No. 09-384

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

REPLY BRIEF FOR THE PETITIONER

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Perhaps the federal respondents' ("EEOC") dismissal of the profound federalism implications of the en banc Ninth Circuit decision should not be surprising. It is, after all, the same federal government that perceives no federalism problem in reaching legislatively inside the Office of every State Governor to police the Governor's selection and retention of his or her closest policymaking, advisory, and confidential staff. *See* Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. § 2000e-16a *et seq.* Whether the EEOC is ultimately correct that Congress's Section 5 power permitted it, *in 1991*, to deem every gubernatorial staffing decision "presumptively invalid" (Opp. 30) and subject to federal superintendence, without compiling any contemporary substantiating record of constitutional violations is, of course, one of the very questions presented here.

But whether the EEOC is right or wrong on the legal merits of that question, it is profoundly wrong in asserting that the Court's certiorari decision can disregard the profound federalism interests at stake in this case. There is nothing "hypothetical" (Opp. 7, 20, 22) about the abrogation of Alaska's Eleventh Amendment immunity that Congress accomplished here. Nor is there anything "non-existent" (Opp. 20) about an en banc Ninth Circuit decision holding that the First Amendment invests high-level advisors to a Governor with a constitutional claim to retain their confidential positions after conducting press conferences denigrating the Governor.

Indeed, while disregarded by the EEOC, the legal significance of the court of appeals' First Amendment ruling has not been lost on other circuits. The Seventh Circuit has already expressed its "disapprov[al]" of the "official duties" test adopted by the Ninth Circuit here, and agrees with petitioner that the decision creates a conflict in circuit law. *See Fairley v. Andrews*, 578 F.3d 518, 523-524 (7th Cir. 2009) (citing conflicting cases).

Finally, there is no constitutional merit or logic to the EEOC's view that "separation-of-powers concerns" warrant certiorari when preliminary, interlocutory discovery orders intrude on the ability of high-level *federal* officials to obtain confidential advice (Opp. 25), but that the constitutional separation of federal and state powers does not equally warrant this Court's review of a ruling that intrudes in the same way on high-level State officials.

In short, the Ninth Circuit's en banc abrogation of petitioner's Eleventh Amendment immunity on the ground that the First Amendment could compel a Governor to retain on his personal staff an individual who betrays his trust is a double-fisted assault on constitutional federalism and the core autonomy of States that only this Court can halt.

1. a. Tellingly, the EEOC makes no effort to defend the merits of the Ninth Circuit's straitened definition of an employee's "official duties." Nor does it dispute the constitutional importance to governments at every level of the "official duties" test, which marks the line between employee speech that state (and federal) employers can regulate and

private citizen speech that they generally cannot. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

Here, the court of appeals held that the "official duties" line turns formulaically on what an employee's formal job duties "require." Pet. App. 14a. As Judge O'Scannlain explained in dissent, the majority's rule is far too "strict[ ]," Pet. App. 26a, ignoring a multi-factored approach that would consider whether the speech "owe[d] its existence to [Ward]'s professional responsibilities," *ibid.*, or the unique obligations that attend serving on the "policymaking staff in the office of the chief executive of the State of Alaska," *id.* at 25a.

b. The Ninth Circuit's cramped "official duties" rule creates a conflict in the circuits that merits this Court's review. In fact, the Seventh Circuit recently announced its "disapprov[al]" of the Ninth Circuit's rule that "*Garcetti* applies only to speech expressly commanded by an employer," *Fairley*, 578 F.3d at 523, and explained that the Ninth Circuit rule also departs from the "official duties" test applied in the District of Columbia, Sixth, Tenth, and Eleventh Circuits, *id.* at 523-524 (citing *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009); *Haynes v. Circleville*, 474 F.3d 357 (6th Cir. 2007); *Thomas v. Blanchard*, 548 F.3d 1317 (10th Cir. 2008); *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009)); *see also* Pet. 16 (citing additional cases). In particular, the Ninth Circuit's wooden rule that "official duties" consist only of speech formally required by an employer conflicts with rulings in the Third and Fifth Circuits that – like the dissent would have held – factor the source of the employee's information into the "official

duties" analysis. *See* Pet. 14-15 (citing *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007)).

The EEOC attempts to dismiss the conflict (Opp. 21 n.8) by contending that the Ninth Circuit did not limit "official duties" to speech "expressly commanded by an employer," as the Seventh Circuit posited. True, the Ninth Circuit asked whether Ward's complaints were "require[d]" (Pet. App. 14a) rather than "commanded" (*Fairley*, 578 F.3d at 523). But that is no distinction at all. *See ibid.* (explaining that the Ninth Circuit decision is erroneous because "*Garcetti* applies to job requirements that limit, as well as those that *require*, speech.") (emphasis added). The Eleventh Circuit too has flatly rejected the rule adopted by the Ninth Circuit here, explaining that, "[i]f we had examined only whether the employee's official responsibilities *required* them to speak, we would have reached a different result" in prior cases. *Abdur-Rahman*, 567 F.3d at 1284 (emphasis added) (citing, *e.g.*, *Battle v. Board of Regents of the State of Georgia*, 468 F.3d 755 (11th Cir. 2007) (discussed at Pet. 16)); *see also Garcetti*, 547 U.S. at 424-425 ("[T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

Alternatively, the EEOC argues that the courts of appeals' "official duties" inquiries under *Garcetti* can

be fact intensive. Opp. 19, 20. But that is precisely petitioner's point – the Ninth Circuit test is *not* fact intensive. It artificially truncates that factual inquiry. As the Seventh Circuit explained in *Fairley*, 578 F.3d at 523-524, other courts of appeals have adopted a legal definition of "official duties" that considers the totality of the relevant employment facts and circumstances and thus have prescribed the very fact-intensive inquiry that the Ninth Circuit has now foreclosed. The conflict thus is in what facts the law in the different circuits (and this Court) allows to be factored into the "official duties" inquiry. And that is the type of square conflict of law that this Court reviews. *See, e.g., United States v. Arvizu,* 534 U.S. 266 (2002) (granting review and reversing Ninth Circuit rule strictly limiting which facts are weighed in Fourth Amendment "reasonable suspicion" inquiry).

c. The EEOC's central response is to argue repeatedly that the court of appeals' First Amendment ruling was "hypothetical" and "non-existent" (Opp. 7, 20, 22). That will certainly come as news to the en banc Ninth Circuit, which explicitly held that Ward's claim of retaliation for speaking stated not a hypothetical, but an "*actual* violation[ ] of the Fourteenth Amendment." Pet. App. 16a (emphasis added); *see id.* at 15a ("[R]etaliation for this kind of speech violates the First Amendment as incorporated into the Due Process Clause"); *id.* at 15a n.7 ("[W]e merely hold that it *is* a First Amendment claim"); *see also id.* at 21a-22a (O'Scannlain, J., dissenting in part) (Ward's claim "is a prototypical example of an employee's attempt to

'constitutionalize an employee grievance,'" and "opens up a new frontier in this area of constitutional law"); *id.* at 18a (the majority's decision "wrongly enlarges the constitutional implications of employment decisions at the highest levels of state government"). The Seventh Circuit likewise fully appreciated the new constitutional rule created by the Ninth Circuit's en banc ruling. *See Fairley, supra.*

The EEOC emphasizes (Opp. 20) that the Ninth Circuit made its First Amendment ruling in the abrogation context. True enough. But that does not mean the First Amendment ruling was "hypothetical" or "non-existent." Quite the opposite, the presence of the abrogation question means that the Constitution itself mandated that an "*actual* violation[ ]" of the First Amendment be shown. *United States v. Georgia*, 546 U.S. 151, 158 (2006); *see id.* at 159 (abrogation inquiry requires courts to determine whether alleged misconduct "violated the Fourteenth Amendment"). Otherwise, the en banc Ninth Circuit would have been constitutionally obligated to analyze whether GERA is proper prophylactic legislation, which it did not do. *Id.* at 158.

Thus, the EEOC's effort to re-characterize the court's ruling as a non-constitutional GERA decision misses the whole point of *Georgia*'s abrogation inquiry. Under *Georgia*, finding that Ward had actually stated a claim under the Constitution was essential to stripping Alaska of its sovereign immunity and permitting Ward's GERA litigation to go forward. There is nothing hypothetical about a ruling of such constitutional consequence.

d. The EEOC further argues (Opp. 22-24) that certiorari review is unwarranted because of the case's interlocutory posture. But whether petitioner's Eleventh Amendment immunity was constitutionally abrogated is precisely the type of question that merits interlocutory appeal, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and for which this Court routinely grants interlocutory certiorari review, *see, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 514 (2004); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 633 (1999).

The EEOC contends (Opp. 23) that this case is different because petitioner does not seek this Court's review of abrogation for the gender discrimination claims. But the Eleventh Amendment does not impose an "in for a penny, in for a pound" rule of abrogation. To the contrary, "claim-by-claim" determination of Eleventh Amendment immunity is precisely what this Court ordered in *Georgia*, 546 U.S. at 159. To hold that, in so ruling, this Court effectively rolled back interlocutory review for Eleventh Amendment immunity claims would invite plaintiffs to haul States into federal courts or agencies and keep them there for the duration of the litigation as long as the claims for which abrogation is contested are roped together with a single constitutional claim. That threat is real because plaintiffs have commonly challenged employment decisions both on grounds for which abrogation is not available (such as age or disability in employment) and on grounds for which it is available (gender,

race). *See, e.g., Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1216 (11th Cir. 1999) (raising claims under ADA, Rehabilitation Act, and FMLA), *rev'd*, 531 U.S. 356 (2001). And this Court has not hesitated to grant review of the abrogation question on one ground but not on another. *See Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (reviewing only whether Title I of the ADA abrogated sovereign immunity).

Finally, the EEOC argues (Opp. 24) that review can await resolution of Ward's speech-retaliation claim on the merits. But, as this Court explained just seven months ago, enforcing legal barriers to suit against government officials at the motion-to-dismiss stage is critical because of the "heavy costs" that litigation exacts on the work of high-level government officials, who must divert themselves from their duties and "the formulation of sound and responsible policies * * * to participat[e] in litigation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Thus, when it comes to damages claims against high-level government officials, "it is cold comfort in th[e] pleading context" to say – as the EEOC now does – that the government should trust the discovery and litigation process to vindicate its interests. *Id.* at 1954. Indeed, the Solicitor General argued exactly the opposite when the interests of federal officials were at stake in *Iqbal*. "For some plaintiffs, the opportunity to distract the attention of high-ranking officials in carrying out policies with which they disagree may itself be a strong incentive for filing suit." Petition for Writ of Certiorari, *Ashcroft v.*

Iqbal, 129 S. Ct. 1937 (2009) (07-1015) 2008 WL 336225 at *22. The same is true for the States.

2. With respect to the clarity – or not – of GERA's abrogation of Eleventh Amendment immunity, the EEOC's argument proves Alaska's point.

The EEOC relies on the statutory language for which explicit abrogation was found in the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), *see Kimel, supra*, and the Family and Medical Leave Act, 29 U.S.C. § 2617(a)(2), *see Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). But the language in those statutes went beyond just including States as members of a broad class of potential defendant "employer[s]." In each of those cases, the statute proceeded to define "employer" specifically to include "a public agency," and then defined "public agency" specifically to include the States. *See* ADEA, 29 U.S.C. §§ 216(b) & 203(x); FMLA, 29 U.S.C. §§ 2611(4)(A)(iii) & 203(x).

GERA is very different. It follows the model of the Rehabilitation Act, which simply lumped the States in with a large pool of potential defendant employers. That is not enough, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and the en banc Ninth Circuit's decision to the contrary squarely conflicts with this Court's precedent.

The EEOC's reliance on the abrogation in Title VII recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), overlooks that GERA is a freestanding statute, and not part of Title VII. In fact, when Congress enacted GERA in 1991, it expressly directed that the statute be codified in Title 2, not

Title 42. *See* Pub. L. No. 102-66, Title III, Nov. 21, 1991, 105 Stat. 1088; Pet. 2 & n.1. The codifiers' decision almost a decade later to "reclassify" GERA in Title 42 thus does not amount to explicit textual abrogation by Congress.

Finally, as explained in the petition (at 23-24), the lack of clarity in GERA reflects the unlikelihood that Congress squarely focused on the Eleventh Amendment question because it designed a scheme for administrative rather than direct judicial resolution of claims long before the holding in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), that the States' sovereign immunity extends to such administrative proceedings. The EEOC's response (Opp. 15) that the language shows that Congress intended for States to be sued in that administrative forum is simply wrong. Yes, the language *could be* read to permit such suits. But the critical point for abrogation purposes is that Congress was not *explicit* and, in fact, likely failed to consider the matter because, at the time of GERA's enactment, no court (to petitioner's knowledge) had held that the Eleventh Amendment applied in the administrative setting.

3. Finally, the EEOC asserts (Opp. 25-30) that, because Congress validly exercised its Section 5 power to remedy gender discrimination in some aspects of State employment, *see Fitzpatrick, supra* (Title VII); *Hibbs, supra*, Congress now has free rein to reach further and deeper in its regulation of the States because every State employment decision involving gender is now (and apparently forever) "presumptively invalid" (Opp. 30).

This Court said just the opposite six months ago in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009). The Court ruled that, even for rights "entitled to heightened protection" (Opp. 28), a law that "imposes current burdens * * * must be justified by current needs." *Id.* at 2512. Because of the "substantial federalism costs" of a law like GERA, which "authorizes federal intrusion into sensitive areas of state and local policymaking," neither past authority nor "[p]ast success alone" is "adequate justification to retain," let alone to expand, the reach of federal law. *Id.* at 2511.

Finally, while the EEOC is correct (Opp. 10) that GERA claims against the States have been limited, that simply underscores the lack of necessity for GERA. In any event, because of the abrogation analysis prescribed by this Court in *Georgia*, GERA's impact now reaches further and has spawned an en banc rule of First Amendment law that intrudes profoundly into the core of State governance and regulates on a day-to-day basis the ability of the States' Chief Executives to choose their closest and most confidential staff and advisors. The "official duties" inquiry is a frequently recurring question of great significance to both the States and the federal government. When similarly pressing constitutional concerns striking at the heart of executive power have arisen for the federal government, this Court has granted review notwithstanding the absence of a circuit conflict or frequent recurrence of the issue. Alaska seeks only equivalent consideration for the intrusive and recurring constitutional ruling made by

the en banc court here, which is in direct and now acknowledged conflict with other circuits as well as this Court's precedent.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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