court of appeals adhered exactly to the analytical framework set out in *Piggie Park*, the decision below does not conflict with this Court's decision in *Piggie Park* and does not warrant further review.

2. Petitioner also argues (Pet. 20-24) that the Court should grant the petition for a writ of certiorari to overrule or limit this Court's decision in *Christiansburg*. Review is not warranted for that reason because *Christiansburg* was correctly decided and has been repeatedly applied by this Court over the last several decades. See, *e.g.*, *Fox* v. *Vice*, 563 U.S. 826, 833-834 (2011); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 (1989); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 762 (1980).

As discussed, the Court in *Christiansburg* followed the analytical framework set out in *Piggie Park* to conclude that a prevailing defendant in a Title VII case is not presumptively entitled to an award of attorney's fees. *Christiansburg*, 434 U.S. at 418-422. Petitioner argues (Pet. 20-24) that all prevailing parties in civil rights cases—plaintiffs and defendants—

should be entitled to recover fees, insisting that that is the holding of *Piggie Park*. Petitioner criticizes (Pet. 21-23) the analysis of *Christiansburg* as "suspect" and "unhinged," while embracing the analysis of *Piggie Park*. But the decisions employ identical analyses, examining whether the party seeking fees was one that Congress sought to encourage in "vindicating a policy that Congress considered of the highest priority." *Piggie Park*, 390 U.S. at 402; see *Christiansburg*, 434 U.S. at 418-419. As the Court in *Piggie Park* explained, Congress understood that "the Nation would have to rely in part upon private litigation as a means of securing broad compliance with" civil rights laws. 390 U.S. at 401. Not surprisingly, then, the Court in *Christiansburg* considered whether presumptively awarding fees to a prevailing defendant would advance or hinder "the efforts of Congress to promote the vigorous enforcement of the provisions of" civil rights laws. 434 U.S. at 422. And the Court correctly concluded that "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut" Congress's enforcement goals. *Ibid.*[2]

Petitioner seeks to bolster its attack on *Christiansburg* by casting aspersions (Pet. 23-24) on the motives of the district court (Bates, J.) and court of appeals judges (Griffith, Tatel, and Silberman, JJ.) in this case. The careful analysis of the opinions issued by each court, however, belies petitioner's suggestion

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[2] The legislative history of the VRA's fee-award provision confirms that Congress was aware of the *Piggie Park* line of cases and intended that its presumption would apply. S. Rep. No. 295, 94th Cong., 1st Sess. 40-41 (1975).

that those federal judges sought only to vindicate "their own preferences." Pet. 23. To the contrary, the district court and court of appeals inquired whether petitioner's suit sought to vindicate Congress's purpose in enacting the fee-award provision, Pet. App. 17a-18a, 67a-81a—which is exactly what this Court did in *Piggie Park* and in *Christiansburg*.

3. Petitioner likewise gains little from its contention (Pet. 15-20) that the D.C. Circuit has erroneously approved fee awards to "individuals and interest groups intervening as defendants to defend the VRA's preclearance regime and oppose covered jurisdictions' attempts to obtain preclearance." As petitioner sees it, those defendant-intervenors "should *not* have received attorney's fees." Pet. App. 15a.

But those cases are largely irrelevant here. To state the obvious, petitioner is not a defendant-intervenor, nor were any fees awarded to any defendant-intervenor in petitioner's case. It would be quite odd (to say the least) for this Court to grant a writ of certiorari in petitioner's case to address concerns about the D.C. Circuit's award of fees to other parties in other cases.[3]

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[3] Petitioner relies (Pet. 16-18) on the decision in *Texas* v. *United States*, 798 F.3d 1108 (D.C. Cir. 2015), petition for cert. pending, No. 15-522 (filed Oct. 22, 2015), which arose out of a Section 5 preclearance action in which the constitutionality of Section 5 was presumed. *Id.* at 1110. Defendant-intervenors sought an award of attorney's fees from Texas based on their efforts to encourage denial of preclearance for a law that was ultimately superseded in the legislature shortly before this Court's decision in *Shelby County*. *Id.* at 1112-1113. The district court ordered such an award, and the court of appeals affirmed the order, after Texas waived and forfeited most of its arguments against such an award and failed to follow the local rules of the district court. *Id.* at 1113-

4. Review of the court of appeals' decision affirming the district court's denial of petitioner's request for a fee award is also unwarranted because the decision is correct. As discussed, petitioner's successful quest for a declaration that Section 4(b) of the VRA is unconstitutional is not the type of suit that Congress sought to encourage by enacting the VRA's fee-award provision. Petitioner's additional arguments to the contrary are unavailing.

a. Petitioner errs in arguing (Pet. 28-31) that it must have been acting as Congress's chosen instrument because its cause of action was created by Section 14(b) of the VRA, 52 U.S.C. 10310(b). Section 14(b) does not create any cause of action; it merely requires that constitutional challenges to the VRA be filed in the United States District Court for the District of Columbia. Pet. App. 22a (observing that Section 14(b) is "a jurisdictional venue provision, not a cause of action"). Petitioner's own complaint confirms as much, identifying Section 14 (which was then codified at 42 U.S.C. 1973*l*) as the basis for the district court's jurisdiction and venue, and characterizing the cause of action as one "seek[ing] a declaratory judgment and injunctive relief pursuant to" the Declaratory Judgment Act, 28 U.S.C. 2201, 2202. Compl. ¶¶ 4-6. Petitioner incorrectly suggests (Pet. 29) that this

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1116. That part of the *Texas* decision has no application to this case. The court of appeals in *Texas* further held that Texas was not the prevailing plaintiff in the case. *Id.* at 1116-1119. That part of the opinion also does not apply to this case in which all parties concede that petitioner is a prevailing plaintiff. In short, although both cases involve Section 5 and attorney's fees, any similarity between this case and *Texas* ends there.

Court described Section 14(b) as creating a cause of action in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). As the court of appeals explained, Pet. App. 21a, the Court in *Allen* merely recognized that Section 14(b) affects "the jurisdiction of the district courts" by imposing a "restriction" on certain VRA suits. 393 U.S. at 557, 560; see *id.* at 558 (noting that "injunctive actions" "aimed at prohibiting enforcement of" VRA provisions are covered by Section 14(b)'s venue provision while actions seeking to enjoin particular VRA violations are not).

b. Petitioner next erroneously contends (Pet. 26-28) that it is entitled to fees under the logic of *Piggie Park* and *Christiansburg* because the United States, by following Congress's command to enforce Section 5, was "a violator of federal law" just as a losing defendant in a Title II or Title VII case is. Pet. 28 (citation omitted). That contention cannot be taken seriously. The losing defendant contemplated in *Christiansburg* was one who violated a statutory command not to discriminate. No similar violation by the Attorney General is even arguably at issue here notwithstanding this Court's ultimate conclusion that Congress exceeded its authority when it reauthorized the Section 4(b) coverage formula in 2006 for the purpose of requiring preclearance under Section 5. The United States Constitution charges the Executive Branch with executing the laws that Congress enacts. U.S. Const. Art. II, § 3. Congress surely did not intend to treat the Executive Branch as a violator of federal law for implementing faithfully the very statute Congress had enacted.

c. Petitioner likewise errs in arguing (Pet. 31-34) that it satisfies Section 14(e)'s requirement that its

action be one "to enforce the voting guarantees of the fourteenth or fifteenth amendment." In his opinion for the court, Judge Griffith expressly declined to decide that issue. Pet. App. 16a-17a. But Judges Tatel and Silberman would have held that Section 14(e) does not authorize the award of fees to petitioner in this case. *Id.* at 31a-40a. Petitioner's inability to satisfy that requirement separately justifies the denial of petitioner's request for a fee award here.

i. Unlike the fee-award provisions at issue in *Piggie Park* and *Christiansburg*, Section 14(e) does not authorize fees for a "prevailing party" in any action filed pursuant to the statute. Instead, Section 14(e) limits the award of fees to a "prevailing party" "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10310(e). But petitioner's suit was not an action to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. In the underlying complaint in this case, petitioner argued that the challenged provisions of the VRA "violate[d] the Tenth Amendment and Article IV of the Constitution," Compl. ¶¶ 37, 39, 41, 43, not the voting guarantees of the Fourteenth or Fifteenth Amendment—and that was the basis of this Court's holding in petitioner's favor, see *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2623-2624, 2631 (2013). Petitioner is therefore not eligible for fees under Section 14(e) regardless of whether or how *Piggie Park* and *Christiansburg* apply.

The "voting guarantees" of the Fourteenth and Fifteenth Amendments are set out in the Equal Protection Clause of Section 1 of the Fourteenth Amendment and in Section 1 of the Fifteenth Amendment.

U.S. Const. Amend. XIV, § 1 ("[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."); U.S. Const. 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."). As this Court noted in *Allen*, the original VRA "was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." 393 U.S. at 556. But by arguing that Congress violated the Tenth Amendment in reauthorizing the temporary provisions of the VRA in 2006, petitioner was neither enforcing the guarantee of equal protection nor enforcing the guarantee that individuals may vote free of racial discrimination.

Petitioner argues (Pet. 33) that it was "enforc[ing] the voting guarantees of the fourteenth or fifteenth amendment," 52 U.S.C. 10310(e), by enforcing the requirement that legislation to enforce the amendments be "appropriate." U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV, § 2. That limitation, petitioner argues (Pet. 33), grants jurisdictions like petitioner the "right * * * to be free of 'inappropriate' federal regulation of its voting practices." See Pet. App. 33a (Tatel, J., concurring) (responding to petitioner's claim that it sought to guarantee the amendments' "guarantee of local voting autonomy") (citation and in-ternal quotation marks omitted). Petitioner is wrong.

The voting guarantees of the Fourteenth and Fifteenth Amendments are guarantees that individual voters be free of prohibited discrimination. Those guarantees exist in the Equal Protection Clause of the Fourteenth Amendment and in Section 1 of the Fif-

teenth Amendment, not in those amendments' enforcement clauses. In *Ex parte Virginia*, 100 U.S. 339 (1880), this Court explained as much, noting that an individual's right to be free from racial discrimination is "guaranteed" by the Fourteenth Amendment's Equal Protection Clause and that Section 5 of the Fourteenth Amendment authorizes Congress to "enforce[]" "this guarantee." *Id.* at 345. Far from describing the enforcement clause of the Fourteenth Amendment as guaranteeing any rights *to a State*, the Court explained that: "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree *restrictions* of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth." *Id.* at 346 (emphasis added); *id.* at 347 ("But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation.").

It would be particularly odd, moreover, to view a limit on Congress's ability to enforce the amendments' prohibition on discrimination in voting as a "voting guarantee[]." 52 U.S.C. 10310(e). The "appropriate legislation" limit sets the boundaries of the voting guarantees established in Section 1 of each amendment; it does not guarantee a voting right to any person or entity. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court explained that the "substantive provisions" of the Fourteenth Amendment are found in Section 1 (which contains the Equal Protection Clause), while Section 5 provides a means of enforcing those substantive provisions. *Id.* at 453. And the

Court emphasized, as it had in *Ex parte Virginia*, that the purpose of the amendments was to *diminish* States' authority, not to guarantee some new right to States. *Id.* at 455-456; *Ex parte Virginia*, 100 U.S. at 346.

The right of a State (or, derivatively, a local jurisdiction) to be free of "inappropriate" legislation that purports to enforce the guarantees of the Fourteenth or Fifteenth Amendment is guaranteed not by those amendments' enforcement clauses, but by the Tenth Amendment. Indeed, that was petitioner's theory of this case, see Compl. ¶¶ 37, 39, 41, 43, and was the basis for this Court's decision in petitioner's favor, see *Shelby Cnty.*, 133 S. Ct. at 2623-2624, 2631. When Congress exceeds the bounds of its enumerated powers—whether under the Reconstruction Amendments, the Commerce Clause, or any other affirmative grant of legislative power—the Tenth Amendment's admonition that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" is what guarantees that a State or a local government need not comply with the infirm law.

ii. For the first time in this case, petitioner also now argues (Pet. 32-33) that its quest for a declaration that portions of the VRA are unconstitutional was an action to enforce the amendments' guarantee that citizens be free of discriminatory voting practices. Having failed to make that argument at any point in this litigation, petitioner cannot raise it for the first time now. See Pet. App. 37a (Tatel, J., concurring) ("[Petitioner] 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 [petitioner] filed."); *id.* at 39a-40a (Silberman, J., concurring in the judgment) ("I agree with Judge Tatel that the original suit was not brought on behalf of the individual voting rights of the citizens of Shelby County.").

d. Finally, petitioner's policy argument (Pet. 12) that, "[u]nder the court of appeals' reasoning, no party could ever be entitled to fees for challenging an unconstitutional federal law or action" is misplaced for several reasons.

First, it ignores the background principle in American law that parties to litigation will bear their own costs absent an affirmative statement by Congress to the contrary (or absent application of equitable principles such as bad faith, which are not at issue in this case). *Alyeska Pipeline Serv. Co.*, 421 U.S. at 254-255, 258-259. Petitioner neglects to mention the "American Rule" anywhere in its petition for a writ of certiorari. But that background rule takes the air out of petitioner's complaints that a party seeking to challenge the constitutionality of a federal statute must, at least in some instances, bear its own costs even if successful. Most plaintiffs in federal litigation must bear their own costs. Any departure from that rule must be found in the intent of Congress—an intent that is, as explained above, lacking in this case.

Second, petitioner is not even correct that, under the court of appeals' reasoning, a party who succeeds in obtaining a declaration that some part of the VRA is unconstitutional could never recover its attorney's fees under Section 14(e). As Judges Tatel and Silberman (the only judges to consider whether petitioner satisfied the criteria in Section 14(e)) explained,

such a plaintiff would be eligible for a fee award if it could establish that a particular application of the VRA discriminated against individual voters (for example, on the basis of race) in violation of the Fourteenth or Fifteenth Amendment. See Pet. App. 37a, 39a-40a.

Finally, petitioner overstates the extent to which the holding in this case will affect the interpretation of fee-shifting provisions in other civil rights statutes. As is evident in *Piggie Park*, *Christiansburg*, and this Court's cases applying those decisions, most civil rights fee-shifting provisions do not require that the prevailing party sought to enforce particular *constitutional* guarantees. Most instead encourage enforcement of particular statutes by authorizing fees in actions to enforce those statutes. See, *e.g.*, 42 U.S.C. 1988(b). In a case involving that more routine kind of fee-shifting provision, the question whether a litigant would be entitled to fees for a successful *constitutional* challenge under the *Piggie Park* presumption would never arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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