IN THE
Supreme Court of the United States

STATE OF ALASKA, OFFICE OF THE GOVERNOR,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *ET AL.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 302 of the Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. § 2000e-16a *et seq.*,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Office of the Governor of the State of Alaska, respectfully petitions for a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a) is reported at 564 F.3d 1062, and the opinion of the panel (App., *infra*, 56a) is reported at 508 F.3d 476. The decisions of the United States Equal Employment Opportunity Commission (App., *infra*, 91a) and its Administrative Law Judge (App., *infra*, 100a-137a) are not reported.

JURISDICTION

The court of appeals issued its en banc opinion on May 1, 2009. App., *infra*, 1a. On July 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 14, 2009, and, on September 9, 2009, Justice Kennedy further extended the time for filing to and including September 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the Appendix to the Petition, App., *infra*, 138a-146a.

STATEMENT OF THE CASE

1. Congress enacted the Government Employee Rights Act as Title III of the Civil Rights Act of 1991 ("GERA"), Pub. L. No. 102-166, 105 Stat. 1071, 1088, to "provide procedures to protect the right of Senate and other government employees" against discrimination. *Id.* § 301(b), 105 Stat. 1088.[1]

As relevant here, GERA prohibits "discrimination on the basis of race, color, religion, sex, national origin, age, or disability" in "[a]ll personnel actions affecting" specified federal and State employees. 42 U.S.C. §§ 2000e-16a(b), 2000e-16b(a). With respect to State employees, GERA's "rights, protections, and remedies" against discrimination apply to "any individual chosen or appointed, by a person elected to public office in any State or political subdivision * * * (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e-16c(a).

GERA further provides that the "remedies" for a violation of its terms "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d)" of Title 42 – that is, backpay and other equitable relief,

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[1] Originally codified in Title 2, GERA was reclassified in 2000 to appear at 42 U.S.C. §§ 2000e-16a to 2000e-16c.

attorney's fees, and interest, respectively. 42 U.S.C. § 2000e-16b(b)(1). GERA also authorizes "such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of [Title 42]." *Ibid.*

GERA does not allow an aggrieved employee to sue in court directly. Instead, the employee is limited to "[e]nforcement by administrative action" before the United States Equal Employment Opportunity Commission to obtain "appropriate relief." 42 U.S.C. § 2000e-16c(b)(1). The EEOC's final order may be reviewed by the regional court of appeals through a petition for review of agency action. 42 U.S.C. § 2000e-16c(c).

2. After his successful campaign for reelection in 1990, then-Alaska Governor Walter Hickel appointed Margaret Ward to be Director of the Office of the Governor in Anchorage. Her "essential" duties included "handl[ing] press conferences" and "supervis[ing] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54-55. Governor Hickel also appointed Lydia Jones to be a Special Staff Assistant in the Governor's Anchorage office. Both positions were politically sensitive positions. App., *infra*, 57a.

In 1993, Governor Hickel and his Chief of Staff, Pat Ryan, obtained information indicating that Ward and Jones were impermissibly using State resources to assist then-Lieutenant-Governor Jack Coghill's plan to run against Governor Hickel in the gubernatorial race the following year. Governor Hickel responded by sending a memorandum to all senior staff in the Offices of the Governor and

Lieutenant-Governor advising them of the legal restrictions on staff members' campaign activities. Pat Ryan also telephoned Ward to warn her against using State resources to support a political campaign. App., *infra*, 58a.

The next day, Ward informed Ryan that Jones had submitted a memorandum charging John Hendrickson, a Special Staff Assistant in the Governor's Juneau office, with sexual harassment. Governor Hickel promptly ordered an internal investigation into the sexual harassment charge. He also ordered an investigation into the alleged misuse of State resources for political activities. *Ibid.*

The internal investigation into the allegations of sexual harassment concluded that Jones and Hendrickson had been involved in an inappropriate workplace relationship and that, if Ward (as Jones' supervisor) had been aware of that behavior, she had failed to take appropriate steps to halt it. Hendrickson received a reprimand and was required to attend corrective training on sexual harassment in the workplace. Pet'r C.A. App. 73. Ward was required to attend training on the prevention of workplace harassment. *Id.* at 75. Jones was advised of the disciplinary actions taken against Hendrickson and Ward, but was not herself disciplined. *Id.* at 76. After they were informed of the results of the harassment investigation, Ward and Jones convened a press conference in which they criticized the Governor and his handling of the harassment allegations and announced their intention to seek relief from the EEOC. App., *infra*, 58a.

Ward and Jones were placed on administrative leave, pending the results of the investigation into the allegations that they impermissibly used State resources to campaign for Lieutenant-Governor Coghill. That investigation eventually determined that Ward and Jones had engaged in wrongful electioneering and, as a result, their employment was terminated. *Ibid.*

3. In 1994, Ward and Jones filed discrimination complaints with the EEOC against the State of Alaska. Jones alleged that she was harassed on the basis of her sex while employed in the Governor's office, was paid less because of her sex and race, and was terminated in retaliation for her press conference. Ward alleged that she was discriminated against on the basis of her sex and was terminated in retaliation for public statements she made at the press conference in support of Jones' harassment claim. App., *infra,* 58a, 93a.

The claims were assigned to an EEOC Administrative Law Judge. Alaska sought summary judgment before the ALJ on the basis that, *inter alia*, the GERA claims were barred by Eleventh Amendment sovereign immunity. The ALJ denied the motion for summary judgment, but declined to rule on Alaska's sovereign immunity defense and certified that issue for appeal to the EEOC. *Id.* at 119a (Ward), 137a (Jones). On appeal, the EEOC refused to rule on the constitutionality of a statute that it is charged to administer. *Id.* at 98a. Alaska then timely petitioned the Ninth Circuit for review. *See* 42 U.S.C. § 2000e-16c(c); *see also* 28 U.S.C. § 2344.

4. A panel of the Ninth Circuit sustained Alaska's argument that the Eleventh Amendment immunized it from GERA claims. App., *infra*, 56a-90a. The court explained that "[n]othing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policymakers existed in 1991 when GERA was enacted." *Id.* at 64a. In the absence of such evidence, the panel held that GERA was not "a proportionate response to a widespread evil," and thus was not a proper exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment sovereign immunity. *Id.* at 65a.

5. A divided decision of the en banc court of appeals reversed. App., *infra*, 1a-55a.

a. The en banc majority first held that GERA clearly expressed Congress's intent to abrogate the States' Eleventh Amendment immunity.[2] Though GERA lacks any explicit language of abrogation and nowhere identifies the States as potential defendants in GERA enforcement proceedings, the majority nevertheless concluded that Congress's intent to

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[2] The court noted that the applicability of the Eleventh Amendment's protections to EEOC proceedings was undisputed in the case, and observed that the EEOC proceedings to which GERA subjects States "are adjudicative, much like those in *Federal Maritime Commission* [*v. South Carolina State Ports Authority*, 535 U.S. 743, 760-761 (2002)]." App., *infra*, 4a & n.2.

abrogate sovereign immunity was "'unequivocal and textual'" because one provision of GERA states that the statute's anti-discrimination protections extend to policymaking appointees on the staff of State elected officials, *id.* at 4a, and a second provision incorporates the "remedies" allowed by Section 2000e-5(g) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g). Because that Section of Title VII authorizes employees under Title VII to recover remedies from "the employer," *id.* at 5a., the majority reasoned that Congress's intent to abrogate the States' Eleventh Amendment immunity was "'unmistakably clear.'" *Ibid.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

The majority held, secondly, that GERA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment as applied to this case because, in the majority's view, each of Ward's and Jones' claims stated an actual violation of the Fourteenth Amendment, *id.* at 7a-8a (citing *United States v. Georgia*, 546 U.S. 151 (2006));16a, and that therefore it did not have to decide whether GERA was congruent and proportional "prophylactic" legislation that prohibits conduct that is not unconstitutional, *id.* at 8a (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). With respect to Ward's claim that she was fired for conducting a press conference criticizing the Governor whose office she headed, the majority reasoned that the First Amendment protects the public statements of high-level advisory members of a Governor's staff, thereby triggering constitutional scrutiny of the Governor's decision to discharge her.

b. Judge O'Scannlain concurred in part and dissented in part. App., *infra*, 16a-33a. In his view, it was "a close question" whether GERA clearly and explicitly expressed Congress's intent to abrogate Eleventh Amendment immunity, but he ultimately concluded that "it seems * * * that Congress did express its intent." *Id.* at 17a.

Judge O'Scannlain, however, "disagree[d] entirely" with the majority's conclusion that Ward's retaliatory discharge claim stated a constitutional violation, *id.* at 18a, describing the claim as an "attempt[ ] to constitutionalize a political spat over [Ward's] loyalty to the administration of Alaska's Governor," *id.* at 22a. In Judge O'Scannlain's view, "it contravenes the spirit of *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006)] and its predecessors to hold that, even though Ward criticized the Governor on a subject of public interest the Governor cannot constitutionally fire her for disloyalty." *Id.* at 25a. Judge O'Scannlain warned that, under the en banc court's constitutional rule, "an aide to a governor who criticizes publically the governor's tax policy in a press conference" could not be fired for disloyalty. *Id.* at 27a.

Having concluded that the retaliatory discharge claim does not state an actual constitutional violation, Judge O'Scannlain addressed whether GERA reflects a congruent and proportional exercise of Congress's power under Section 5 of the Fourteenth Amendment to adopt prophylactic legislation that abrogates Eleventh Amendment immunity. App., *infra*, 28a-33a. He concluded that GERA was not proper Section 5 legislation because

Congress "made no findings regarding discrimination against state employees at the policy-making level," and the EEOC could point to "no evidence that Congress identified, as the Supreme Court has required it to do, a history and pattern of violations of the constitutional rights [by] states against high-level personal and policy-making employees." *Id.* at 30a, 32a.

c. Judge Ikuta, joined by Judges Tallman and Callahan, dissented from the majority's holding that Congress clearly and explicitly abrogated the States' sovereign immunity in GERA. App., *infra*, 33a-55a. Explaining that "abrogation by inference is not enough," the dissenters stressed that GERA (i) lacks any express language abrogating the States' Eleventh Amendment sovereign immunity; (ii) does not identify States as potential defendants; (iii) does not create a statutory scheme under which States are the only possible defendants, and thus lacks all of the indicia of abrogation recognized by this Court's precedents. *Id.* at 39a-42a. With respect to GERA's cross-reference to Title VII's remedies, the dissenters noted that this provision "deals with the types of remedies available, not with who can be sued." *Id.* at 47a. GERA, the dissent concluded, "simply define[s] what types of discriminatory conduct [a]re prohibited and which government employees could bring claims," neither of which the dissent considered sufficient to abrogate sovereign immunity clearly and explicitly. *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

As this Court recently explained, "federal intrusion into sensitive areas of state and local

policymaking[] imposes substantial federalism costs." *Northwest Austin Municipal Utility Dist. Number One v. Holder*, 129 S. Ct. 2504, 2511 (2009). As construed by the en banc Ninth Circuit, GERA strikes at the heart of State government's policymaking by forcing States to appear before a federal administrative agency, with federal court review, to defend against statutory and constitutional challenge every decision a Governor makes concerning the employment of his or her closest, most confidential personal and policymaking advisors. Under the Ninth Circuit's decision, moreover, Congress can now intrude into a Governor's personal staffing to that unprecedented degree without having to warn the States and their representatives directly during the legislative process. That is because the court of appeals held that the States' constitutional immunity from such intrusive suits can be abrogated without any mention of the subject in the statutory text or any identification of the States as defendants subject to suit. That ruling squarely conflicts with this Court's precedent. Because the Ninth Circuit's decision was en banc, this Court is the only forum in which Alaska and the eight other States that are governed by the Ninth Circuit's decisions can vindicate the sovereign immunity and the autonomy in selecting a Chief Executive's closest advisor that the Constitution carefully preserved for them.

I. The Court Of Appeals' Holding That The First Amendment Shields Disloyal Speech By A Governor's Closest Advisors And Policymaking Staff Defies This Court's Precedent And Creates A Circuit Conflict.

The Ninth Circuit's decision has created a new constitutional right for a Governor's closest and most confidential advisors to convene a press conference, publicly denounce the Governor, betray his trust, and still retain their highly sensitive positions on the Governor's staff. The en banc majority rested its ruling on this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). But *Garcetti* does not sweep that broadly. Indeed, in conflict with the Ninth Circuit's decision here, the Third and Fifth Circuits have construed *Garcetti* far more narrowly.

Even more significantly, the Ninth Circuit decision represents an extraordinary and unprecedented intrusion on State sovereignty and will significantly chill the ability of the States' highest officials to conduct their affairs and to obtain reliable advice from advisors of their own choosing. *Cf. Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381-382, 385 (2004). Much like *Cheney* or a court decision declaring a state law unconstitutional, the constitutional cost of the Ninth Circuit's ruling to States and to the "constitutional blueprint" of "[d]ual sovereignty" warrants certiorari review. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002).

In *Garcetti*, this Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for

First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," 547 U.S. at 421. The en banc majority's holding here that a member of a Governor's hand-picked staff – the head of the Office of the Governor – can claim a constitutional right to retain that confidential position *because* she conducted a press conference to "protest [against]" the Governor and to accuse him of "misconduct" is an unprecedented expansion of the First Amendment in conflict with this Court's precedent and the decisions of other circuits.

The en banc majority held that Ward's allegedly retaliatory discharge was elevated from a routine employee grievance to a constitutional claim solely because criticizing the Governor was an issue of public concern, and because the Court's definition of "official duties" was so narrow as to exclude the convening of press conferences complaining about the Governor, App., *infra*, 14a, even though her "essential" duties included "handl[ing] press conferences," Pet'r C.A. App. 55. Under this Court's government employee speech precedent, however, the First Amendment is not so myopic in its assessment of an employee's duties and, in fact, it does not that readily police high-level government officials (whether the President or a Governor) in choosing their trusted advisors.

First, the Ninth Circuit's analysis ignored this Court's direction that the inquiry into whether speech was made in the course of the speaker's "official duties" "is a practical one." *Garcetti*, 547 U.S. at 424. In determining that the press conference

criticizing the Governor's management of his personal staff was not part of Ward's "official duties" and thus was speech subject to constitutional protection, *id.* at 421, the court of appeals asked only whether Ward's formal duties included exposing allegations of discrimination to the public. App., *infra*, 14a. That is far too cramped a conception of "official duties." As Judge O'Scannlain explained in dissent, for members of a Governor's high-level staff, maintaining the Governor's trust in communications with the public and press is part of the individual's official duties. *Id.* at 27a. Surely, given Ward's position, if she had conducted a press conference *defending* the Governor, that would be considered part of her service to the Governor. *See* Pet'r C. A. App. 55. The First Amendment's protection, however, should not turn on and off based on whether a Governor's close advisor seeks to support or embarrass him.

Indeed, the United States would presumably agree that avoiding open public criticism and political humiliation of the President is part of the official duties of the President's Chief of Staff or the head of the Office of the President, and that the First Amendment's Free Speech Clause would not constrain or regulate a President's discharge of such a high-level staff member for disloyalty. The same rule must apply to a State's Chief Executive.

As this Court held in *Garcetti*, "Government employers, like private employers, need a significant degree of control over their employee's words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*,

547 U.S. at 418. At the high political level at which Ward worked and at which GERA exclusively operates, the need for control over speech and the risk of "impair[ing] the proper performance of governmental functions," *id.* at 419, are magnified exponentially. The Ninth Circuit fundamentally erred by excluding those considerations from the inquiry into the constitutional status (or not) of a key political staffer's speech about the State's Chief Executive. As in *Connick v. Myers*, 461 U.S. 138 (1983), it was not "necess[ary] for [the Governor] to allow events to unfold to the extent that the disruption of [his] office and the destruction of working relationships [was] manifest before taking action." *Id.* at 152.

Second, the Ninth Circuit ignored this Court's direction in *Garcetti* that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421-422. But for her high-level position of trust and access to the Governor's internal affairs, Ward would not have obtained the information she used as ammunition at her press conference. Indeed, the very reason that Jones came to Ward is that Ward's "essential functions" included serving as the "supervis[or of] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54.

In according Ward's special knowledge and access to information no relevance in its First Amendment analysis, the Ninth Circuit placed itself in conflict with the Third and Fifth Circuits, which hold that

employee speech based on special knowledge obtained in the course of performing the employee's job does satisfy *Garcetti's* "official duties" inquiry and takes the employee's speech outside of the First Amendment. *See Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (actions in advising and advocating for student in disciplinary proceedings unprotected by First Amendment in light of professor's position as department chair and special knowledge of disciplinary code); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007) (troopers' complaints about conditions at firing range were within job duties and not protected by First Amendment due to troopers' special knowledge and experience); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (memoranda questioning handling of school athletic funds unprotected by First Amendment in light of athletic director's special knowledge of funds and procedures relating to athletic departments); *see also Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008) ("While the First Amendment protects the right of public employees to speak out on matters of public concern," it does not require an employer to "nourish a viper in the nest") (internal quotation marks omitted), *petition for cert. pending*, No. 08-1328 (filed April 27, 2009)). This Court's review is necessary to resolve that conflict and to afford high-level state officials within the nine States composing the Ninth Circuit the same protection in employing confidential staff that is enjoyed by State officials in the remaining 41 States.

Third, this Court's review is needed more broadly to redress the substantial confusion in circuit law

concerning the scope of *Garcetti's* "official duties" inquiry. While the Ninth Circuit focused on formal job duties and the Third and Fifth Circuits looked to whether employment status provided the source of the knowledge or information, other courts of appeals have focused the inquiry on whether the employee directed the speech to supervisors or others within the relevant chain of command. *Compare Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008) (communication made to outside agency protected by First Amendment), *with Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007) (communication to superior not protected by First Amendment), *cert. denied*, 128 S. Ct. 538 (2007), and *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (same). Still others place dispositive significance on whether regulations or policies require an employee to speak. *See Morales v. Jones*, 494 F.3d 590, 597-598 (7th Cir. 2007) (speech within job duties and not protected by First Amendment where policy required officer to report all potential crimes), *cert. denied*, 128 S. Ct. 905 (2008); *Battle v. Bd. of Regents for the State of Georgia*, 468 F.3d 755, 761-762 (11th Cir. 2007) (speech within scope of duties because of federal guidelines requiring employees to report suspected wrongdoing). The need for this Court's clarification is underscored by the frequency with which the need to define the scope of "official duties" arises.[3]

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[3] The recurring nature of this issue is illustrated by the number of times it has been raised in this Court alone since

Finally, in addition to the conflicts and confusion in the circuits, the profound constitutional and federalism implications of the Ninth Circuit's decision here warrant certiorari review in their own right. *See Cheney*, 542 U.S. at 381 (review warranted in light of separation-of-powers considerations, including the need to protect "'Presidential confidentiality'" and protect against intrusions on the President's ability to perform his "constitutional duties") (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 488-489 (1989) (Kennedy, J., concurring) (examining extent to which legislative enactment can "interfere with the manner in which the President obtains information necessary to discharge his [Constitutional] dut[ies]"). As the United States itself has argued, court decisions restricting the ability of the President or Vice-President to select their advisors and choose those whom they place and maintain in positions of close trust are of such significant constitutional dimension as to warrant this Court's review. *See, e.g.*, Petition

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Garcetti was decided. *See Callahan v. Fermon*, 129 S. Ct. 2734 (2009); *Flipping v. Reilly*, 129 S. Ct. 1316 (2009); *Thampi v. Collier County Bd. of Comm'rs*, 129 S. Ct. 1040 (2009); *Vose v. Kliment*, 128 S. Ct. 2500 (2008); *Ibarra v. Lexington-Fayette Urban County Gov't*, 128 S. Ct. 510 (2007); *see also* Petition for a Writ of Certiorari, *Cheek v. City of Edwardsville*, No. 08-1295, 2009 WL 1070679 (scheduled for Conference on September 29, 2009); Petition for a Writ of Certiorari, *York v. Robinson*, No. 08-1462, 2009 WL 1497816 (same); Petition for a Writ of Certiorari, *Cooley v. Eng*, No. 08-1571, 2009 WL 1786470 (same).

for Writ of Certiorari, *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367 (2004) (No. 03-475), 2003 WL 22669130 at *7-*8 (certiorari warranted because claim "would open the way for judicial supervision of internal Executive Branch deliberations" and "will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid"). Certainly, if concerns about intrusions on the constitutional duties of high-level federal officials are sufficient in their own right to support certiorari, then, as a matter of constitutional federalism, equivalent concerns for the ability of State Chief Executives to carry out their duties, to select their closest advisors, and to obtain advice from those whom they trust merit similar status in this Court's certiorari calculus.

Indeed, in *Gregory v. Ashcroft,* 501 U.S. 452 (1991), this Court recognized the profound implications for constitutional federalism of congressional legislation that purported to regulate "important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy" because such positions within a State "go to the heart of representative government," *id.* at 462. The en banc court of appeals' decision here, however, leaves nine States, with no chance of legal reprieve, laboring under a rule of law that renders the discharge of a Governor's closest and most confidential staff members for public disloyalty a subject of constitutional regulation by the federal courts. The implications of that decision are hard to understate. At the uniquely high level at which

GERA operates, virtually every public disclosure made by a high-level policy advisor or staff member will meet the Ninth Circuit's "issue of public concern" test, and virtually no staff member – save the press spokesperson – will be formally deputized, with the precision Ninth Circuit law now demands, with the official duty of revealing to the press the Governor's internal office affairs.

The Ninth Circuit's First Amendment ruling thus intrudes deeply into constitutional federalism by ensuring that virtually all critical public commentary by high-level advisors will be cloaked with constitutional protection. In an area where federal courts should be the most hesitant to constitutionalize employee grievances and the most vigilant about protecting legitimate State prerogatives, the Ninth Circuit's test has opened the door widely to regulation by litigation of the States' most sensitive and critical employment decisions. But "federal court is not the appropriate forum in which to review the wisdom of [a Governor's] personnel decision," particularly when it concerns the selection and retention of a Governor's most trusted advisors and staff. *Connick*, 461 U.S. at 147. Before the Ninth Circuit's significant distortion of the constitutional federal/state balance is allowed to police the employment decisions of nine Governors and other high-level state officials, this Court's review should be afforded.

II. The Ninth Circuit's Holding That GERA Abrogates The States' Sovereign Immunity Squarely Conflicts With This Court's Precedent.

1. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Gregory*, 501 U.S. at 457 (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)). Because of the "fundamental nature of the interests implicated by the Eleventh Amendment," *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985), and "the vital role of the doctrine of sovereign immunity in our federal system," *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), Congress may abrogate the States' constitutionally secured immunity from suit "only by making its intention unmistakably clear in the language of the statute," *Atascadero,* 473 U.S. at 242. The test is a "stringent" one, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), because courts, as a matter of judicial restraint, will not lightly impute to Congress an intent to "upset the usual constitutional balance of federal and state powers," *Gregory*, 501 U.S. at 460.

To effect a sufficiently clear abrogation of sovereign immunity, this Court's precedents have required Congress to take one of three paths.

First, Congress may explicitly abrogate the States' Eleventh Amendment or sovereign immunity. *See, e.g., United States v. Georgia,* 546 U.S. 151, 153 (2006) (under Americans with Disabilities Act, 42 U.S.C. § 12202, "[a] State shall not be immune under

the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 635 (1999) (Patent Remedy Act, 35 U.S.C. § 296(a), provides that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit").

Second, Congress may create a statutory scheme under which States are the only possible defendants. *See, e.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 57 (1996).

Third, Congress may specifically define States as potential defendants who are subject to suit. *See, e.g., Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726 (2003) (Family and Medical Leave Act, 29 U.S.C. § 2617, expressly allows a suit against a "public agency," defined to include both "the government of a State" and "any agency of . . . a State"); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (Age Discrimination in Employment Act allows suit against a "public agency," which is specifically defined to include "the government of a State").

GERA satisfies none of this Court's tests. First, GERA nowhere mentions, let alone expressly abrogates, Eleventh Amendment or sovereign immunity. Nor does GERA incorporate by reference any other provision of law explicitly abrogating the States' immunity.

Second, States are not the only possible defendants under GERA. To the contrary, the original legislative impetus for GERA was to subject federal governmental entities to suit. Pub. L. No. 102-166, § 302, 105 Stat. 1088; 42 U.S.C. § 2000e-16b(a). In addition, GERA authorizes claims against political subdivisions of States, such as counties and municipalities, 42 U.S.C. § 2000e-16c(a), which do not enjoy the Eleventh Amendment's protection of sovereign immunity. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

Finally, and critically, nothing in GERA specifically defines the States as potential defendants or subjects them to suit. As the dissenting judges below noted, "GERA contains no express definition of the individuals and entities subject to claims under its provisions." App., *infra*, 42a. To the contrary, the operative provisions of GERA that were in effect in 1994 when this suit was filed (as now) simply (i) identify which high-level and policymaking government employees are covered, *compare* 2 U.S.C. § 1220(a) (1994), *with* 42 U.S.C. § 2000e-16c(a) (2006); (ii) guarantee their right to be free of discrimination, *compare* 2 U.S.C. § 1202 (1994), *with* 42 U.S.C. § 2000e-16b(a) (2006); and (iii) authorize them to seek "appropriate" "[r]emedies," *compare* 2 U.S.C. § 1207(h) (1994), *with* 42 U.S.C. § 2000e-16b(b) (2006). Nowhere does the statute say that States, as opposed to the federal or local governments, are proper defendants, are subject to suit, or are an "appropriate" source of the authorized "remedies."

Even more tellingly, at the time GERA was enacted, Congress did not contemplate, let alone authorize, private individuals suing States in federal court at all, which is the historic core of the Eleventh Amendment. Quite the opposite, GERA's statutory scheme ensured that States would *not* be subject to suit in federal court at the behest of private individuals by mandating that GERA's rights be enforced through administrative action before the EEOC. 42 U.S.C. § 2000e-16c(b). Subsequent judicial review, moreover, is limited to the filing of a petition for administrative review, 42 U.S.C. § 2000e-16c(c), which renders the United States a party to the litigation, thereby vitiating the Eleventh Amendment's application, *see, e.g., Alden v. Maine*, 527 U.S. 706, 755-756 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

There is no indication that, at the time GERA was enacted, Congress regarded GERA's administrative enforcement scheme as implicating the States' sovereign immunity. To be sure, this Court held a decade *after* GERA's enactment that the States' sovereign immunity under the Eleventh Amendment extends to administrative proceedings like those authorized by GERA, *Federal Maritime Commission, supra*, but there is no evidence that Congress in 1991 anticipated this Court's decision in *Federal Maritime Commission* or otherwise considered it necessary to undertake the sensitive constitutional weighing involved in legislatively abrogating the States' constitutionally based immunity from suit to enact its administrative relief scheme.

Thus, far from containing any clear or explicit abrogation of sovereign immunity, GERA's text points in the opposite direction. States are nowhere identified as defendants and are nowhere subject to the type of suits that triggered the Eleventh Amendment's protection under this Court's precedent at the time Congress acted. In fact, GERA's remedial design strongly suggests that Congress sought to avoid the necessity of abrogating immunity by foreclosing direct judicial enforcement without the presence of the United States as a party. The court of appeals thus fundamentally departed from this Court's precedent by making the abrogation decision for Congress without explicit textual direction. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

2. The Ninth Circuit majority reasoned that GERA's cross-reference to Title VII's provision entitling aggrieved employees to "back-pay * * * payable by the employer" was an "unmistakabl[e] express[ion of] Congress's intent to allow suits against States for damages." App., *infra*, 7a. That analysis defies this Court's precedent. Having never identified States as potential defendants, that "general authorization" for recovery of a particular type of *remedy* "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 473 U.S. at 246.

At best, the cross-reference might support an "inference that the States were intended to be subject to damages actions for violations of the [GERA]." *Dellmuth*, 491 U.S. at 232. That is not enough. *See, e.g., id.* at 232 ("permissible inference" is not "the unequivocal declaration which * * * is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation"); *Atascadero*, 473 U.S. at 242 (abrogation by inference rejected because it would "temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court").

Contrary to the majority's ruling (App., *infra*, 6a-7a), this Court's decisions in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), and *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003), actually underscore the error in the court of appeals' decision. The Age Discrimination in Employment Act at issue in *Kimel* and the Family and Medical Leave Act at issue in *Hibbs* both contain or incorporate statutory provisions that specifically authorize not just a remedy, but a lawsuit to obtain that remedy, against the government of a State. *See Kimel,* 528 U.S. at 73-74; *Hibbs*, 538 U.S. at 726.

Because the court of appeals' decision was en banc, absent this Court's review, the nine sovereign States within the Ninth Circuit will have been stripped of the protection of their sovereign immunity that the Constitution and this Court's precedent demand. Moreover, they will be left on a lesser footing than their sister States in the other federal

circuits who have hewed to this Court's abrogation precedent by requiring explicit abrogation, express identification of States as defendants to suit, or the existence of a scheme in which States are the only potential defendants. *See, e.g., Nelson v. La Crosse County Dist. Att'y*, 301 F.3d 820, 828 (7th Cir. 2002) (section 106(a) of Bankruptcy Code stating that "sovereign immunity is abrogated" expresses a clear statement of congressional intent to abrogate sovereign immunity); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 819 (6th Cir. 2000) (Equal Pay Act clearly expresses congressional intent to abrogate state sovereign immunity by incorporating provision of Fair Labor Standards Act allowing lawsuit against "the government of a State"). The protection of sovereign immunity and the principles of judicial restraint embodied in this Court's clear statement rule should not vary based on geography, and the en banc Ninth Circuit's decision so starkly conflicts with this Court's precedent as to warrant certiorari review.

III. GERA Exceeds Congress's Power Under Section 5 Of The Fourteenth Amendment.

GERA regulates exclusively the employment of close policy, advisory, and confidential staff of high-level government officials. When Congress chooses to adopt prophylactic legislation that operates at the apex of federalism concerns as GERA does, its constitutional obligation to establish the necessity and appropriateness of that intrusion is at its pinnacle. Yet, as Judge O'Scannlain explained in dissent, the record justifying GERA could not be more barren. Having made the decision when

enacting Title VII that there was no pressing need for federal regulation of such employment positions, *see Gregory, supra*; App., *infra,* 31a-32a (O'Scannlain, J., dissenting), Congress reversed course in 1991 and passed GERA to regulate at the federal level the employment and retention of some of a State's most sensitive policymaking positions. In doing so, however, Congress "made no findings" – none – "regarding discrimination against state employees at the policy-making level." App., *infra,* 30a. Nor has the EEOC identified any "history and pattern of violations of the constitutional rights [by] the states against high-level personal and policy-making employees." *Id.* at 32a. GERA, in other words, is a Section 5 solution without a constitutional problem to remediate. That fails at every level this Court's test for appropriate Section 5 legislation. *See, e.g., Kimel, supra; City of Boerne v. Flores,* 521 U.S. 507 (1997).

To be sure, GERA suits against States have not arisen with great frequency. But that simply underscores the lack of a problem justifying the intrusion and the lack of constitutional justification for the chill GERA casts over the day-to-day employment decisions of all fifty States' highest-level officials. In short, "[t]he substantial costs" that GERA "exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general [sovereignty] power, far exceed any pattern or practice of unconstitutional conduct," *Boerne,* 521 U.S. at 534,

and this Court should grant review to restore the proper constitutional balance.[4]

* * * * *

"The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Gregory*, 501 U.S. at 458 (internal citations omitted). The divided decision of the en banc Ninth Circuit in this case has profoundly unsettled that balance and, for the States within the Ninth Circuit, only action by this Court can restore their constitutional sovereignty. Decisions of the federalism magnitude and consequence rendered by the court of appeals in this case merit this Court's review because the States' sovereignty ought not to be dependent on circuit boundary lines.

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[4] As the Ninth Circuit acknowledged, Ms. Ward is not seeking relief directly under the First Amendment. App., *infra*, 12a n.6. Instead, she seeks relief under GERA on the theory that GERA provides a cause of action for anyone who is retaliated against for exercising GERA rights. *Ibid.* By holding that Ward's claim stated a direct violation of the Constitution, the Ninth Circuit majority forewent any analysis of Congress's authority to subject the States to such intrusive regulation. Because Judge O'Scannlain addressed the issue in dissent, as did the panel decision of the Ninth Circuit, the question is properly before this Court. Indeed, it is an indispensable component of determining whether Alaska's sovereign immunity was properly abrogated, an issue that is properly resolved on interlocutory review. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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September 28, 2009

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No. 09-

IN THE
Supreme Court of the United States

STATE OF ALASKA, OFFICE OF THE GOVERNOR,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *ET AL.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 302 of the Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. § 2000e-16a *et seq.*, prohibits discrimination on the basis of race, sex, religion, and national origin "with respect to [the] employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e-16c(a); *see* 42 U.S.C. § 2000e-16b(a). The questions presented are:

1. Whether high-level policymaking, advisory, and personal staff chosen by a Governor can assert a First Amendment right to continued employment in such positions of trust and confidence after conducting press conferences criticizing the Governor and his actions.

2. Whether GERA unequivocally abrogates the States' sovereign immunity from suit in the absence of any explicit abrogation of immunity, textual specification of States as defendants, or express authorization of proceedings against States.

3. Whether, given the absence of any legislative or judicial record documenting a pattern of unconstitutional discrimination by States against the high-level policymaking and advisory staff of elected officials, GERA constitutes a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is the Office of the Governor of the State of Alaska, who was also the petitioner in the court of appeals.

The Equal Employment Opportunity Commission and the United States of America were respondents in the court of appeals.

Margaret G. Ward was an intervenor in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Office of the Governor of the State of Alaska, respectfully petitions for a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a) is reported at 564 F.3d 1062, and the opinion of the panel (App., *infra*, 56a) is reported at 508 F.3d 476. The decisions of the United States Equal Employment Opportunity Commission (App., *infra*, 91a) and its Administrative Law Judge (App., *infra*, 100a-137a) are not reported.

JURISDICTION

The court of appeals issued its en banc opinion on May 1, 2009. App., *infra*, 1a. On July 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 14, 2009, and, on September 9, 2009, Justice Kennedy further extended the time for filing to and including September 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the Appendix to the Petition, App., *infra*, 138a-146a.

STATEMENT OF THE CASE

1. Congress enacted the Government Employee Rights Act as Title III of the Civil Rights Act of 1991 ("GERA"), Pub. L. No. 102-166, 105 Stat. 1071, 1088, to "provide procedures to protect the right of Senate and other government employees" against discrimination. *Id.* § 301(b), 105 Stat. 1088.[1]

As relevant here, GERA prohibits "discrimination on the basis of race, color, religion, sex, national origin, age, or disability" in "[a]ll personnel actions affecting" specified federal and State employees. 42 U.S.C. §§ 2000e-16a(b), 2000e-16b(a). With respect to State employees, GERA's "rights, protections, and remedies" against discrimination apply to "any individual chosen or appointed, by a person elected to public office in any State or political subdivision * * * (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e-16c(a).

GERA further provides that the "remedies" for a violation of its terms "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d)" of Title 42 – that is, backpay and other equitable relief,

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[1] Originally codified in Title 2, GERA was reclassified in 2000 to appear at 42 U.S.C. §§ 2000e-16a to 2000e-16c.

attorney's fees, and interest, respectively. 42 U.S.C. § 2000e-16b(b)(1). GERA also authorizes "such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of [Title 42]." *Ibid.*

GERA does not allow an aggrieved employee to sue in court directly. Instead, the employee is limited to "[e]nforcement by administrative action" before the United States Equal Employment Opportunity Commission to obtain "appropriate relief." 42 U.S.C. § 2000e-16c(b)(1). The EEOC's final order may be reviewed by the regional court of appeals through a petition for review of agency action. 42 U.S.C. § 2000e-16c(c).

2. After his successful campaign for reelection in 1990, then-Alaska Governor Walter Hickel appointed Margaret Ward to be Director of the Office of the Governor in Anchorage. Her "essential" duties included "handl[ing] press conferences" and "supervis[ing] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54-55. Governor Hickel also appointed Lydia Jones to be a Special Staff Assistant in the Governor's Anchorage office. Both positions were politically sensitive positions. App., *infra*, 57a.

In 1993, Governor Hickel and his Chief of Staff, Pat Ryan, obtained information indicating that Ward and Jones were impermissibly using State resources to assist then-Lieutenant-Governor Jack Coghill's plan to run against Governor Hickel in the gubernatorial race the following year. Governor Hickel responded by sending a memorandum to all senior staff in the Offices of the Governor and

Lieutenant-Governor advising them of the legal restrictions on staff members' campaign activities. Pat Ryan also telephoned Ward to warn her against using State resources to support a political campaign. App., *infra*, 58a.

The next day, Ward informed Ryan that Jones had submitted a memorandum charging John Hendrickson, a Special Staff Assistant in the Governor's Juneau office, with sexual harassment. Governor Hickel promptly ordered an internal investigation into the sexual harassment charge. He also ordered an investigation into the alleged misuse of State resources for political activities. *Ibid.*

The internal investigation into the allegations of sexual harassment concluded that Jones and Hendrickson had been involved in an inappropriate workplace relationship and that, if Ward (as Jones' supervisor) had been aware of that behavior, she had failed to take appropriate steps to halt it. Hendrickson received a reprimand and was required to attend corrective training on sexual harassment in the workplace. Pet'r C.A. App. 73. Ward was required to attend training on the prevention of workplace harassment. *Id.* at 75. Jones was advised of the disciplinary actions taken against Hendrickson and Ward, but was not herself disciplined. *Id.* at 76. After they were informed of the results of the harassment investigation, Ward and Jones convened a press conference in which they criticized the Governor and his handling of the harassment allegations and announced their intention to seek relief from the EEOC. App., *infra*, 58a.

Ward and Jones were placed on administrative leave, pending the results of the investigation into the allegations that they impermissibly used State resources to campaign for Lieutenant-Governor Coghill. That investigation eventually determined that Ward and Jones had engaged in wrongful electioneering and, as a result, their employment was terminated. *Ibid.*

3. In 1994, Ward and Jones filed discrimination complaints with the EEOC against the State of Alaska. Jones alleged that she was harassed on the basis of her sex while employed in the Governor's office, was paid less because of her sex and race, and was terminated in retaliation for her press conference. Ward alleged that she was discriminated against on the basis of her sex and was terminated in retaliation for public statements she made at the press conference in support of Jones' harassment claim. App., *infra,* 58a, 93a.

The claims were assigned to an EEOC Administrative Law Judge. Alaska sought summary judgment before the ALJ on the basis that, *inter alia,* the GERA claims were barred by Eleventh Amendment sovereign immunity. The ALJ denied the motion for summary judgment, but declined to rule on Alaska's sovereign immunity defense and certified that issue for appeal to the EEOC. *Id.* at 119a (Ward), 137a (Jones). On appeal, the EEOC refused to rule on the constitutionality of a statute that it is charged to administer. *Id.* at 98a. Alaska then timely petitioned the Ninth Circuit for review. *See* 42 U.S.C. § 2000e-16c(c); *see also* 28 U.S.C. § 2344.

4. A panel of the Ninth Circuit sustained Alaska's argument that the Eleventh Amendment immunized it from GERA claims. App., *infra*, 56a-90a. The court explained that "[n]othing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policymakers existed in 1991 when GERA was enacted." *Id.* at 64a. In the absence of such evidence, the panel held that GERA was not "a proportionate response to a widespread evil," and thus was not a proper exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment sovereign immunity. *Id.* at 65a.

5. A divided decision of the en banc court of appeals reversed. App., *infra*, 1a-55a.

a. The en banc majority first held that GERA clearly expressed Congress's intent to abrogate the States' Eleventh Amendment immunity.[2] Though GERA lacks any explicit language of abrogation and nowhere identifies the States as potential defendants in GERA enforcement proceedings, the majority nevertheless concluded that Congress's intent to

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[2] The court noted that the applicability of the Eleventh Amendment's protections to EEOC proceedings was undisputed in the case, and observed that the EEOC proceedings to which GERA subjects States "are adjudicative, much like those in *Federal Maritime Commission* [*v. South Carolina State Ports Authority*, 535 U.S. 743, 760-761 (2002)]." App., *infra*, 4a & n.2.

abrogate sovereign immunity was "'unequivocal and textual'" because one provision of GERA states that the statute's anti-discrimination protections extend to policymaking appointees on the staff of State elected officials, *id.* at 4a, and a second provision incorporates the "remedies" allowed by Section 2000e-5(g) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g). Because that Section of Title VII authorizes employees under Title VII to recover remedies from "the employer," *id.* at 5a., the majority reasoned that Congress's intent to abrogate the States' Eleventh Amendment immunity was "'unmistakably clear.'" *Ibid.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

The majority held, secondly, that GERA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment as applied to this case because, in the majority's view, each of Ward's and Jones' claims stated an actual violation of the Fourteenth Amendment, *id.* at 7a-8a (citing *United States v. Georgia*, 546 U.S. 151 (2006));16a, and that therefore it did not have to decide whether GERA was congruent and proportional "prophylactic" legislation that prohibits conduct that is not unconstitutional, *id.* at 8a (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). With respect to Ward's claim that she was fired for conducting a press conference criticizing the Governor whose office she headed, the majority reasoned that the First Amendment protects the public statements of high-level advisory members of a Governor's staff, thereby triggering constitutional scrutiny of the Governor's decision to discharge her.

b. Judge O'Scannlain concurred in part and dissented in part. App., *infra*, 16a-33a. In his view, it was "a close question" whether GERA clearly and explicitly expressed Congress's intent to abrogate Eleventh Amendment immunity, but he ultimately concluded that "it seems * * * that Congress did express its intent." *Id.* at 17a.

Judge O'Scannlain, however, "disagree[d] entirely" with the majority's conclusion that Ward's retaliatory discharge claim stated a constitutional violation, *id.* at 18a, describing the claim as an "attempt[ ] to constitutionalize a political spat over [Ward's] loyalty to the administration of Alaska's Governor," *id.* at 22a. In Judge O'Scannlain's view, "it contravenes the spirit of *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006)] and its predecessors to hold that, even though Ward criticized the Governor on a subject of public interest the Governor cannot constitutionally fire her for disloyalty." *Id.* at 25a. Judge O'Scannlain warned that, under the en banc court's constitutional rule, "an aide to a governor who criticizes publically the governor's tax policy in a press conference" could not be fired for disloyalty. *Id.* at 27a.

Having concluded that the retaliatory discharge claim does not state an actual constitutional violation, Judge O'Scannlain addressed whether GERA reflects a congruent and proportional exercise of Congress's power under Section 5 of the Fourteenth Amendment to adopt prophylactic legislation that abrogates Eleventh Amendment immunity. App., *infra*, 28a-33a. He concluded that GERA was not proper Section 5 legislation because

Congress "made no findings regarding discrimination against state employees at the policy-making level," and the EEOC could point to "no evidence that Congress identified, as the Supreme Court has required it to do, a history and pattern of violations of the constitutional rights [by] states against high-level personal and policy-making employees." *Id.* at 30a, 32a.

c. Judge Ikuta, joined by Judges Tallman and Callahan, dissented from the majority's holding that Congress clearly and explicitly abrogated the States' sovereign immunity in GERA. App., *infra*, 33a-55a. Explaining that "abrogation by inference is not enough," the dissenters stressed that GERA (i) lacks any express language abrogating the States' Eleventh Amendment sovereign immunity; (ii) does not identify States as potential defendants; (iii) does not create a statutory scheme under which States are the only possible defendants, and thus lacks all of the indicia of abrogation recognized by this Court's precedents. *Id.* at 39a-42a. With respect to GERA's cross-reference to Title VII's remedies, the dissenters noted that this provision "deals with the types of remedies available, not with who can be sued." *Id.* at 47a. GERA, the dissent concluded, "simply define[s] what types of discriminatory conduct [a]re prohibited and which government employees could bring claims," neither of which the dissent considered sufficient to abrogate sovereign immunity clearly and explicitly. *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

As this Court recently explained, "federal intrusion into sensitive areas of state and local

policymaking[] imposes substantial federalism costs." *Northwest Austin Municipal Utility Dist. Number One v. Holder*, 129 S. Ct. 2504, 2511 (2009). As construed by the en banc Ninth Circuit, GERA strikes at the heart of State government's policymaking by forcing States to appear before a federal administrative agency, with federal court review, to defend against statutory and constitutional challenge every decision a Governor makes concerning the employment of his or her closest, most confidential personal and policymaking advisors. Under the Ninth Circuit's decision, moreover, Congress can now intrude into a Governor's personal staffing to that unprecedented degree without having to warn the States and their representatives directly during the legislative process. That is because the court of appeals held that the States' constitutional immunity from such intrusive suits can be abrogated without any mention of the subject in the statutory text or any identification of the States as defendants subject to suit. That ruling squarely conflicts with this Court's precedent. Because the Ninth Circuit's decision was en banc, this Court is the only forum in which Alaska and the eight other States that are governed by the Ninth Circuit's decisions can vindicate the sovereign immunity and the autonomy in selecting a Chief Executive's closest advisor that the Constitution carefully preserved for them.

I. The Court Of Appeals' Holding That The First Amendment Shields Disloyal Speech By A Governor's Closest Advisors And Policymaking Staff Defies This Court's Precedent And Creates A Circuit Conflict.

The Ninth Circuit's decision has created a new constitutional right for a Governor's closest and most confidential advisors to convene a press conference, publicly denounce the Governor, betray his trust, and still retain their highly sensitive positions on the Governor's staff. The en banc majority rested its ruling on this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). But *Garcetti* does not sweep that broadly. Indeed, in conflict with the Ninth Circuit's decision here, the Third and Fifth Circuits have construed *Garcetti* far more narrowly.

Even more significantly, the Ninth Circuit decision represents an extraordinary and unprecedented intrusion on State sovereignty and will significantly chill the ability of the States' highest officials to conduct their affairs and to obtain reliable advice from advisors of their own choosing. *Cf. Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367, 381-382, 385 (2004). Much like *Cheney* or a court decision declaring a state law unconstitutional, the constitutional cost of the Ninth Circuit's ruling to States and to the "constitutional blueprint" of "[d]ual sovereignty" warrants certiorari review. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002).

In *Garcetti*, this Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for

First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," 547 U.S. at 421. The en banc majority's holding here that a member of a Governor's hand-picked staff – the head of the Office of the Governor – can claim a constitutional right to retain that confidential position *because* she conducted a press conference to "protest [against]" the Governor and to accuse him of "misconduct" is an unprecedented expansion of the First Amendment in conflict with this Court's precedent and the decisions of other circuits.

The en banc majority held that Ward's allegedly retaliatory discharge was elevated from a routine employee grievance to a constitutional claim solely because criticizing the Governor was an issue of public concern, and because the Court's definition of "official duties" was so narrow as to exclude the convening of press conferences complaining about the Governor, App., *infra*, 14a, even though her "essential" duties included "handl[ing] press conferences," Pet'r C.A. App. 55. Under this Court's government employee speech precedent, however, the First Amendment is not so myopic in its assessment of an employee's duties and, in fact, it does not that readily police high-level government officials (whether the President or a Governor) in choosing their trusted advisors.

First, the Ninth Circuit's analysis ignored this Court's direction that the inquiry into whether speech was made in the course of the speaker's "official duties" "is a practical one." *Garcetti*, 547 U.S. at 424. In determining that the press conference

criticizing the Governor's management of his personal staff was not part of Ward's "official duties" and thus was speech subject to constitutional protection, *id.* at 421, the court of appeals asked only whether Ward's formal duties included exposing allegations of discrimination to the public. App., *infra*, 14a. That is far too cramped a conception of "official duties." As Judge O'Scannlain explained in dissent, for members of a Governor's high-level staff, maintaining the Governor's trust in communications with the public and press is part of the individual's official duties. *Id.* at 27a. Surely, given Ward's position, if she had conducted a press conference *defending* the Governor, that would be considered part of her service to the Governor. *See* Pet'r C. A. App. 55. The First Amendment's protection, however, should not turn on and off based on whether a Governor's close advisor seeks to support or embarrass him.

Indeed, the United States would presumably agree that avoiding open public criticism and political humiliation of the President is part of the official duties of the President's Chief of Staff or the head of the Office of the President, and that the First Amendment's Free Speech Clause would not constrain or regulate a President's discharge of such a high-level staff member for disloyalty. The same rule must apply to a State's Chief Executive.

As this Court held in *Garcetti*, "Government employers, like private employers, need a significant degree of control over their employee's words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*,

547 U.S. at 418. At the high political level at which Ward worked and at which GERA exclusively operates, the need for control over speech and the risk of "impair[ing] the proper performance of governmental functions," *id.* at 419, are magnified exponentially. The Ninth Circuit fundamentally erred by excluding those considerations from the inquiry into the constitutional status (or not) of a key political staffer's speech about the State's Chief Executive. As in *Connick v. Myers*, 461 U.S. 138 (1983), it was not "necess[ary] for [the Governor] to allow events to unfold to the extent that the disruption of [his] office and the destruction of working relationships [was] manifest before taking action." *Id.* at 152.

Second, the Ninth Circuit ignored this Court's direction in *Garcetti* that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421-422. But for her high-level position of trust and access to the Governor's internal affairs, Ward would not have obtained the information she used as ammunition at her press conference. Indeed, the very reason that Jones came to Ward is that Ward's "essential functions" included serving as the "supervis[or of] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54.

In according Ward's special knowledge and access to information no relevance in its First Amendment analysis, the Ninth Circuit placed itself in conflict with the Third and Fifth Circuits, which hold that

employee speech based on special knowledge obtained in the course of performing the employee's job does satisfy *Garcetti's* "official duties" inquiry and takes the employee's speech outside of the First Amendment. *See Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (actions in advising and advocating for student in disciplinary proceedings unprotected by First Amendment in light of professor's position as department chair and special knowledge of disciplinary code); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007) (troopers' complaints about conditions at firing range were within job duties and not protected by First Amendment due to troopers' special knowledge and experience); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (memoranda questioning handling of school athletic funds unprotected by First Amendment in light of athletic director's special knowledge of funds and procedures relating to athletic departments); *see also Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008) ("While the First Amendment protects the right of public employees to speak out on matters of public concern," it does not require an employer to "nourish a viper in the nest") (internal quotation marks omitted), *petition for cert. pending*, No. 08-1328 (filed April 27, 2009)). This Court's review is necessary to resolve that conflict and to afford high-level state officials within the nine States composing the Ninth Circuit the same protection in employing confidential staff that is enjoyed by State officials in the remaining 41 States.

Third, this Court's review is needed more broadly to redress the substantial confusion in circuit law

concerning the scope of *Garcetti's* "official duties" inquiry. While the Ninth Circuit focused on formal job duties and the Third and Fifth Circuits looked to whether employment status provided the source of the knowledge or information, other courts of appeals have focused the inquiry on whether the employee directed the speech to supervisors or others within the relevant chain of command. *Compare Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008) (communication made to outside agency protected by First Amendment), *with Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007) (communication to superior not protected by First Amendment), *cert. denied*, 128 S. Ct. 538 (2007), and *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (same). Still others place dispositive significance on whether regulations or policies require an employee to speak. *See Morales v. Jones*, 494 F.3d 590, 597-598 (7th Cir. 2007) (speech within job duties and not protected by First Amendment where policy required officer to report all potential crimes), *cert. denied*, 128 S. Ct. 905 (2008); *Battle v. Bd. of Regents for the State of Georgia*, 468 F.3d 755, 761-762 (11th Cir. 2007) (speech within scope of duties because of federal guidelines requiring employees to report suspected wrongdoing). The need for this Court's clarification is underscored by the frequency with which the need to define the scope of "official duties" arises.[3]

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[3] The recurring nature of this issue is illustrated by the number of times it has been raised in this Court alone since

Finally, in addition to the conflicts and confusion in the circuits, the profound constitutional and federalism implications of the Ninth Circuit's decision here warrant certiorari review in their own right. *See Cheney,* 542 U.S. at 381 (review warranted in light of separation-of-powers considerations, including the need to protect "'Presidential confidentiality'" and protect against intrusions on the President's ability to perform his "constitutional duties") (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 488-489 (1989) (Kennedy, J., concurring) (examining extent to which legislative enactment can "interfere with the manner in which the President obtains information necessary to discharge his [Constitutional] dut[ies]"). As the United States itself has argued, court decisions restricting the ability of the President or Vice-President to select their advisors and choose those whom they place and maintain in positions of close trust are of such significant constitutional dimension as to warrant this Court's review. *See, e.g.,* Petition

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Garcetti was decided. *See Callahan v. Fermon*, 129 S. Ct. 2734 (2009); *Flipping v. Reilly*, 129 S. Ct. 1316 (2009); *Thampi v. Collier County Bd. of Comm'rs*, 129 S. Ct. 1040 (2009); *Vose v. Kliment*, 128 S. Ct. 2500 (2008); *Ibarra v. Lexington-Fayette Urban County Gov't*, 128 S. Ct. 510 (2007); *see also* Petition for a Writ of Certiorari, *Cheek v. City of Edwardsville*, No. 08-1295, 2009 WL 1070679 (scheduled for Conference on September 29, 2009); Petition for a Writ of Certiorari, *York v. Robinson*, No. 08-1462, 2009 WL 1497816 (same); Petition for a Writ of Certiorari, *Cooley v. Eng*, No. 08-1571, 2009 WL 1786470 (same).

for Writ of Certiorari, *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367 (2004) (No. 03-475), 2003 WL 22669130 at *7-*8 (certiorari warranted because claim "would open the way for judicial supervision of internal Executive Branch deliberations" and "will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid"). Certainly, if concerns about intrusions on the constitutional duties of high-level federal officials are sufficient in their own right to support certiorari, then, as a matter of constitutional federalism, equivalent concerns for the ability of State Chief Executives to carry out their duties, to select their closest advisors, and to obtain advice from those whom they trust merit similar status in this Court's certiorari calculus.

Indeed, in *Gregory v. Ashcroft,* 501 U.S. 452 (1991), this Court recognized the profound implications for constitutional federalism of congressional legislation that purported to regulate "important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy" because such positions within a State "go to the heart of representative government," *id.* at 462. The en banc court of appeals' decision here, however, leaves nine States, with no chance of legal reprieve, laboring under a rule of law that renders the discharge of a Governor's closest and most confidential staff members for public disloyalty a subject of constitutional regulation by the federal courts. The implications of that decision are hard to understate. At the uniquely high level at which

GERA operates, virtually every public disclosure made by a high-level policy advisor or staff member will meet the Ninth Circuit's "issue of public concern" test, and virtually no staff member – save the press spokesperson – will be formally deputized, with the precision Ninth Circuit law now demands, with the official duty of revealing to the press the Governor's internal office affairs.

The Ninth Circuit's First Amendment ruling thus intrudes deeply into constitutional federalism by ensuring that virtually all critical public commentary by high-level advisors will be cloaked with constitutional protection. In an area where federal courts should be the most hesitant to constitutionalize employee grievances and the most vigilant about protecting legitimate State prerogatives, the Ninth Circuit's test has opened the door widely to regulation by litigation of the States' most sensitive and critical employment decisions. But "federal court is not the appropriate forum in which to review the wisdom of [a Governor's] personnel decision," particularly when it concerns the selection and retention of a Governor's most trusted advisors and staff. *Connick*, 461 U.S. at 147. Before the Ninth Circuit's significant distortion of the constitutional federal/state balance is allowed to police the employment decisions of nine Governors and other high-level state officials, this Court's review should be afforded.

II. The Ninth Circuit's Holding That GERA Abrogates The States' Sovereign Immunity Squarely Conflicts With This Court's Precedent.

1. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Gregory*, 501 U.S. at 457 (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)). Because of the "fundamental nature of the interests implicated by the Eleventh Amendment," *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985), and "the vital role of the doctrine of sovereign immunity in our federal system," *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), Congress may abrogate the States' constitutionally secured immunity from suit "only by making its intention unmistakably clear in the language of the statute," *Atascadero,* 473 U.S. at 242. The test is a "stringent" one, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), because courts, as a matter of judicial restraint, will not lightly impute to Congress an intent to "upset the usual constitutional balance of federal and state powers," *Gregory*, 501 U.S. at 460.

To effect a sufficiently clear abrogation of sovereign immunity, this Court's precedents have required Congress to take one of three paths.

First, Congress may explicitly abrogate the States' Eleventh Amendment or sovereign immunity. *See, e.g., United States v. Georgia,* 546 U.S. 151, 153 (2006) (under Americans with Disabilities Act, 42 U.S.C. § 12202, "[a] State shall not be immune under

the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 635 (1999) (Patent Remedy Act, 35 U.S.C. § 296(a), provides that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit").

Second, Congress may create a statutory scheme under which States are the only possible defendants. *See, e.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 57 (1996).

Third, Congress may specifically define States as potential defendants who are subject to suit. *See, e.g., Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726 (2003) (Family and Medical Leave Act, 29 U.S.C. § 2617, expressly allows a suit against a "public agency," defined to include both "the government of a State" and "any agency of . . . a State"); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (Age Discrimination in Employment Act allows suit against a "public agency," which is specifically defined to include "the government of a State").

GERA satisfies none of this Court's tests. First, GERA nowhere mentions, let alone expressly abrogates, Eleventh Amendment or sovereign immunity. Nor does GERA incorporate by reference any other provision of law explicitly abrogating the States' immunity.

Second, States are not the only possible defendants under GERA. To the contrary, the original legislative impetus for GERA was to subject federal governmental entities to suit. Pub. L. No. 102-166, § 302, 105 Stat. 1088; 42 U.S.C. § 2000e-16b(a). In addition, GERA authorizes claims against political subdivisions of States, such as counties and municipalities, 42 U.S.C. § 2000e-16c(a), which do not enjoy the Eleventh Amendment's protection of sovereign immunity. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

Finally, and critically, nothing in GERA specifically defines the States as potential defendants or subjects them to suit. As the dissenting judges below noted, "GERA contains no express definition of the individuals and entities subject to claims under its provisions." App., *infra*, 42a. To the contrary, the operative provisions of GERA that were in effect in 1994 when this suit was filed (as now) simply (i) identify which high-level and policymaking government employees are covered, *compare* 2 U.S.C. § 1220(a) (1994), *with* 42 U.S.C. § 2000e-16c(a) (2006); (ii) guarantee their right to be free of discrimination, *compare* 2 U.S.C. § 1202 (1994), *with* 42 U.S.C. § 2000e-16b(a) (2006); and (iii) authorize them to seek "appropriate" "[r]emedies," *compare* 2 U.S.C. § 1207(h) (1994), *with* 42 U.S.C. § 2000e-16b(b) (2006). Nowhere does the statute say that States, as opposed to the federal or local governments, are proper defendants, are subject to suit, or are an "appropriate" source of the authorized "remedies."

Even more tellingly, at the time GERA was enacted, Congress did not contemplate, let alone authorize, private individuals suing States in federal court at all, which is the historic core of the Eleventh Amendment. Quite the opposite, GERA's statutory scheme ensured that States would *not* be subject to suit in federal court at the behest of private individuals by mandating that GERA's rights be enforced through administrative action before the EEOC. 42 U.S.C. § 2000e-16c(b). Subsequent judicial review, moreover, is limited to the filing of a petition for administrative review, 42 U.S.C. § 2000e-16c(c), which renders the United States a party to the litigation, thereby vitiating the Eleventh Amendment's application, *see, e.g., Alden v. Maine*, 527 U.S. 706, 755-756 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

There is no indication that, at the time GERA was enacted, Congress regarded GERA's administrative enforcement scheme as implicating the States' sovereign immunity. To be sure, this Court held a decade *after* GERA's enactment that the States' sovereign immunity under the Eleventh Amendment extends to administrative proceedings like those authorized by GERA, *Federal Maritime Commission, supra*, but there is no evidence that Congress in 1991 anticipated this Court's decision in *Federal Maritime Commission* or otherwise considered it necessary to undertake the sensitive constitutional weighing involved in legislatively abrogating the States' constitutionally based immunity from suit to enact its administrative relief scheme.

Thus, far from containing any clear or explicit abrogation of sovereign immunity, GERA's text points in the opposite direction. States are nowhere identified as defendants and are nowhere subject to the type of suits that triggered the Eleventh Amendment's protection under this Court's precedent at the time Congress acted. In fact, GERA's remedial design strongly suggests that Congress sought to avoid the necessity of abrogating immunity by foreclosing direct judicial enforcement without the presence of the United States as a party. The court of appeals thus fundamentally departed from this Court's precedent by making the abrogation decision for Congress without explicit textual direction. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

2. The Ninth Circuit majority reasoned that GERA's cross-reference to Title VII's provision entitling aggrieved employees to "back-pay * * * payable by the employer" was an "unmistakabl[e] express[ion of] Congress's intent to allow suits against States for damages." App., *infra*, 7a. That analysis defies this Court's precedent. Having never identified States as potential defendants, that "general authorization" for recovery of a particular type of *remedy* "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 473 U.S. at 246.

At best, the cross-reference might support an "inference that the States were intended to be subject to damages actions for violations of the [GERA]." *Dellmuth*, 491 U.S. at 232. That is not enough. *See, e.g., id.* at 232 ("permissible inference" is not "the unequivocal declaration which * * * is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation"); *Atascadero*, 473 U.S. at 242 (abrogation by inference rejected because it would "temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court").

Contrary to the majority's ruling (App., *infra*, 6a-7a), this Court's decisions in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), actually underscore the error in the court of appeals' decision. The Age Discrimination in Employment Act at issue in *Kimel* and the Family and Medical Leave Act at issue in *Hibbs* both contain or incorporate statutory provisions that specifically authorize not just a remedy, but a lawsuit to obtain that remedy, against the government of a State. *See Kimel,* 528 U.S. at 73-74; *Hibbs*, 538 U.S. at 726.

Because the court of appeals' decision was en banc, absent this Court's review, the nine sovereign States within the Ninth Circuit will have been stripped of the protection of their sovereign immunity that the Constitution and this Court's precedent demand. Moreover, they will be left on a lesser footing than their sister States in the other federal

circuits who have hewed to this Court's abrogation precedent by requiring explicit abrogation, express identification of States as defendants to suit, or the existence of a scheme in which States are the only potential defendants. *See, e.g., Nelson v. La Crosse County Dist. Att'y*, 301 F.3d 820, 828 (7th Cir. 2002) (section 106(a) of Bankruptcy Code stating that "sovereign immunity is abrogated" expresses a clear statement of congressional intent to abrogate sovereign immunity); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 819 (6th Cir. 2000) (Equal Pay Act clearly expresses congressional intent to abrogate state sovereign immunity by incorporating provision of Fair Labor Standards Act allowing lawsuit against "the government of a State"). The protection of sovereign immunity and the principles of judicial restraint embodied in this Court's clear statement rule should not vary based on geography, and the en banc Ninth Circuit's decision so starkly conflicts with this Court's precedent as to warrant certiorari review.

III. GERA Exceeds Congress's Power Under Section 5 Of The Fourteenth Amendment.

GERA regulates exclusively the employment of close policy, advisory, and confidential staff of high-level government officials. When Congress chooses to adopt prophylactic legislation that operates at the apex of federalism concerns as GERA does, its constitutional obligation to establish the necessity and appropriateness of that intrusion is at its pinnacle. Yet, as Judge O'Scannlain explained in dissent, the record justifying GERA could not be more barren. Having made the decision when

enacting Title VII that there was no pressing need for federal regulation of such employment positions, *see Gregory, supra*; App., *infra,* 31a-32a (O'Scannlain, J., dissenting), Congress reversed course in 1991 and passed GERA to regulate at the federal level the employment and retention of some of a State's most sensitive policymaking positions. In doing so, however, Congress "made no findings" – none – "regarding discrimination against state employees at the policy-making level." App., *infra,* 30a. Nor has the EEOC identified any "history and pattern of violations of the constitutional rights [by] the states against high-level personal and policy-making employees." *Id.* at 32a. GERA, in other words, is a Section 5 solution without a constitutional problem to remediate. That fails at every level this Court's test for appropriate Section 5 legislation. *See, e.g., Kimel, supra; City of Boerne v. Flores,* 521 U.S. 507 (1997).

To be sure, GERA suits against States have not arisen with great frequency. But that simply underscores the lack of a problem justifying the intrusion and the lack of constitutional justification for the chill GERA casts over the day-to-day employment decisions of all fifty States' highest-level officials. In short, "[t]he substantial costs" that GERA "exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general [sovereignty] power, far exceed any pattern or practice of unconstitutional conduct," *Boerne,* 521 U.S. at 534,

and this Court should grant review to restore the proper constitutional balance.[4]

* * * * *

"The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Gregory*, 501 U.S. at 458 (internal citations omitted). The divided decision of the en banc Ninth Circuit in this case has profoundly unsettled that balance and, for the States within the Ninth Circuit, only action by this Court can restore their constitutional sovereignty. Decisions of the federalism magnitude and consequence rendered by the court of appeals in this case merit this Court's review because the States' sovereignty ought not to be dependent on circuit boundary lines.

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[4] As the Ninth Circuit acknowledged, Ms. Ward is not seeking relief directly under the First Amendment. App., *infra*, 12a n.6. Instead, she seeks relief under GERA on the theory that GERA provides a cause of action for anyone who is retaliated against for exercising GERA rights. *Ibid.* By holding that Ward's claim stated a direct violation of the Constitution, the Ninth Circuit majority forewent any analysis of Congress's authority to subject the States to such intrusive regulation. Because Judge O'Scannlain addressed the issue in dissent, as did the panel decision of the Ninth Circuit, the question is properly before this Court. Indeed, it is an indispensable component of determining whether Alaska's sovereign immunity was properly abrogated, an issue that is properly resolved on interlocutory review. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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