ORAL ARGUMENT NOT YET SCHEDULED

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 14-5138

SHELBY COUNTY, ALABAMA,

Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR., In his official capacity as Attorney General of the United States,

Defendant-Appellee,

EARL CUNNINGHAM; HARRY JONES; ALBERT JONES; ERNEST MONTGOMERY; ANTHONY VINES; WILLIAM WALKER; BOBBY PIERSON; WILLIE GOLDSMITH, SR.; MARY PAXTON-LEE; KENNETH DUKES; ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC.; BOBBY LEE HARRIS,

Defendant-Intervenor-Appellees.

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

JOINT BRIEF FOR DEFENDANT-INTERVENOR-APPELLEES

SHERRILYN IFILL
JANAI S. NELSON
CHRISTINA A. SWARNS
RYAN P. HAYGOOD
NATASHA M. KORGAONKAR
LEAH C. ADEN
DEUEL ROSS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
(212) 965-2200

DALE HO *
SEAN J. YOUNG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2693
* *Counsel of Record*

JON M. GREENBAUM
ROBERT A. KENGLE
MARK A. POSNER
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8600

Attorneys for Defendant-Intervenor-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

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

(B) Rulings Under Review

Reference to the ruling under review appears in 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 Appellant's Certificate as to Parties, Rulings, and Related Cases. Counsel is unaware of any currently pending related cases.

CORPORATE DISCLOSURE STATEMENT OF DEFENDANT-INTERVENOR-APPELLEE ALABAMA STATE CONFERENCE OF THE NAACP, INC.

There is no parent corporation or any publicly held corporation that owns 10% or more of the stock of the Alabama State Conference of the NAACP, Inc. ("Alabama NAACP").

The National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and is the nation's oldest, largest, and most widely recognized grassroots based civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among citizens of the United States; to remove all barriers of racial discrimination through democratic processes; and to seek enactment, enforcement, and the proper construction of federal, state, and local laws securing civil rights. The purpose of the Alabama NAACP is to implement the mission of the NAACP within Alabama. The NAACP has worked to protect voter registration, voter education, get out the vote efforts, election protection, census participation, and redistricting. The Alabama NAACP has approximately 2700 members who are residents of the state of Alabama.

Respectfully Submitted,

/s/ Dale Ho
DALE HO
SEAN J. YOUNG
American Civil Liberties Union
Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2693
dale.ho@aclu.org

M. LAUGHLIN MCDONALD
American Civil Liberties Union
Foundation, Inc.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
(404) 500-1235
lmcdonald@aclu.org

ARTHUR B. SPITZER
American Civil Liberties Union of the
Nation's Capital
1400 20th Street, NW, Suite 119
Washington, DC 20036
(202) 457-0800
artspitzer@gmail.com

Attorneys for the Pierson Defendant-Intervenor-Appellees

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GLOSSARY

DOJ: Department of Justice

NAACP: National Association for the Advancement of Colored People

VRA: Voting Rights Act

JOINT BRIEF FOR DEFENDANT-INTERVENOR-APPELLEES

This brief is submitted by the Defendant-Intervenor-Appellees (collectively, "Defendant-Intervenors"), a group of "voters from Shelby County, Alabama [and a non-profit organization, the Alabama NAACP,] who believe[] in the constitutionality of the challenged provisions of the [Voting Rights Act]" and intervened at the merits stage of this litigation in the district court. Joint Appendix ("JA") 62.[1] Defendant-Intervenors fully participated in all stages of the merits litigation of this case, and presented oral argument before the district court and the Supreme Court. Defendant-Intervenors also participated fully in the attorney's fees litigation in the district court, opposing Plaintiff-Appellant Shelby County's ("Shelby County" or "County") petition for an award of attorney's fees.

STATEMENT OF JURISDICTION

Defendant-Intervenors agree with the Jurisdictional Statement submitted by Defendant-Appellee Attorney General Holder.

STATEMENT OF THE CASE

Defendant-Intervenors agree with the Statement of the Case submitted by Defendant-Appellee Attorney General Eric Holder.

[1] Defendant-Intervenors are Bobby Pierson, Willie Goldsmith, Sr., Kenneth Dukes, Mary-Paxton Lee, and the Alabama State Conference of the NAACP (the "Pierson Intervenors"); Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker (the "Cunningham Intervenors"); and Bobby Lee Harris.

ISSUE PRESENTED

Whether Shelby County brought this action—a facial challenge to the constitutionality of the 2006 reauthorization of Section 4(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10303(b)—to enforce the voting guarantees of the Fourteenth and/or Fifteenth Amendments, such that the County may obtain attorney's fees under Section 14(e) of the VRA, 52 U.S.C. § 10310(e), which allows courts to award fees to a prevailing party "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment"?

SUMMARY OF ARGUMENT

Shelby County may not recover attorney's fees in this litigation. The sole basis for the County's fees request is Section 14(e) of the Voting Rights Act ("VRA"), which authorizes courts to award fees to "the prevailing party, other than the United States," "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). While Shelby County was the prevailing party in the merits portion of this litigation, the crucial and outcome-determinative fact regarding its request for attorney's fees is that the County did not seek in this litigation to carry out this explicit statutory purpose, *i.e.*, the County did not seek to enforce the Fourteenth and Fifteenth Amendments' guarantees against racial discrimination in voting.

Two alternative analyses flow from this fact, and under either Shelby County loses its bid for attorney's fees. Under the first analytic approach (which the District Court described as the "plaintiff-specific" approach, *see* JA 71), a prevailing party is eligible for attorney's fees under Section 14(e) only if the action is one in which the *plaintiff* filed suit "to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). Using this approach, Shelby County clearly is not eligible for fees, because its Complaint sought to enforce the federalism interests protected by the Tenth Amendment, and to police restrictions on Congress's authority to enact voting rights legislation pursuant to the enforcement provisions of the Reconstruction Amendments.

Under the other analytic approach (what the district court called the "neutral" approach, *see* JA 78), a prevailing litigant is eligible to receive fees under the statute if the action is one in which either *the plaintiff or the defendant* sought to enforce the constitutional voting guarantees. In this framework the County is arguably fee-eligible because defendant-intervenors sought to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments. This putative fee eligibility, however, is of no help to Shelby County, because the County then would fail the next step of the fees inquiry, which asks whether the fee-eligible litigant is *entitled* to fees. That question, in turn, would focus again on whether Shelby County was the party who sought to enforce the Reconstruction

Amendments' voting guarantees. It is well-established under Section 14(e) (and other civil rights fee provisions) that when a prevailing fee-eligible party is the party who *contested* the enforcement of a federal civil rights statute, that party is entitled to fees only if its opponents' position was frivolous, unreasonable, or without foundation. Under this second approach, therefore, even if Shelby County is deemed to be eligible for fees, it would have to satisfy this restrictive entitlement standard, which the County acknowledges it cannot.

In any event, because both alternate analyses lead to the same result, this Court need not resolve in this case which analysis best comports with the statute and with precedent. Either way, Shelby County cannot obtain attorney's fees under the facts of this litigation.

Finally, even assuming *arguendo* that Shelby County is both eligible and entitled to attorney's fees under Section 14(e), the County could not obtain fees from the Defendant-Intervenors under the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), which held that fees are generally not available from a defendant-intervenor who is not alleged to have violated federal law. Shelby County does not argue otherwise.

Ultimately, Shelby County's request for attorney's fees attempts to stand Section 14(e) on its head. Fee-shifting provisions are designed to encourage private enforcement of federal civil rights statutes. Shelby County accomplished precisely the opposite of that goal, obtaining a ruling that struck down Section 4(b) of the Act and rendered Section 5 inert, thereby making enforcement of those provisions impossible. The judgment of the district court denying this request for attorney's fees should be affirmed.

ARGUMENT

I. SHELBY COUNTY DID NOT SEEK TO ENFORCE THE VOTING GUARANTEES OF THE FOURTEENTH OR FIFTEENTH AMENDMENT.

Section 14(e) of the VRA authorizes a district court in its "discretion" to award reasonable attorney's fees to a prevailing party in an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). The Fourteenth and Fifteenth Amendments both prohibit racial discrimination in voting. Voting practices "violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination . . . .'" *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).[2] Similarly, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the

[2] In addition to the prohibition on racial discrimination in voting, the Fourteenth Amendment guarantees other voting rights protections, prohibiting undue burdens on voting, *see Burdick v. Takushi*, 504 U.S. 428 (1992); malapportionment, *see Reynolds v. Sims*, 377 U.S. 533 (1964); and arbitrary unequal treatment of voters, *see Bush v. Gore*, 531 U.S. 98 (2000). Actions brought to enforce these individual voting rights guarantees of the Fourteenth Amendment may also fall within the ambit of 52 U.S.C. § 10310(e).

United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1. Congress expressly sought to enforce these individual voting guarantees when it reauthorized Sections 4(b) and 5 of the VRA in 2006. *See* H.R. Rep. No. 109-478, at 55 (2006) (citing Congress's Fourteenth and Fifteenth Amendment "authority to address voting discrimination"). Private individuals who bring a successful action to protect their right to vote free from racial discrimination clearly fall within the scope of Section 14(e) and may obtain attorney's fees. *See Donnell v. United States*, 682 F.2d 240, 245 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

Shelby County's objectives in this litigation were, if not diametrically opposed to, at least clearly distinct from those explicitly identified in Section 14(e). As is clear from the text of the Complaint, Shelby County brought this action to enforce not the individual voting guarantees of the Fourteenth or Fifteenth Amendments, but rather to vindicate the federalism interests and the principle of equal sovereignty of the states under "the Tenth Amendment and Article IV of the Constitution." Compl. ¶ 39, JA 53; *see also* Br. for Petitioner at 22-23, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2012 WL 6755130 ("Sections 5 and 4(b) have accomplished their mission and their *encroachment on Tenth Amendment rights* and the constitutional principle of equal sovereignty is no longer warranted.").

Shelby County argues that these federalism interests are, in some sense, related to individual voting rights, insofar as state sovereignty "guarantees . . . the right of . . . citizens to control voting procedures." Appellant's Br. at 14. That is an extremely attenuated link at best. Tenth Amendment federalism concerns are a far cry from the individual rights protections of the Reconstruction Amendments, which "by their own terms embody *limitations* on state authority." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (emphasis added). Indeed, "the principle of state sovereignty" is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* However important these federalism interests are, they are quite different from those identified in Section 14(e) of the VRA.

As explained below, these fundamental facts regarding what Shelby County was, and was not, seeking to "enforce" in this lawsuit precludes the County from obtaining attorney's fees under Section 14(e).

II. BECAUSE SHELBY COUNTY DID NOT SEEK TO ENFORCE THE VOTING GUARANTEES OF THE FOURTEENTH OR FIFTEENTH AMENDMENTS, IT IS EITHER INELIGIBLE OR NOT ENTITLED TO ATTORNEY'S FEES.

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 415 (1978) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)). This has come to be known as the "American Rule," under which a prevailing party may obtain attorney's fees only under limited exceptions authorized "under selected statutes granting or protecting various federal rights." *Christiansburg*, 434 U.S. at 415 (quoting *Alyeska*, 421 U.S. at 260). Section 14(e) of the Voting Rights Act is one of several statutes Congress has enacted to promote the enforcement of civil rights by creating such an exception. At the same time, however, Congress was careful in drafting Section 14(e) to define the specific circumstances in which the statute permits fees to be shifted from one litigant to another.

Here, the fact that Shelby County did not seek to enforce the voting guarantees of the Fourteenth and/or Fifteenth Amendment compels one of two conclusions. *First*, if the statute is construed to authorize an award of fees only in cases where the lawsuit was brought by the *plaintiff* to enforce these voting guarantees, then Shelby County is wholly ineligible for attorney's fees. *Second*, and alternatively, if Section 14(e) is construed to authorize fees in cases where *any party* (plaintiff or defendant) sought to enforce the Fourteenth and/or Fifteenth Amendments' voting guarantees, then Shelby County may be fee-eligible, but is not entitled to fees under the restrictive legal standard that governs fee requests by a party whose objectives are contrary to Congress's. Ultimately, this Court need not conclusively resolve which analysis is correct—in either case, Shelby County cannot receive attorney's fees under the facts of this litigation.[3]

A. Under the Plaintiff-Specific Interpretation of Section 14(e), Shelby County is Ineligible for Attorney's Fees.

As the Attorney General discusses in his brief, Shelby County fails to clearly articulate in its opening brief its theory as to how or why it is eligible for fees under Section 14(e). *See* Br. for Att'y General as Appellee ("DOJ Br.") at 12-15. One approach to the threshold question of fee eligibility—and perhaps the simplest interpretation of Section 14(e)—is what the district court described as the "plaintiff-specific" approach, under which a party may only obtain fees under Section 14(e) if the plaintiff sought to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments. JA 71. That is, a case may only be an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment," 52 U.S.C. § 10310(e), and thus, fee-eligible under Section 14(e), if the plaintiff's goal in the litigation was the enforcement of those voting guarantees.

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[3] The district court also hypothesized a third approach, the "party-specific interpretation," under which Shelby County's fees request would not pass the threshold fee-eligibility inquiry. *See* JA 76. For the reasons stated by the district court, Defendant-Intervenors agree that the other approaches described in the district court's opinion are more suitable bases for resolving this fees dispute, and therefore do not discuss the party-specific interpretation at length in this brief, other than to note that, under this interpretation, Shelby County's fees request would still fail. *See id.*

Under this interpretation, which the district court acknowledged "has much to recommend it—most notably, its consistency with the statutory text and its relative administrability," JA 74, Shelby County is clearly ineligible for fees. As discussed *supra*, Sec. I., the County sought through this lawsuit to vindicate federalism interests that are of a very different nature than the individual "voting guarantees" referenced in Section 14(e). The district court correctly observed that "[t]he character of a lawsuit . . . is shaped most significantly by the plaintiff's complaint." JA 71. And here, the Complaint was "shaped" around these federalism concerns, rather than around the protection of the right to vote free from racial discrimination.

Nevertheless, Shelby County attempts to shoehorn its request for attorney's fees into the plaintiff-specific interpretation of Section 14(e) in two different ways. Neither has any merit.

First, relying entirely on *Allen v. State Board of Elections*, 393 U.S. 544, 558 (1969), Shelby County argues that it is entitled to fees because this action was supposedly "facilitated through the creation of a specific cause of action under [Section 14(b) of] the VRA," 52 U.S.C. § 10310(b), and, therefore, enforces that provision of the VRA. *See* Appellant's Br. at 17, 36 (citing *Allen*, *supra*). As an initial matter, that assertion grossly mischaracterizes both Section 14(b) and the holding in *Allen*. By its plain terms, Section 14(b) is a *jurisdictional* provision, providing simply that "[n]o court other than the District Court for the District of Columbia shall have jurisdiction to issue any . . . injunction against the execution or enforcement of any provision of [the VRA]." 52 U.S.C. § 10310(b). Tellingly, although Shelby County places great weight on Section 14(b), the County neglects entirely to quote the language of that provision. Likewise, *Allen*—which was not a case challenging the constitutionality of the VRA, but rather was a VRA enforcement action holding that Section 5 should be interpreted broadly to protect minority voting rights, *see* 393 U.S. at 565—in no way held that, in enacting Section 14(b), Congress specifically sought to "facilitate," Appellant's Br. at 17, let alone to encourage actions challenging the VRA's constitutionality. Rather, *Allen* simply explains that Section 14(b) establishes jurisdiction in the District Court for the District of Columbia for any such claims. *See also* DOJ Br. at 29.

Thus, there is simply no authority to support the proposition that Section 14(b)'s specification of jurisdiction amounts to the establishment of a cause of action to challenge the constitutionality of the VRA itself. Indeed, in none of the cases concerning the VRA's constitutionality—including this one—has a court held that Section 14(b) specifically authorizes a cause of action challenging the VRA's constitutionality. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v.*

Katzenbach, 383 U.S. 301 (1966). And, as the Attorney General notes, Shelby County did not claim that this action was authorized under Section 14(b) when it filed its Complaint, and only makes that claim for the first time in in its brief in this appeal. *See* DOJ Br. at 29.

In any event, even if Shelby County's characterization of this action as specifically authorized by Section 14(b) were correct—and it is not—its argument remains unavailing. As its plain terms make clear, Section 14(e) does not—contrary to what Shelby County implicitly asserts—simply make fees available in a manner that is co-extensive with the full range of actions that might be pursued under the VRA generally. Its scope is much more specific, and is plainly limited only to actions to enforce the "voting guarantees" of the Fourteenth and Fifteenth Amendments. The district court correctly observed this distinction, holding that, "[b]y using the phrase 'voting guarantees,' Congress made clear that it was referring to the individual voting rights protections" found in those amendments. JA 72-73. Thus, an action that does not enforce those voting guarantees—such as this case—plainly falls outside of the scope of a plaintiff-specific interpretation of Section 14(e), even if the action is otherwise authorized by the VRA. *See also* DOJ Br. at 22-23.

Second, Shelby County argues that this action enforces the Fourteenth and Fifteenth Amendments by policing the limits of "appropriate" Congressional enforcement authority pursuant to those amendments. *See* Appellant's Br. at 43. Both the Fourteenth and Fifteenth Amendments expressly delegate to Congress the "power to enforce" individual voting rights "by appropriate legislation." U.S. Const. Amend. XIV, § 5; Amend. XV, § 2. It is axiomatic that Congressional power under these enforcement provisions is not unlimited, and Shelby County successfully argued that the 2006 reauthorization of Section 4(b) of the VRA exceeded Congress's authority. *See Shelby Cnty.*, 133 S. Ct. at 2631. But the limitations contained within these enforcement provisions are not the individual "voting guarantees" referenced in Section 14(e). Rather, as Shelby County itself argued in its Complaint, these limitations are restrictions on congressional power grounded in the Constitution's federalism provisions. *See* Compl. ¶¶ 38, 39, 41, JA 52-54 ("Because [the challenged provisions] exceed[] Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, [they] *violate[] the Tenth Amendment and Article IV of the Constitution*.") (emphasis added). Policing those restrictions does not render this case an action to enforce the "voting guarantees" referenced in Section 14(e).

In sum, Shelby County's creative—and unprecedented—request for attorney's fees cannot be squared with what is perhaps the simplest reading of the statutory language of Section 14(e). To be sure, the district court, without rejecting the plaintiff-specific interpretation, nevertheless expressed a concern that it is "difficult" to accept in light of this Court's rulings in *Donnell*, 682 F.2d at 248-49, and *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 437-38 (D.C. Cir. 1982), two cases in which this Court held that defendant-intervenors may obtain attorney's fees in Section 5 declaratory judgment actions, despite the fact that such cases are initiated by covered jurisdictions against the Attorney General to obtain preclearance of new voting laws, and are seemingly "not filed to vindicate individual voting rights." JA 75. While the plaintiff-specific interpretation can be harmonized with those rulings,[4] this Court need not resolve that issue on this appeal, because, as explained below, even under an alternative interpretation of Section 14(e), Shelby County cannot obtain attorney's fees.

[4] Although the Court need not reach this issue to resolve this case, we note that the plaintiff-specific interpretation could be harmonized with *Donnell* and *Medina County* by interpreting these cases as establishing a limited exception for *defendant-intervenors* in VRA litigation, who often present a special case for fee-eligibility. Regardless of the nominal plaintiff's aims in bringing a case, Congress clearly stated its intent that, where defendant-intervenors seek to protect individual voting rights, they are analogous to ordinary civil rights plaintiffs and must be eligible for attorney's fees under Section 14(e). *See Donnell*, 682 F.2d at 246 ("The legislative history of [Section 14(e)] . . . indicates that intervenors may be considered as prevailing parties entitled to an award of attorneys' fees"). *See infra*, Section II.B.2. As discussed, *infra*, Section II.B.3., there is nothing in Section 14(e)'s legislative history remotely suggesting that there should be a similar exception for a plaintiff jurisdiction like Shelby County that did not seek to protect individual voting rights. Under this reading of *Donnell*, Defendant-Intervenors would have been eligible for attorney's fees had they prevailed in this case, even under a plaintiff-specific approach to Section 14(e).

B. Under the Neutral Interpretation of Section 14(e), Even if Eligible for Attorney's Fees, Shelby County is Not Entitled to Fees.

Under an alternative interpretation of Section 14(e), Shelby County would arguably survive the eligibility test for attorney's fees, but would not be entitled to fees. This "neutral" approach to Section 14(e) stakes eligibility on whether *any party* (either a plaintiff or a defendant) sought to enforce the Reconstruction Amendments' voting guarantees. Arguably, under this approach, Shelby County could be eligible for fees because the United States and Defendant-Intervenors sought to protect individual voting rights.[5]

[5] The Attorney General contends that, even under this neutral framework, Shelby County is ineligible for attorney's fees because this case involved the *defense* of the constitutionality of various provisions of the VRA, rather than the *enforcement* of the VRA to enjoin a particular state or local voting law. *See* DOJ Br. at 19-20, 42-43. Thus, this Court could hold that, even under the neutral interpretation of Section 14(e), Shelby County is ineligible for attorney's fees in this case. And this Court could harmonize such a ruling with *Donnell* and *Medina County* on the grounds that, in a declaratory judgment action—unlike in this case—the United States and private intervenors, as defendants, seek to enforce the VRA to block implementation of a particular voting change, rendering such cases fee-eligible. Under that interpretation, no parties in this case would be fee-eligible.

While the Court need not address this issue to dispose of this appeal, we note that the Attorney General's position does not account for the fact that *defendant-intervenors* are eligible for fees in other types of Section 5 litigation beyond declaratory judgment actions. For example, as the Attorney General notes, defendant-intervenors may obtain fees in a Section 5 bailout action, which is brought by a covered jurisdiction to terminate its preclearance obligations, and—like this case—does not involve the enforcement of the VRA to block a specific proposed voting change. *See id.* at 34-35. But if defendant-intervenors seeking to preserve Section 5 coverage for a single jurisdiction in a bailout action are fee-eligible, then it would seem to follow that the Defendant-Intervenors in this case, who sought to preserve Section 5 coverage for *all* covered jurisdictions, would

But even assuming that Shelby County is eligible for fees under this neutral interpretation of Section 14(e), the County is not *entitled* to fees in this case. As set forth in the Attorney General's Brief, *see* DOJ Br. at 26-27, 31-33, the purpose of the VRA's fee-shifting provision—like the fees provisions of other civil rights statutes including Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (Title II); 42 U.S.C. § 2000e-5(k) (Title VII), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988—"is the familiar one of encouraging private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws." *Donnell*, 682 F.2d at 245. *Cf. King v. Ill. State Bd. of Elections*, 410 F.3d 404, 412 (7th Cir. 2005) (purpose of the VRA's fee-shifting provision is "to encourage private citizens to initiate court action to correct violations of the Nation's civil rights statutes") (citation and quotation marks omitted). The Supreme Court has consistently held that fee-shifting provisions in civil rights statutes must be interpreted to effectuate that purpose, particularly when determining the appropriate legal standard to apply to a prevailing party.

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similarly be eligible for attorney's fees (had they prevailed). That is not to say, however, that *all parties* should be considered fee-eligible in this case. As noted, this Court could hold that Shelby County is ineligible for fees under the plaintiff-specific interpretation of Section 14(e), while also holding that, under *Donnell*, defendant-intervenors are a special case for fee-eligibility meriting an exception to that general rule. *See supra* at 14 n.4. Put another way, the crucial distinction between this case and *Donnell* with respect to fee-eligibility may lie in the special role played by defendant-intervenors in VRA cases as enforcers of Congressional objectives, *see infra*, Section II.B., rather than in the particular nature of Section 5 declaratory judgment actions.

Here, Shelby County's goals in bringing this litigation were contrary to Congress's objectives in enacting the VRA generally, and in making fees available under Section 14(e) specifically. Shelby County's fees request, therefore, is at best subject to a heightened standard under *Christiansburg*—a standard that Shelby County concedes it cannot satisfy.

1. **Courts Apply the Lenient *Piggie Park* Standard Only to Parties that Seek to Further Congressional Objectives.**

The Supreme Court has consistently held that fee-shifting provisions in federal civil rights statutes must be interpreted in light of Congressional purpose. Thus, notwithstanding that these provisions generally describe an award of attorney's fees as "discretion[ary]," *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (quoting Title II's fees provision, 42 U.S.C. § 2000a-3(b)), the Supreme Court has held that fees are all but automatic for a party that successfully enforces a civil rights statute. *See Piggie Park*, 390 U.S. at 402 (party successfully enforcing Title II's prohibition on racial discrimination in public accommodations "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."). As the Court explained, a lenient standard for fees is necessary to encourage private enforcement of civil rights statutes, without which the achievement of Congressional objectives would be impossible. *See id.* at 401 (noting Congress's recognition 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").

Conversely, although civil rights fees provisions are facially neutral and do not distinguish between different types of prevailing parties, a party that successfully defeats a claim brought to enforce a civil rights statute is generally subject to a heightened standard, under which attorney's fees are not available unless their opponent's position is "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421. Because a party defeating an enforcement effort is not "the chosen instrument of Congress" and the losing party is not "a violator of federal law," *id.* at 418, the lenient *Piggie Park* standard for attorney's fees in this context is inappropriate because it "would undercut the efforts of Congress to promote the vigorous enforcement" of civil rights statutes. *Christiansburg*, 434 U.S. at 422.

Together, *Piggie Park* and *Christiansburg* stand for the proposition that, even where a fee-shifting provision is worded neutrally, different standards must be applied to prevailing parties depending on their role in the litigation relative to Congressional objectives. As the district court, quoting the Third Circuit, correctly explained:

> [E]ven a neutrally-worded fee statute does not necessarily have an identical application to every prevailing party. Rather, when the statute establishes a flexible standard, a consideration of policy and congressional intent must guide the determination of the

> circumstances under which a particular party, or class of parties (such as plaintiffs or defendants), is entitled to fees.

JA 89 (quoting *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund of Phila.*, 799 F.2d 45, 49 (3d Cir. 1986)).

These principles apply fully to Section 14(e). As the district court explained, "[i]n most VRA lawsuits, an individual plaintiff, perhaps with the assistance of the Attorney General, is suing a state government entity for taking an action that violates the plaintiff's individual voting rights." JA 91. *Cf.* S. Rep. No. 94-295, at 41 (1975) ("[D]efendants in these cases are frequently state or local bodies or state or local officials."). Because plaintiffs in a typical VRA case are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" *Christiansburg*, 434 U.S. at 418 (quoting *Piggie Park*, 390 U.S. at 402), the standards for attorney's fees in such cases are clear: a plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," *Donnell*, 682 F.2d at 245 (quoting *Piggie Park*, 390 U.S. at 402), while "a defendant may not recover attorneys' fees unless the court finds that the plaintiff's suit was frivolous, vexatious, or without foundation," *Medina Cnty.*, 683 F.2d at 439 (citing *Christiansburg*, 434 U.S. at 421-22).

2. Section 5 Litigation Inverts the Normal Roles of the Parties, Making Defendant-Intervenors, Rather than Plaintiffs, the Chosen Instrument of Congress.

In this case, however, the typical litigant roles were reversed. This is frequently the case in litigation concerning Section 5, and requires a stricter legal standard for Shelby County's fees request, notwithstanding its nominal designation as the plaintiff. For example, in Section 5 preclearance actions, a covered jurisdiction, as the plaintiff, "file[s] a declaratory judgment action in the District Court for the District of Columbia and subsequently may implement the change in voting laws if that court declares that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Morris v. Gressette*, 432 U.S. 491, 502 (1977) (citations and internal quotation marks omitted). To protect their Fourteenth and/or Fifteenth Amendment interests in voting free from discrimination, private parties may intervene as defendants and assert that the proposed voting changes are in fact discriminatory. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003).

Similarly, in a Section 5 bailout action, a covered jurisdiction, as the plaintiff, seeks to "earn exemption from [Section 5] coverage by obtaining from a three-judge panel of [the D.C. District Court] a declaratory judgment" that it has satisfied the statutory requirements for release from preclearance obligations. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 226

(D.D.C. 2008), *rev'd on other grounds*, 557 U.S. 193 (2009). A private party may then intervene as a defendant to protect individual voting rights by opposing bailout, and thereby preserve Section 5 coverage in the plaintiff jurisdiction. *See id.* at 230 (noting intervention). And, as in this case, a covered jurisdiction may, as a plaintiff, challenge the preclearance regime as facially unconstitutional, with private parties intervening to protect individual voting rights through the maintenance of Section 5 enforcement throughout the covered jurisdictions.

In sum, most types of cases involving Section 5 reverse the normal position of the litigants.[6] The Senate Report to the 1975 VRA amendments, which added Section 14(e) to the VRA, explained that under this inverted litigation posture, it is the defendant-intervenors rather, than the nominal "plaintiff" jurisdictions, who are Congress's chosen instruments. In these cases, therefore, the defendant-intervenors are eligible for fees as though they were ordinary civil rights plaintiffs:

> In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, 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.

[6] There is one type of Section 5 case in which the normal posture of the parties is not inverted: a Section 5 enforcement action, in which the Justice Department or private citizens, alleging that a covered jurisdiction has implemented a change to its voting laws without complying with its preclearance obligations, may "bring suit under Section 5 to compel a covered jurisdiction to submit its proposed voting change for preclearance." *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 479 (D.D.C. 2011), *rev'd*, 133 S. Ct. 2612 (2013).

S. Rep. No. 94-295, at 40 n.42. As noted, *supra* Section II.A., this Court has followed that guidance to hold that defendant-intervenors in Section 5 litigation may recover attorney's fees under Section 14(e). *See, e.g.*, *Donnell*, 682 F.2d at 246; *Medina Cnty.*, 683 F.2d at 439.

Critically, in determining the appropriate standard to apply to a prevailing party's request for attorney's fees in a Section 5 case, the question is whether "[t]he result of the litigation furthered the *purpose* of the Voting Rights Act." *Donnell*, 682 F.2d at 245 (emphasis added). Thus, because defendant-intervenors in a Section 5 case are the parties seeking to enforce the VRA's individual voting rights protections, they are entitled to fees under the lenient *Piggie Park* standard:

> It is thus clear from the case law and the legislative history that when the procedural posture of a case places the party who seeks to vindicate rights guaranteed by the Constitution in the position of defendant, the restrictive *Christiansburg Garment* rule is not applicable. Accordingly, neither appellants' status as intervenors nor as defendants precludes an award of fees under the Voting Rights Act.

Medina Cnty., 683 F.2d at 440; *see also Donnell*, 682 F.2d at 247 (holding that fees should be granted to intervenors absent a "special circumstance that creates an exception to the ordinary presumption in favor of granting attorneys' fees to a prevailing party") (internal quotation marks omitted).[7]

[7] Consistent with the general rule that fees provisions must be interpreted in light of Congressional purpose, *Donnell* held that, for defendant-intervenors seeking fees, one such "special circumstance" would be where a case was litigated successfully by the Attorney General without substantial contributions from the

3. Under the Inverted Posture of This Litigation, Shelby County Cannot Obtain Fees Without Satisfying the Strict *Christiansburg* Standard.

The logic of these cases compels the conclusion that, even assuming *arguendo* that Shelby County is eligible for attorney's fees, it may only obtain them subject to the heightened *Christiansburg* standard. Plainly, "[t]he result of the litigation" here did not "further[] the purpose of the Voting Rights Act" generally, *Donnell*, 682 F.2d at 245, or the purpose of the Section 14(e) fees provision specifically. Congress explained that failing to make fees available under the VRA "would be tantamount to repealing the Act itself by frustrating its basic purpose.'" S. Rep. No. 94-295, at 42 n.44 (quoting Supreme Court Justice Tom Clark in reference to other fee provisions). Of course, "repealing the Act itself," or at least rendering inert Sections 4(b) and 5—which constitute the "heart of the Act," *S. Carolina v. Katzenbach*, 383 U.S. at 315—is precisely what Shelby County accomplished in this case. Far from the "chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," Appellant's

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defendant-intervenors. Thus, to obtain attorney's fees, defendant-intervenors in Section 5 litigation must establish that they "contributed substantially to the success of the litigation." *Donnell*, 682 F.2d at 248-49. That additional requirement is not, strictly speaking, dictated by the statute's text. Rather, it arises from this Court's understanding of Congressional intent. *See id.* at 246 ("[W]e do not believe Congress intended that such an award be as nearly automatic as it is for a party prevailing in its own right."). As this Court explained, "Congress has charged a governmental entity to enforce [Section 5]," and "did not intend to allow private litigants to ride the back of the Justice Department to an easy award of attorneys' fees." *Id.* at 248-49. As always, fees provisions must be interpreted in accordance with purposive considerations.

Br. at 19 (citations and internal quotation marks omitted), Shelby County can only be described as acting contrary to Congressional objectives. A ruling from this Court finding Shelby County entitled to fees would not encourage compliance with federal statutes, but rather would embolden future litigation to limit to scope of the VRA (and perhaps other federal civil rights statutes), thus hampering Congressional objectives.

Under these circumstances, Shelby County may only obtain attorney's fees under the heightened *Christiansburg* standard. That is, if defendant-intervenors in cases concerning Section 5 are best understood as analogous to plaintiffs in a typical VRA case, then it follows that plaintiff jurisdictions like Shelby County are akin to *defendants* in civil rights litigation. As such, the heightened *Christiansburg* standard must apply to Shelby County in this case, regardless of the nominal designations of the parties as plaintiffs or defendants. Under that standard, Shelby County may only obtain fees upon a showing that the position of the Attorney General and Defendant-Intervenors in this case was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421; *see also* DOJ Br. at 37-38. Shelby County does not attempt to satisfy that standard, and could not do so even if it tried. Although the County ultimately prevailed, it was a close case, as the district court, a majority of the members of a panel of this Court, and four Justices of Supreme Court concluded that defendant-intervenors had the better of the argument. *See* JA 95.

Unable to deny that the chief purpose of Section 14(e) is to encourage affirmative litigation to enforce the individual voting rights provisions of the VRA, Shelby County raises two arguments. *First*, Shelby County speculates that, in enacting Section 14(e), "Congress *might* have encouraged Section 14(b) suits like this one" to challenge the constitutionality of the VRA itself. *See* Appellant's Br. at 40 (emphasis added). But it is, at best, highly doubtful that Congress reauthorized Section 4(b) of the VRA, by a vote of 98-0 in the Senate and 390-33 in the House, with the goal of having it declared unconstitutional. *See* H.R. Rep. No. 109-478, at 54-55 (2006) (stating Congress's view that reauthorizing Sections 4(b) and 5 was constitutional). Indeed, Shelby County cannot cite a single case or page of legislative history for the startling proposition that a near unanimous Congress wanted to see its own purposes frustrated when it re-authorized the special provisions of the VRA.

Shelby County avers that "nothing in the legislative history suggests that Congress was disavowing promotion of other types of litigation authorized under the statute," Appellant's Br. at 38, but that argument flips the normal presumption in statutory interpretation on its head. To the extent that Shelby County asserts that congressional intent should guide this Court's decision, it is the County's burden to demonstrate that congressional intent compels its preferred interpretation of the statute. Shelby County, however, has not a shred of evidence that Congress intended fees to be available to a plaintiff jurisdiction in a case challenging the constitutionality of Sections 4(b) or 5, let alone under the permissive *Piggie Park* standard. The *absence* of evidence does not, as Shelby County brazenly claims, weigh in favor of its counterintuitive position. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

Second, Shelby County asserts that, "as a prevailing plaintiff," it is entitled to the same lenient *Piggie Park* standard that other plaintiffs typically receive in civil rights litigation. *See* Appellant's Br. at 45. That argument is nothing more than a plea that this Court endorse Shelby County's unsupported vision of equity. No case holds that *every* nominal plaintiff must receive the lenient *Piggie Park* standard when seeking fees after prevailing on the merits. Fee provisions, which must be interpreted in light of congressional purpose, do "not even invite, let alone require . . . a mechanical construction." *Christiansburg*, 434 U.S. at 418. Rather, *Piggie Park* and *Christiansburg* make clear that, in determining the appropriate legal standard for a prevailing party's fees request, courts *must* adopt asymmetrical rules where doing so would further the congressional purpose.

Shelby County argues that it is "telling" that the district court cited no case in which a nominal plaintiff's request for fees under a civil rights statute was not analyzed under the *Piggie Park* standard. Appellant's Br. at 45. But that is hardly surprising, as there is no other statute that, like Section 5 of the VRA, reverses the normal litigant posture of the parties. It is more telling that Shelby County cannot cite an example of a plaintiff jurisdiction that, after successfully contesting the enforcement of the Voting Rights Act, subsequently obtained fees under the lenient *Piggie Park* standard.

* * *

Ultimately, this Court need not endorse a particular interpretation of Section 14(e) to resolve this appeal. Under any reasonable interpretation of the statute, Shelby County cannot obtain attorney's fees. Which interpretation of Section 14(e) is best, and where the precise contours of that interpretation lie, are questions that can be left for another day. Fees are simply not available to Shelby County in this case.

III. SHELBY COUNTY IS NOT ENTITLED TO ATTORNEY'S FEES FROM DEFENDANT-INTERVENORS.

Finally, even assuming *arguendo* that Shelby County is both eligible and entitled to attorney's fees from the United States, Shelby County cannot collect fees from Defendant-Intervenors.[8]

Under the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), defendant-intervenors are generally insulated from liability for attorney's fees pursuant to any of the several fee-shifting provisions governing civil rights litigation. In *Zipes*, the Supreme Court held that the fee-shifting provision of Title VII generally does not authorize an award of attorney's fees against a losing defendant-intervenor, unless "the intervenors' action was frivolous, unreasonable, or without foundation." 491 U.S. at 761. The Court deemed this stringent standard—which, as noted *supra*, is typically employed when civil rights defendants seek fees, *see id.* (citing *Christiansburg*, 434 U.S. at 421)—rather than the lenient *Piggie Park* standard to be appropriate in this context, because "[a]ssessing fees against blameless intervenors . . . is not essential to . . . vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law." *Zipes*, 491 U.S. at 761; *see also id.* at 762 (a lenient standard for fees against intervenors "would further neither the general policy that wrongdoers make whole those whom

[8] Although Shelby County has represented that it does not seek fees from Defendant-Intervenors at this time, *see* District Court Fees Hr'g Tr., ECF No. 106, at 27, the County's filings make clear its view that, as a legal matter, Defendant-Intervenors are "responsible part[ies]" for attorney's fees. Reply in Supp. of Pl.'s Mot. for Att'y's Fees, ECF No. 104, at 12 n.4.

they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices.").

Zipes held that absolving defendant-intervenors from fee liability in all but the most exceptional cases is appropriate for several reasons, the "[f]oremost" of which is, as here, that "losing intervenors . . . have not been found to have violated anyone's civil rights." *Id.* at 762. Indeed, Shelby County itself acknowledges that there is a "'crucial connection' between 'liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes.'" Appellant's Br. at 21 (quoting *Zipes*, 491 U.S. at 761-62). Thus, defendant-intervenors' blamelessness generally makes a fee award against them improper, even at the risk that this might "create some marginal disincentive against Title VII suits." *Zipes*, 491 U.S. at 762.[9]

The holding of *Zipes* was in the context of Title VII, but its reasoning applies with equal force here. In enacting Section 14(e) of the VRA, Congress repeatedly made clear that it "intended that the standards for awarding fees" under

[9] Nor would a more lenient fee standard for plaintiff jurisdictions in VRA litigation be appropriate to discourage intervention. Intervenors are not "disfavored participants," and "[i]ntervention that is in good faith is by definition not a means of prolonging litigation, but rather of protecting legal rights." *Zipes*, 491 U.S. at 763, 765. Thus, intervention motions by minority citizens seeking to protect their voting rights are "routinely" granted in VRA litigation. *Cnty. Council of Sumter Cnty., S.C. v. United States*, 555 F. Supp. 694, 696 (D.D.C. 1983); *see also Georgia v. Ashcroft*, 539 U.S. at 477 (affirming intervention); *Nw. Austin*, 573 F. Supp. 2d at 230 (noting grant of multiple motions to intervene).

the VRA "be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94-295, at 40 (1975); *see also id.* ("This section is similar to provisions in Titles II and VII of the Civil Rights Act of 1964."); *id.* at 41 (VRA fees provision should "be governed by the same standards which prevail in other types of equally complex Federal litigation."). Here, Defendant-Intervenors have not engaged in any statutory or constitutional violations—they are just as blameless as the Title VII defendant-intervenors in *Zipes*. Indeed, Shelby County relies heavily on *Zipes*, *see* Appellant's Br. at 21-22, 27, 29-30, 32, and does not dispute that *Zipes* governs the availability of fees from Defendant-Intervenors in this case. Thus, at most, fees could be awarded against Defendant-Intervenors only based on a showing that their position in this case was frivolous, a standard that, as noted *supra*, Section II.B.3., Shelby County clearly cannot satisfy.

CONCLUSION

For the reasons set for herein, the order of the district court should be affirmed.

Dated this 22nd day of December, 2014.

Respectfully Submitted,

/s/ Dale Ho
DALE HO
SEAN J. YOUNG
American Civil Liberties Union
Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2693
dale.ho@aclu.org

M. LAUGHLIN MCDONALD
American Civil Liberties Union
Foundation, Inc.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
(404) 500-1235
lmcdonald@aclu.org

ARTHUR B. SPITZER
American Civil Liberties Union of the
Nation's Capital
1400 20th Street, NW, Suite 119
Washington, DC 20036
(202) 457-0800
artspitzer@gmail.com

Attorneys for the Pierson Defendant-Intervenor-Appellees

JON M. GREENBAUM
ROBERT A. KENGLE
MARK A. POSNER
Lawyers' Committee for Civil Rights
Under Law

1401 New York Avenue, NW
Suite 400
Washington, DC 20005
Tel. (202) 662-8325
Fax (202) 783-0857
mposner@lawyerscommittee.org

JOHN M. NONNA
Patton Boggs LLP
1185 Avenue of the Americas
30th Floor
New York, NY 10036
(646) 557-5172
john.nonna@squirepb.com

Attorneys for Defendant-Intervenor-Appellee Harris

SHERRILYN IFILL
President & Director-Counsel
JANAI S. NELSON
CHRISTINA A. SWARNS
RYAN P. HAYGOOD
NATASHA M. KORGAONKAR
LEAH C. ADEN
DEUEL ROSS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, New York 10006
(212) 965-2200
rhaygood@naacpldf.org

Attorneys for the Cunningham Defendant-Intervenor-Appellees

CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to Federal Rule of Appellate Procedure 32(a), that the foregoing Joint Brief for Defendant-Intervenor-Appellees was prepared using Microsoft Word 2010 and 14-point Times New Roman font. This brief contains 7,444 words.

Dated: December 22, 2014

/s/ Dale Ho
DALE HO

Counsel of Record

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on December 22, 2014 the foregoing Joint Brief for Defendant-Intervenor-Appellees was filed through the CM/ECF system and served electronically on all participants in this appeal.

In addition, 9 paper copies will be sent to the court on this date.

/s/ Robyn Cocho
Robyn Cocho