No. 07-70174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, Office of the Governor,

Petitioner,

v.

EEOC, UNITED STATES OF AMERICA,

Respondents, and

MARGARET WARD,

Intervenor.

ON PETITION FOR REVIEW FROM AN ORDER
OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MARGARET WARD'S PETITION FOR REHEARING *EN BANC*

SAMUEL R. BAGENSTOS
One Brookings Dr., Box 1120
St. Louis, MO 63130
(314) 935-6856
(314) 935-4029 (fax)
srbagenstos@wulaw.wustl.edu

LEE HOLEN
Lee Holen Law Office
608 W. 4th Ave., Suite 21
Anchorage, AK 99501
(907) 278-0298
(907) 278-0247 (fax)
leeholen@gci.net

COUNSEL FOR INTERVENOR MARGARET WARD

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 2

ARGUMENT 5

I. The Panel's Holding that GERA is *Not* Valid Section 5 Legislation Directly Conflicts with the Tenth Circuit's Holding that GERA *is* Valid Section 5 Legislation 5

II. By Requiring That Congress Prove the Existence of "Widespread" Race and Sex Discrimination in the Specific Context of "the Selection and Retention of a Governor's Close Associates," the Panel's Decision Conflicts With This Court's Decision in *Hibbs* and the Decisions of the Supreme Court and Other Circuits 7

A. Because Race and Sex Discrimination by State Actors Violates the Fourteenth Amendment, Georgia *Makes Clear That Congress Need Not Show* Any *Pattern of Past Violations to Provide a Remedy for That Discrimination* 9

B. Because Race and Sex Discrimination by State Actors is Subject to Heightened Scrutiny, the Rulings of the Supreme Court, This Court, and Other Circuits Make Clear That Congress Was Not Required to Show a Pattern of Discrimination by Governors *in Any Event* 13

CONCLUSION 19

APPENDIX (Panel Opinion)

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Board of County Commrs. v. E.E.O.C., 405 F.3d 840 (10th Cir. 2005) 1, 5, 6, 7, 18

Board of Trustees v. Garrett, 531 U.S. 356 (2001) 10

Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 6, 10

Crumpacker v. Kansas Dept. of Human Resources, 338 F.3d 1163 (10th Cir. 2003), cert. denied, 540 U.S. 1180 (2004) 2, 16, 18

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 6, 7

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 10

Fullilove v. Klutznick, 448 U.S. 448 (1980) 17

Hibbs v. Department of Human Resources, 273 F.3d 844 (9th Cir. 2001), aff'd, 538 U.S. 721 (2003) ..... *passim*

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 12

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 10

Maitland v. University of Minn., 260 F.3d 959 (8th Cir. 2001), cert. denied, 535 U.S. 929 (2002) 2, 16, 18

Nanda v. Board of Trustees, 303 F.3d 817 (7th Cir. 2002), cert. denied, 539 U.S. 902 (2003) 9

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) ... *passim*

Okruhlik v. University of Arkansas, 255 F.3d 615 (8th Cir. 2001) 9

Tennessee v. Lane, 541 U.S. 509 (2004) ..... *passim*

United States v. Georgia, 546 U.S. 151 (2006) ..... *passim*

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) 16

Constitution, Statutes, and Rules

Eleventh Amendment 6, 7, 16

Fourteenth Amendment ..... *passim*

Section 5 ..... *passim*

Americans with Disabilities Act 10, 11, 12

Family and Medical Leave Act 14, 15, 17

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

42 U.S.C. § 2000e-16b 3, 4

42 U.S.C. § 2000e-16c 3

Title VII of the Civil Rights Act of 1964 ..... *passim*

42 U.S.C. § 2000e(f) 3

42 U.S.C. § 2000e-5 4

Fed. R. App. P. 35 1

Tennessee v. Lane, 541 U.S. 509 (2004) ..... *passim*

United States v. Georgia, 546 U.S. 151 (2006) ..... *passim*

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) 16

Constitution, Statutes, and Rules

Eleventh Amendment 6, 7, 16

Fourteenth Amendment ..... *passim*

Section 5 ..... *passim*

Americans with Disabilities Act 10, 11, 12

Family and Medical Leave Act 14, 15, 17

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

42 U.S.C. § 2000e-16b 3, 4

42 U.S.C. § 2000e-16c 3

Title VII of the Civil Rights Act of 1964 ..... *passim*

42 U.S.C. § 2000e(f) 3

42 U.S.C. § 2000e-5 4

Fed. R. App. P. 35 1

Intervenor Margaret Ward respectfully petitions for rehearing *en banc* in the above-entitled case. Ward seeks review of the following question:

> Whether the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. § 2000e-16a *et seq.*, which provides certain state government employees relief against race and sex discrimination, validly abrogates state sovereign immunity.

This is a "question[] of exceptional importance," Fed. R. App. P. 35(b)(1)(B), because the panel's 2-1 ruling, which answered it in the negative, invalidated a significant federal statute. *En banc* consideration is also "necessary to secure and maintain uniformity of the court's decisions," Fed. R. App. P. 35(b)(1)(A), because the panel's ruling conflicts with this Court's decision in *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), aff'd, 538 U.S. 721 (2003).

In holding that GERA was not a valid exercise of Congress's Section 5 power to enforce the Fourteenth Amendment, the panel majority did more than simply deprive the workers covered by the statute of any effective remedy against race and sex discrimination by their state employers. It also ran headlong into a conflict with the Tenth Circuit's decision in *Board of County Commrs. v. E.E.O.C.*, 405 F.3d 840, 849-50 (10th Cir. 2005), which held that GERA *is* valid Section 5 legislation. And it disregarded the Supreme Court's three most recent Section 5 decisions, all of which make clear that Congress has power to abrogate state sovereign immunity in cases

where state actors have engaged in race and sex discrimination, as well as the decisions of other circuits that have similarly upheld the abrogation of sovereign immunity in the race and sex discrimination context. See *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Crumpacker v. Kansas Dept. of Human Resources*, 338 F.3d 1163 (10th Cir. 2003), cert. denied, 540 U.S. 1180 (2004); *Maitland v. University of Minn.*, 260 F.3d 959 (8th Cir. 2001), cert. denied, 535 U.S. 929 (2002). *En banc* review is necessary to resolve the conflict with this Court's own decision in *Hibbs* and to bring this Circuit's law in line with that of the Supreme Court and the other circuits.

BACKGROUND

This case arose from sex discrimination charges Intervenor Ward filed with the EEOC in 1994. ER 4-5, 353-354. Ward worked for the Alaska government as the Director of the Anchorage Regional Office of the then-Governor, Walter Hickel. *Id.* at 39. Along with her coworker Lydia Jones, Ward was fired from her job on April 1994. *Id.* Ward promptly filed a Title VII charge with the EEOC, in which she alleged that the state had discriminated against her during her employment because of her sex, and that it had terminated her in retaliation for reporting Jones's complaints of

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sexual harassment. *Id.* at 4-5, 353-354. Jones also filed a Title VII charge, in which she alleged that she had been the victim of sexual harassment, sex discrimination, and race discrimination. *Id.* at 9-10.

The EEOC consolidated Ward's and Jones's charges, and it treated those charges as having been filed under GERA. *Id.* at 29. GERA, enacted in 1991, establishes an administrative process for discrimination complaints by state employees who are excluded from Title VII because they serve elected officials in policymaking or close advisory positions. See 42 U.S.C. § 2000e-16c.[1] The statute provides that "[a]ll personnel actions affecting" those employees "shall be made free from any discrimination based on," *inter alia*, "race, color, religion, sex, or national origin." *Id.* § 2000e-16b(a)(1). If the EEOC finds that an employer has violated that prohibition,

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[1] GERA covers:

> 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 also 42 U.S.C. § 2000e(f) (excluding an identically defined class of state workers from coverage under Title VII). Ward objected to the EEOC's proceeding under GERA; she contended that she was not the kind of high policymaking official who is excluded from Title VII and covered by GERA. See ER 317, ¶2. The EEOC never made a definitive ruling on the coverage question, however. See ER 18, 22-23 (ALJ decision leaving the question for trial).

GERA provides that it may award the same equitable remedies as are available under Title VII, see *id.* § 2000e-16b(b)(1) (incorporating 42 U.S.C. § 2000e-5(g), (k)), as well as the same compensatory damages for intentional discrimination as are available under 42 U.S.C. § 1981a(a), and (b)(2), see *id.* § 2000e-16b(b)(1). GERA prohibits any award of punitive damages. See *id.* § 2000e-16b(b)(3).

Alaska objected to the proceedings on the ground that they were barred by the state's sovereign immunity. *Id.* at 33-35. When the EEOC overruled that objection, *id.* at 42-43, and before the agency could conduct proceedings on the merits of Ward's and Jones's claims, Alaska filed a petition for review in this Court. *Id.* at 44-45.

The panel, by a 2-1 decision, held that Congress had not validly abrogated state sovereign immunity when it enacted GERA. Although it recognized that Congress, in extending Title VII's coverage to state employees, had "found extensive gender and racial discrimination by the States" in employment, Slip op. 14713, the majority held that Congress lacked power under Section 5 of the Fourteenth Amendment to extend protection to elected officials' close staff: "Nothing 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 14715. In

the absence of such a "widespread evil," the majority concluded that GERA was not a "proportionate response." *Id.* at 14716. Judge Paez dissented. *Id.* at 14719-14736.

ARGUMENT

I. The Panel's Holding that GERA is *Not* Valid Section 5 Legislation Directly Conflicts with the Tenth Circuit's Holding that GERA *is* Valid Section 5 Legislation

The decision of the panel majority squarely conflicts with the Tenth Circuit's decision in *Board of County Commissioners*, *supra*. In *Board of County Commissioners*, 405 F.3d at 842-843, the county sought review from the EEOC's determination that it had violated GERA by retaliating against an employee for filing a sex harassment complaint. The county argued that GERA, by "includ[ing] a right against retaliation," exceeded Congress's enumerated powers and therefore violated the Tenth Amendment. *Id.* at 847.

The Tenth Circuit rejected that argument. See *id.* at 847-850. The court canvassed the legislative record that led to the enactment of GERA and concluded that the statute, with its prohibition on retaliation, was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. See *id.* Because Congress had Section 5 authority to enact the statute, the court explained, GERA could not violate the Tenth Amendment.

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See *id.* at 847. In support of that proposition, the court relied on the Supreme Court's holding that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Id.* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-456 (1976)).

By holding that GERA is *not* a valid exercise of Congress's Section 5 authority (Slip op. 14712-14716), the panel brought this Court into direct conflict with the Tenth Circuit's decision in *Board of County Commissioners*. It makes no difference that this case arises in the context of an Eleventh Amendment challenge to GERA's abrogation of state sovereign immunity, while *Board of County Commissioners* arose in the context of a Tenth Amendment challenge to the statute's substantive prohibition on retaliation. The test for valid Section 5 legislation is the same in both instances. Compare *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (applying "congruence and proportionality" test to determine whether statute invaded the reserved powers of the states), with *Lane*, 541 U.S. at 520-521 (applying the same test to determine whether statute validly abrogated state sovereign immunity). Indeed, the Tenth Circuit itself recognized the point;

in holding that valid Section 5 legislation does not violate the Tenth Amendment, the court relied on *Fitzpatrick*, *supra*, in which the Supreme Court held that valid Section 5 legislation can abrogate *Eleventh* Amendment immunity.

Although Judge Paez's panel dissent relied (Slip op. 14728-14729) on *Board of County Commissioners*, the panel majority did not so much as cite that case. Perhaps unwittingly, the majority brought this Court into conflict with the Tenth Circuit's holding. *En banc* review is necessary to resolve the conflict.

II. By Requiring That Congress Prove the Existence of "Widespread" Race and Sex Discrimination in the Specific Context of "the Selection and Retention of a Governor's Close Associates," the Panel's Decision Conflicts With This Court's Decision in *Hibbs* and the Decisions of the Supreme Court and Other Circuits

In concluding that GERA was not valid Section 5 legislation, the panel found it "critical" that the statute's legislative history "did not establish an existing evil in the selection and retention of a governor's close associates." Slip op. 14715. In the absence of such a "widespread evil," the panel majority held, GERA was not a "proportionate response." *Id.* at 14716. See also *id.* ("It would be guesswork, unsupported by the record, to suppose that a widespread pattern of intentional discrimination on account of gender or race existed among the fifty governors of the states as they

selected staff assisting them in the exercise of their office."). In his concurring opinion, Judge Wallace similarly contended that Congress did not "take the time for hearings to develop an appropriate record," and that Congress's "failure to do so here requires the conclusion that the constitutional protections on state sovereign immunity have not been met." *Id.* at 14718.

The panel's conclusion conflicts with controlling precedent of the Supreme Court, this Court, and other circuits in two key respects. First, as applied to this case, GERA prohibits conduct that itself violates the Fourteenth Amendment, and the Supreme Court's decision in *Georgia*, *supra*, makes clear that Congress need not adduce *any* record of past constitutional violations in order to provide a remedy for state conduct that itself violates the Fourteenth Amendment. Second, even if Congress was required to adduce a record of past constitutional violations, the Supreme Court's decisions in *Lane*, *supra*, and *Hibbs*, *supra*, make clear that, where Congress responds to state action that triggers heightened scrutiny, it need not demonstrate a pattern of widespread violations in the particular, narrow context in which its statute applies. This Court applied the same principle in its own decision in *Hibbs*, as have the Eighth and Tenth Circuits. The panel's decision conflicts with all of these authorities.

A. *Because Race and Sex Discrimination by State Actors Violates the Fourteenth Amendment,* Georgia *Makes Clear That Congress Need Not Show* Any *Pattern of Past Violations to Provide a Remedy for That Discrimination*

By requiring that Congress develop a "record" showing a "pattern" of past race and sex discrimination by Governors against their immediate staff to justify the application to them of a law prohibiting race and sex discrimination, the panel completely failed to take account of *Georgia*, *supra*. When, as alleged here, state actors discriminate against employees because of their race or sex, they engage in conduct that *itself* violates the Fourteenth Amendment. See *Nanda v. Board of Trustees*, 303 F.3d 817, 828-830 (7th Cir. 2002) (ordinary disparate treatment on the basis of race or sex violates both Title VII and the Equal Protection Clause), cert. denied, 539 U.S. 902 (2003); *Okruhlik v. University of Arkansas*, 255 F.3d 615, 626 (8th Cir. 2001) ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution."). *Georgia* makes clear that Congress need not demonstrate a pattern of past constitutional violations before adopting a statute that provides remedies for conduct that itself violates the Fourteenth Amendment.

Although this case involves only Congress's *remedial* power to provide "remedies against the States for *actual* violations" of the Fourteenth Amendment, *Georgia*, 546 U.S. at 148, the panel majority improperly

treated this as a case involving Congress's "prophylactic" power to "proscribe facially constitutional conduct" in order to ensure that unconstitutional conduct does not evade the law's sweep, see *Hibbs*, 538 U.S. at 727-728. In a number of pre-*Georgia* cases in which plaintiffs invoked federal statutes to challenge state conduct that did *not* itself violate the Constitution, the Court did indeed state that *prophylactic* legislation "must be based" on a demonstrated "pattern of unconstitutional discrimination." *Board of Trustees v. Garrett*, 531 U.S. 356, 370 (2001) (holding that Title I of the Americans with Disabilities Act (ADA) was not valid Section 5 legislation). See also *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640 (1999) ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."). Cf. *City of Boerne*, 521 U.S. at 534 ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice

of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith.*").

But in *Georgia*, 546 U.S. at 157-158, the Court explained that things are very different when the plaintiff invokes a federal statute to obtain a remedy for conduct that itself violates Section 1 of the Fourteenth Amendment. The prisoner-plaintiff in that case sought money damages against the state as a remedy for conditions of confinement that, if proven, would violate both ADA Title II and the Eighth Amendment (as incorporated in the Fourteenth). See *id.* at 157. Although the justices had "disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment," the Court explained that "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions," and that "[t]his enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States." *Id.* at 158-159.

Accordingly, the Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at 159. The Eleventh Circuit had therefore "erred

in dismissing those of Goodman's Title II claims that were based on such unconstitutional conduct." *Id.* Crucially, the Court did not even examine whether Congress, in enacting Title II, had been responding to a demonstrated pattern of state violations of the constitutional rights of prisoners with disabilities. Because the plaintiff sought to apply Title II as remedial rather than prophylactic legislation, no such record was necessary.

The *Georgia* analysis is dispositive here. Race- and sex- based employment discrimination by the state violates the Fourteenth Amendment. Under *Georgia*, Congress therefore has the power to abrogate state sovereign immunity to provide the victims of that discrimination a remedy for it.[2] Congress need not first show that Governors in general have engaged

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[2] Under *Georgia*, Congress also has Section 5 power to prohibit states from retaliating against employees who complain about race and sex discrimination. The prohibition on retaliation is not the sort of "prophylactic" requirement about which the Court reserved judgment in *Georgia*, 546 U.S. at 158. Instead, it "seeks to secure [the statute's] primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006) (discussing retaliation prohibition under Title VII). See also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) ("[I]f retaliation were not prohibited, Title IX's enforcement scheme would unravel."). It is therefore a "requirement[] directly related to the *facilitation* of 'enforcement'"—the kind of requirement that even Justice Scalia, who wrote the Court's unanimous opinion in *Georgia* and (alone among the justices) has rejected the notion that Congress has any general power to enact prophylactic Section 5 legislation, has recognized to be constitutional. *Lane*, 541 U.S. at 560 (Scalia, J., dissenting).

in a "pattern" of race and sex discrimination against their close staff in order to provide a damages remedy in cases in which a Governor is proven to have engaged in unconstitutional discrimination. By invalidating GERA because of Congress's failure to hold hearings that specifically demonstrated a pattern of race and sex discrimination by Governors against their close staffs, the panel majority contradicted the Supreme Court's holding in *Georgia*.

B. *Because Race and Sex Discrimination by State Actors is Subject to Heightened Scrutiny, the Rulings of the Supreme Court, This Court, and Other Circuits Make Clear That Congress Was Not Required to Show a Pattern of Discrimination* by Governors *in Any Event*

Even if it were proper to treat GERA as prophylactic rather than remedial legislation, the ruling of the panel majority would still conflict with controlling Supreme Court precedent, this Court's decision in *Hibbs*, and the holdings of other circuits. The majority acknowledged that Congress acted in response to evidence of "extensive gender and racial discrimination by the States." Slip op. 14713. But it nonetheless held that Congress had failed to show a sufficient pattern of discrimination to justify the enactment of GERA, because Congress did not adduce evidence of a "widespread evil" in the specific context of "the selection and retention of a governor's close associates." *Id.* at 14715-14716.

That holding flies in the face of *Lane*, *supra*, and *Hibbs*, *supra*. In those cases, the Court held that where Congress responds to action (such as race or sex discrimination) that triggers heightened scrutiny under the Fourteenth Amendment, it is "'easier for Congress to show a pattern of state constitutional violations'" to justify prophylactic Section 5 legislation. *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 736). Most important here, those cases made clear that, where the constitutional rights at issue trigger heightened scrutiny, Congress need *not* adduce evidence that shows a pattern of state constitutional violations in the *specific* context in which the statute applies.

Hibbs is especially relevant. There, the Court upheld the Family and Medical Leave Act's (FMLA's) requirement that state employees receive leave to care for sick family members. But the Court did so because Congress was responding to the "long and extensive history of sex discrimination" by states generally. *Hibbs*, 538 U.S. at 730. The Court did not point to *any* evidence of unconstitutional state discrimination in the *specific* context of leave to care for sick family members. Instead, the Court pointed exclusively to evidence that discussed disparities in *maternity and paternity* leave. See *Id.* at 730-732. Even in that context, the overwhelming majority of the evidence the Court discussed involved the practices of

private-sector and federal-government employers, not states. See *id.*; *id.* at 746-748 (Kennedy, J., dissenting). See also *Lane*, 541 U.S. at 527 n.16, 528 (recognizing these limitations of the *Hibbs* legislative record).

The Court upheld the family-care leave requirement, *not* because Congress had identified any ongoing pattern of unconstitutional state discrimination in the particular context governed by that requirement, but because "the persistence of . . . unconstitutional [sex] discrimination by the States justifies Congress' passage of prophylactic § 5 legislation." *Hibbs*, 538 U.S. at 730. This Court made the point explicit in its own decision in *Hibbs*, which the Supreme Court affirmed. This Court recognized that the legislative record did "not document a widespread pattern of precisely the kind of discrimination that [the FMLA's family-care provision] is intended to prevent." *Hibbs*, 273 F.3d at 859. But it concluded that Congress could properly infer gender discrimination in family-care leave from the long history of widespread gender discrimination by states. See *id.* at 859-860 (citation omitted). Because of that history, this Court concluded that Congress need not prove the existence of gender discrimination in each specific area of state government it seeks to regulate; rather, it "makes sense to put the burden of proof on the challenger of a statute like the FMLA, to

prove the absence of the sort of gender discrimination that the Court has found to be longstanding and widespread." *Id.* at 858.

Other circuits have followed the same analysis. In *Maitland*, 260 F.3d at 965, the Eighth Circuit held that Title VII was valid Section 5 legislation in the context of claims of discrimination against male state employees, notwithstanding the lack of evidence of a pattern of such discrimination. The court specifically "disagree[d] with the defendants' contention that, although Title VII removes the bar of Eleventh Amendment immunity to federal court sex-discrimination actions by women, the Constitution requires a parsing of the legislative findings or review of the 'proportionality and congruity' of remedies to determine whether the Eleventh Amendment bar also has been removed with respect to Title VII actions by men." *Id.* In *Crumpacker*, 338 F.3d at 1170, the Tenth Circuit upheld application to the states of Title VII's prohibition on retaliation, notwithstanding the lack of evidence that states had engaged in retaliatory conduct. The Court concluded that "[t]o properly enact legislation under its § 5 authority, Congress need not identify a pattern of each *form* of gender discrimination in the workplace by the states." *Id.* See also *Warren v. Prejean*, 301 F.3d 893, 899 (8th Cir. 2002) (engaging in same analysis).

The same principles apply here. When it enacted GERA in 1991, Congress responded to the same "long and extensive history of sex discrimination" in employment, and the same "persistence of such unconstitutional discrimination by the States," *Hibbs*, 538 U.S. at 730, that would justify its application of the FMLA to the states two years later. As Judge Paez demonstrated in his panel dissent Slip op. 14727-14731, Congress's enactment of GERA rested on two decades' worth of consideration of the problems of race and sex discrimination in state employment. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

Indeed, the case for upholding GERA as valid Section 5 legislation is much stronger than was the case for upholding the FMLA in *Hibbs*. The FMLA "grant[ed] a substantive benefit, namely, 12 weeks of leave, to all employees," *Hibbs*, 273 F.3d at 860 n.11—something that went well beyond what the Constitution requires. GERA, by contrast, prohibits very little conduct that does not itself violate the Constitution in the race and sex discrimination context. The statute's prohibition of *intentional* race and sex

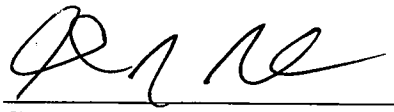
discrimination, as we have shown, is essentially identical to the Fourteenth Amendment's prohibition of that discrimination. See part II-A, *supra*. The statute's prohibition on disparate-impact discrimination (a prohibition that is not at issue in this case) is a valid means of preventing violations of the prohibition on intentional discrimination. See *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."). And the prohibition on retaliation simply ensures that states cannot subvert the statute's enforcement structure. See *Board of County Commrs.*, 405 F.3d at 847-850.

By holding that GERA is *not* valid Section 5 legislation, and by requiring Congress to establish a pattern of discrimination in the specific context of governors' relationships with their close staff, the panel's decision conflicts with the decisions of this Court and the Supreme Court in *Hibbs*, the decision of the Supreme Court in *Lane*, the decision of the Eighth Circuit in *Maitland*, and the decision of the Tenth Circuit in *Crumpacker*. *En banc* review is necessary to resolve these conflicts.

CONCLUSION

This Court should grant rehearing *en banc*.[3]

Respectfully submitted,



SAMUEL R. BAGENSTOS
One Brookings Dr., Box 1120
St. Louis, MO 63130
(314) 935-6856
(314) 935-4029 (fax)
srbagenstos@wulaw.wustl.edu

LEE HOLEN
Lee Holen Law Office
608 W. 4th Ave., Suite 21
Anchorage, AK 99501
(907) 278-0298
(907) 278-0247 (fax)
leeholen@gci.net

[3] If the Court does not grant rehearing *en banc* on the constitutionality of GERA's abrogation of state sovereign immunity, it should at the very least modify the panel's remand order. The panel ordered that the case be remanded to the EEOC "with directions to dismiss the suit." Slip op. at 14716. But Ward has always contended that her claim was properly brought under Title VII, not GERA, see n.1, *supra*; accordingly, the panel should at the very least have directed the agency to dismiss only the GERA case and have remanded the issue of whether Ward presented a Title VII claim to the agency for determination.

No. 07-70174

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,

Petitioner,

v.

UNITED STATES OF AMERICA and the
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents,

and

MARGARET WARD,

Intervenor.

ON PETITION FOR REVIEW FROM THE UNITED
STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

NELSON P. COHEN
United States Attorney

MARLEIGH D. DOVER
(202) 514-3511
STEPHANIE R. MARCUS
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7642
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Of Counsel:

VINCENT J. BLACKWOOD
Assistant General Counsel
PAUL D. RAMSHAW
Attorney
U.S. Equal Employment
Opportunity Commission
Office of General Counsel

TABLE OF CONTENTS

Page

INTRODUCTION AND STATEMENT REQUIRED BY FED. R. APP. P. 35(b) 1

STATEMENT 3

ARGUMENT 7

CONCLUSION 15

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 and 40-1 (FORM 11)

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases:

Board of County Comm'rs, Fremont County v. EEOC, 405 F.3d 840 (10th Cir. 2005) 2, 8, 11

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 12, 13, 15

City of Boerne v. Flores, 521 U.S. 507 (1997) 10

Crumpacker v. Kansas Dept. of Human Res., 338 F.3d 1163 (10th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004) 12

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 8, 11, 14

Fullilove v. Klutznick, 448 U.S. 448 (1980) 10

Gregory v. Ashcroft, 501 U.S. 452 (1991) 14

Guru Nanak Sikh Soc. of Yuba City v. County of Sutter,
456 F.3d 978 (9th Cir. 2006) 2, 9

Hibbs v. Department of Human Res., 273 F.3d 844
(9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003) 2, 9

Johnson v. California, 543 U.S. 499 (2005) 8

Maitland v. University of Minn., 260 F.3d 959
(8th Cir. 2001), *cert. denied*, 535 U.S. 929 (2002) 12

Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721
(2003) 1, 2, 8, 9, 10, 11, 13

Okruhlik v. University of Arkansas, 255 F.3d 615
(8th Cir. 2001) 10

Tennessee v. Lane, 541 U.S. 509 (2004) 1, 2, 7, 8, 9, 12, 13, 15

United States v. Georgia, 546 U.S. 151 (2006) 1, 14, 15

United States v. Virginia, 518 U.S. 515 (1996) 8, 15

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) 12

Washington v. Davis, 426 U.S. 229 (1976) 15

United States Constitution:

Tenth Amendment 2, 11
Eleventh Amendment 1, 2, 5, 7, 8, 9, 10, 11, 12, 13, 14
Fourteenth Amendment 6, 8, 11, 13, 14, 15

Statutes:

Civil Rights Act of 1991, Pub. L. No. 102-166
(November 21, 1991) 3

42 U.S.C. § 2000e-16 . . . . . 3, 13
42 U.S.C. §§ 2000e-16a *et seq* 3
42 U.S.C. § 2000e-16b(a)(1) 1, 3, 7, 8, 11
42 U.S.C. § 2000e-16b(b)(1) 4
42 U.S.C. § 2000e-16b(b)(3) 13
42 U.S.C. § 2000e-16c(a) 3
42 U.S.C. § 2000e-16c(b)(1) 3
42 U.S.C. § 2000e-16c(b)(2) 3, 4
42 U.S.C. § 2000e-16c(c) 4
42 U.S.C. § 2000e-16c(d) 4

42 U.S.C. § 1981a(a) 4
42 U.S.C. § 1981a(a)(1) 13
42 U.S.C. § 1981a(b)(2) 4
42 U.S.C. § 1981a(b)(3) 13

42 U.S.C. § 2000e-5(d) 3-4
42 U.S.C. § 2000e-5(g) 4
42 U.S.C. § 2000e-5(k) 4

42 U.S.C. § 2000e-16(d) 4

Legislative Materials:

H.R. Rep. No. 40(II), 102nd Cong., 1st Sess. 1991,
reprinted in 1991 U.S.C.C.A.N. 694 (1991) 2

INTRODUCTION AND STATEMENT REQUIRED BY FED. R. APP. P. 35(b)

Respondents the United States and the Equal Employment Opportunity Commission ("EEOC") respectfully petition this Court for panel rehearing and, in the alternative, for rehearing en banc.

1. A divided panel of this Court held that Congress did not validly abrogate state Eleventh Amendment immunity when, in Section 2000e-16b(a)(1) of the Government Employee Rights Act of 1991 ("GERA"), it extended the protections of Title VII to previously-excluded state appointees, including individuals appointed to be members of an elected official's personal staff. The panel majority concluded that Congress had not created an adequate legislative record with respect to discrimination by States against such appointees.

The panel majority's decision conflicts with the Supreme Court's analysis in recent Eleventh Amendment cases. *E.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004); *Nevada Dept. of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003); *United States* v. *Georgia*, 546 U.S. 151 (2006). Like Title VII itself, the challenged sections of GERA target classifications based on race, sex, religion, color or national origin that are subject to strict or heightened scrutiny. Analysis of the validity of the abrogation of immunity in GERA thus is distinguishable from analysis of the validity of an abrogation of immunity in legislation that addresses state action subject to rational-basis scrutiny. Indeed, it is "easier for Congress to show a pattern of state constitutional violations" here than it would be in cases where the legislation at issue "target[s] classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (internal quotations omitted).

The Supreme Court's recent decisions in *Hibbs* and *Lane*, *supra*, upholding Congress's abrogation of State sovereign immunity in the Family and Medical Leave Act ("FMLA") and in cases involving the right of access to the courts under Title II of the Americans with Disabilities Act ("ADA") respectively, confirm this

distinction. *Hibbs*, 538 U.S. at 728-40; *Lane*, 541 U.S. at 518-34. In holding that Congress had not created an adequate legislative record in 1991, when, in GERA, it extended Title VII to previously-exempt state employees, the panel majority failed even to address this distinction, and therefore departed from binding Supreme Court precedent.

2. The panel's decision also conflicts with this Court's Eleventh Amendment precedent. This Court has made clear the difference in analysis -- with respect to both the sufficiency of legislative findings and the proportionality of the remedy -- where, as here, Congress is attempting to remedy and prevent presumptively invalid classifications by States that are subject to heightened or strict scrutiny. *E.g.*, *Hibbs* v. *Department of Human Res.*, 273 F.3d 844, 849-50 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003); *Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006). In addition, the panel's ruling is in tension with the Tenth Circuit's decision in *Board of County Comm'rs, Fremont County* v. *EEOC*, 405 F.3d 840, 849 (10th Cir. 2005) ("*Fremont County*") upholding GERA against a Tenth Amendment challenge, and with decisions of other courts of appeals rejecting Eleventh Amendment challenges to Title VII.

3. The issues presented are of exceptional importance not only because the panel's decision conflicts with Supreme Court precedent and precedent of this and other circuits, but also because it fails to effectuate Congress's purpose of protecting state employees covered under GERA from employment discrimination on the basis of race and sex. By invalidating Congress's abrogation of state Eleventh Amendment immunity, the panel majority contravened Congress's intent "to ensure that all persons enjoy full and adequate protection against employment discrimination." H.R. Rep. No. 40(II), 102nd Cong., 1st Sess. 1991 at 2, *reprinted in* 1991 U.S.C.C.A.N. 694 (1991).

STATEMENT

1. The present action arises under the GERA, 42 U.S.C. §§ 2000e-16a *et seq.*, which, *inter alia*, prohibits employment discrimination against state and local appointees who previously were excluded from coverage under Title VII. Congress enacted GERA as part of the Civil Rights Act of 1991, Pub. L. No. 102-166 (November 21, 1991). GERA applies in relevant part to "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).

GERA provides, in pertinent part, that "[a]ll personnel actions affecting" such state or local appointees "shall be made free from any discrimination" based upon "race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title [Title VII of the Civil Rights Act]." 42 U.S.C. § 2000e-16b(a)(1) (emphasis added). GERA thus expressly incorporates the standards of 42 U.S.C. § 2000e-16, which waives sovereign immunity for employment discrimination claims against the federal government under Title VII.

2. Any covered state or local employee under GERA may file a complaint with the EEOC, and the agency "shall determine whether a violation has occurred" and, if so, "shall also provide for appropriate relief." 42 U.S.C. § 2000e-16c(b)(1). The EEOC, prior to acting on a complaint, must refer it to any State or local fair employment practices (FEP) agency authorized by state or local law "to grant or seek relief from" the alleged discrimination. 42 U.S.C. § 2000e-16c(b)(2); 42

U.S.C. § 2000e-5(d). And, upon request by the State or local agency, the EEOC must provide that agency "a reasonable time, but not less than sixty days * * * to act under such State or local law to remedy the practice alleged." 42 U.S.C. § 2000e-5(d)(incorporated by 42 U.S.C. § 2000e-16c(b)(2)). GERA provides that remedies "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title." 42 U.S.C. § 2000e-16b(b)(1).

Any party aggrieved by an EEOC final order under GERA may petition the court of appeals in the appropriate venue for review under the Hobbes Act. 42 U.S.C. § 2000e-16c(c). The court "shall decide all relevant questions of law and interpret constitutional and statutory provisions." 42 U.S.C. § 2000e-16c(d).

3. This action arose out of discrimination complaints filed with the EEOC by Lydia Jones and intervenor Margaret Ward against petitioner the State of Alaska. Excerpts of Record ("ER") 39. Both Jones and Ward were employed by former Governor of Alaska Walter Hickel. ER 16, 29. Ward served as Director of the Governor's Anchorage office, and Jones was a Special Staff Assistant in that office. ER 9, 39. The EEOC determined that Ward and Jones's complaints arose under GERA, and processed the complaints accordingly. See ER 39.

Jones alleged that she was harassed on the basis of sex and race, that the State paid her less than her male counterparts due to her sex and race, and that the State discharged her in retaliation for complaining of discriminatory harassment. ER 29-30. Ward alleged that she was discriminated against on the basis of sex, and that the State terminated her employment in retaliation for supporting Jones' harassment complaint. ER 16.

4. The EEOC referred the complaints to an ALJ, who denied Alaska's

motions for summary decision. ER 19-23, 32-35. The EEOC declined to entertain Alaska's interlocutory appeals. ER 39-43. Alaska filed a petition for review in this Court, alleging, *inter alia*, Eleventh Amendment immunity from suit.

5. On November 8, 2007, a panel of this Court (Wallace, Noonan, Paez) held that Congress did not validly abrogate state Eleventh Amendment immunity when, in GERA, it extended the protections of Title VII to previously-excluded state appointees. Judge Noonan, in the opinion for the court, concluded that because Congress made no specific findings with respect to discrimination by States against such high-level state employees, GERA was not "a proportionate response to a widespread evil identified as the predicate of this legislation." Slip Opinion ("Op.") at 14716. Judge Wallace wrote a separate concurring opinion. Op. 14716-18. Judge Paez dissented. Op. 14719-36.

a. In the principal opinion, Judge Noonan acknowledged that in 1972, Congress "held extensive hearings on discrimination in the treatment of the ten million or more employees of state and local governments," and, based on such hearings, "found extensive gender and racial discrimination by the States." Op. 14713. The "reported instances of discrimination appeared to be across the board," and "[n]o special mention, one way or the other, was made of highly-placed employees serving in posts close to the governor of a State." *Id.*

Judge Noonan concluded, however, that Congress's findings regarding discrimination against state employees in 1972 were insufficient to sustain GERA in 1991. Op. 14714. He stated that "separate provisions of the same act may have different effects on Eleventh Amendment immunity," and, accordingly, the fact that Congress validly abrogated state sovereign immunity in Title VII in 1972 does not necessarily mean that Congress also validly abrogated such immunity when, in 1991, it extended Title VII to previously-excluded state employees. *Id.*

Judge Noonan found 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." Op. 14715. The lack of such findings "is critical," he opined, because "[v]ery few modern governors, it may fairly be assumed unless the contrary were shown, would intentionally discriminate on the basis of gender or race in choosing key advisers, and very few modern governors who did discriminate would be likely to keep their office." Op. 14715-16.

Judge Wallace concurred. In his view, "[w]e do not know why Congress excluded high level state employees in 1972, and the 1990 Congress cannot simply shortcut its action by reference to the 1972 Act." Op. 14718. He stated that although Congress may enact "a statute such as GERA," it must "do so in a prescribed manner" by "develop[ing] an appropriate record." *Id.* According to Judge Wallace, Congress's "failure to do so here requires the conclusion that the constitutional protections on state sovereign immunity have not been met." *Id.*

b. Judge Paez dissented. He would have upheld the challenged provisions of GERA as a valid exercise of Congress's authority under the Fourteenth Amendment. Op. 14719. First, Judge Paez found that "there can be no serious doubt that Congress expressed its unequivocal intent in GERA to abrogate the States' Eleventh Amendment immunity." Op. 14722. Second, he concluded that, in abrogating state sovereign immunity, Congress acted within its authority under Section 5 of the Fourteenth Amendment. Op. 14725-36.

Judge Paez disagreed with the majority's holding that Congress had to make specific findings regarding discrimination by State elected officials against their appointees in order to validly abrogate state immunity. Op. 14731. He observed that "[w]here, as here, the remedial legislation protects against discrimination on the basis of classifications subject to heightened or strict scrutiny, and the

evidence before Congress established a history of discrimination by the States on the basis of these classifications, the [Supreme] Court has not invalidated such legislation on the ground that the evidence was not exactly or explicitly tailored to the harms that Congress sought to remedy." *Id.* Thus, "given the deference we owe to Congress when it exercises its § 5 authority, it was entitled in enacting GERA to rely on the extensive evidence from 1972 of widespread race and gender-based discrimination by the States against their employees."[1] Op. 14732.

ARGUMENT

The panel majority departed from well-settled Supreme Court and circuit precedent by holding that Congress did not validly abrogate state Eleventh Amendment immunity when it enacted Section 2000e-16b(a)(1).

1. a. To validly abrogate the States' Eleventh Amendment immunity, Congress must have "unequivocally expressed its intent to abrogate that immunity," and must have "acted pursuant to a valid grant of constitutional authority." *Lane*, 541 U.S. at 517 (internal quotations omitted). The panel majority did not dispute that Congress clearly expressed its intent to abrogate state Eleventh Amendment immunity.[2] We therefore focus on the second requirement for abrogating state immunity -- that Congress "acted pursuant to a valid grant of constitutional authority." *Lane*, 541 U.S. at 517 (internal quotations omitted).

b. To be valid under Section 5, legislation "must exhibit congruence and

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[1] Judge Paez further concluded that the remedies created by GERA are congruent and proportional to the employment discrimination based on race and gender that the statute was enacted to prevent. Op. 14733-35.

[2] As noted, the dissent addressed the issue, and correctly concluded that Congress unequivocally intended to abrogate state Eleventh Amendment immunity. See op. 14719-25; see also Brief For Respondents 15-17.

proportionality between the injury to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. at 728 (internal quotations omitted). Like Title VII itself, the challenged sections of GERA are directed at the central Fourteenth Amendment end of preventing state employment discrimination on the basis of race and sex. In GERA Section 2000e-16b(a)(1), Congress targeted classifications based on race, sex, religion, color or national origin that are subject to strict or heightened scrutiny. *E.g.*, *Johnson* v. *California*, 543 U.S. 499, 505 (2005); *United States* v. *Virginia*, 518 U.S. 515, 532-33 (1996). Analysis of the validity of the challenged provisions of GERA thus is distinguishable from analysis of the validity of legislation that addresses state action subject to rational-basis scrutiny. *E.g.*, *Lane*, 541 U.S. at 529; *Hibbs*, 538 U.S. at 736.

Moreover, by extending the protections of Title VII against employment discrimination to previously-excluded state employees, GERA was "the last step in the sequence of broadening Title VII to provide protections to state employees, the intermediate steps of which were explicitly stated by Congress to be based on its Fourteenth Amendment powers." *Fremont County*, 405 F.3d at 849. At the time GERA was enacted, the Supreme Court had already sustained the abrogation of state Eleventh Amendment immunity in the 1972 amendments to Title VII. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). Because GERA is the "last step" in providing state employees with Title VII protections in response to the history of pervasive race and gender discrimination by the States, Congress also validly exercised its authority under Section 5 of the Fourteenth Amendment when it enacted GERA Section 2000e-16b(a)(1).

2. In the present case, the panel majority held that Congress did not validly abrogate state sovereign immunity because it did not create an adequate legislative record. Op. 14715-16; op. 14717-18. The majority overlooked the Supreme

Court's admonition that "where, as here, Congress is attempting to remedy discrimination that triggers such heightened or strict scrutiny, it is "'easier for Congress to show a pattern of state constitutional violations'" than in cases where the legislation at issue "target[s] classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 736). Indeed, the Supreme Court's recent decisions in *Hibbs* and *Lane*, *supra*, make clear the difference in Eleventh Amendment analysis where, as here, Congress is attempting to remedy presumptively invalid classifications by States that are subject to heightened or strict scrutiny. *Lane*, 541 U.S. at 529-31; *Hibbs*, 538 U.S. at 735-37.

This Court has also recognized this distinction. In its *Hibbs* decision, which the Supreme Court affirmed, this Court explained the "ways in which the heightened scrutiny to which state-sponsored gender discrimination is subject justifies shifting or modifying the burden of proof in the legislative history inquiry." 273 F.3d at 858. And in *Guru Nanak Sikh Soc.*, this Court held that it is easier for Congress to show a pattern of state constitutional violations where the legislation at issue targets regulations or classifications subject to strict scrutiny. 456 F.3d at 993. As the dissent recognized (op. 14727-28), under Supreme Court and circuit precedent, Congress therefore did not need to create a new legislative record showing a "history and pattern of unconstitutional conduct or discrimination by elected State officials that it was purporting to remedy." Nonetheless, in holding that Congress did not create an adequate legislative record in enacting GERA, neither the principal opinion nor the concurrence even acknowledged the distinction. Op. 14715-16; op. 14718 (Wallace, J., concurring).

The panel majority's insistence that Congress had to create an entirely new legislative record of unconstitutional discrimination by state officials when it enacted GERA is particularly inappropriate in light of the Supreme Court's

recognition of the history and persistence of state gender and race discrimination. *E.g.*, *Hibbs*, 538 U.S. at 729-30 (Court upholds Congress's abrogation of state Eleventh Amendment immunity in family-care leave provision of FMLA, which was enacted in 1993 -- *after* Congress enacted GERA -- based on "long and extensive history of sex discrimination" by States, and "persistence of such unconstitutional discrimination"); *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997) (Court notes that it has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination").

Moreover, "[a]fter Congress has legislated repeatedly in an area of national concern," such as combating race and gender discrimination in employment, "its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring). This principle applies here. Congress not only enacted the 1972 amendments to Title VII, the legislative history of which, as the panel majority acknowledged (Op. 14713), identified serious and pervasive unconstitutional state employment discrimination, but also at that time was considering the Equal Rights Amendment and the Education Opportunity Act. *Okruhlik* v. *University of Arkansas*, 255 F.3d 615, 625 (8th Cir. 2001). Congress "held extensive hearings and received numerous reports detailing racial and gender discrimination by the states," and "identified a history and pattern of discrimination by the states on the basis of both race and gender." *Id.* And GERA was enacted as part of the Civil Rights Act of 1991, a statute that Congress found "necessary to provide additional protections against unlawful discrimination in employment." 42 U.S.C. § 1981 note.

3. The panel majority's analysis is also in tension with that of the Tenth Circuit in *Fremont County*, 405 F.3d at 849. In that case, the Tenth Circuit held -- albeit in the context of a Tenth Amendment challenge -- that in enacting GERA, Congress acted within its authority under Section 5 of the Fourteenth Amendment. 405 F.3d at 847-50. As the Tenth Circuit recognized, GERA was not enacted in isolation to prohibit only discrimination by state elected officials. To the contrary, by extending the protections of Title VII against employment discrimination to previously-excluded state and local government employees, GERA was "the last step in the sequence of broadening Title VII to provide protections to state employees, the intermediate steps of which were explicitly stated by Congress to be based on its Fourteenth Amendment powers." *Id.* at 849. Thus, "[d]espite the lack of direct legislative history on GERA, § 2000e-16b(a)(1) is the result of a continuing congressional expansion of protections for state employees against racial and gender discrimination, the origins of which were expressly enacted pursuant to Congress's § 5 authority." *Id.* at 849-50.

As noted, when Congress took this "last step" of broadening Title VII in 1991, the Supreme Court had already sustained the abrogation of state Eleventh Amendment immunity in Title VII itself. *Fitzpatrick*, 427 U.S. at 452-57; *Hibbs*, 538 U.S. at 729-30. Rather than viewing GERA as the "last step" in the incremental broadening of Title VII to provide protection to state employees, however, the panel majority viewed GERA too narrowly, and erroneously imposed a requirement that Congress create a new legislative record regarding state discrimination against the subset of state employees covered by GERA.

4. In addition, as the dissent explains (op. 14730-33), when the majority held that the extensive evidence of employment discrimination by the States that supported the 1972 amendments to Title VII was insufficient evidence of

discrimination against the particular state employees covered under GERA, it parsed the legislative history too finely, and conflicted with the analysis of other courts of appeals. In rejecting Eleventh Amendment challenges to Title VII, other courts of appeals have emphasized that Congress need not create a legislative record for each type of Title VII claim; rather, the general record of State gender and race discrimination sufficed. *Crumpacker* v. *Kansas Dept. of Human Res.*, 338 F.3d 1163, 1169-70 (10th Cir. 2003), (Congress need not identify pattern of State retaliatory conduct to abrogate state immunity for Title VII retaliation claims), *cert. denied*, 540 U.S. 1180 (2004); *Warren* v. *Prejean*, 301 F.3d 893, 899 (8th Cir. 2002) (same); *Maitland* v. *University of Minn.*, 260 F.3d 959, 963-65 (8th Cir. 2001) (Congress need not establish separate pattern of state employment discrimination against men), *cert. denied*, 535 U.S. 929 (2002).

Similarly, Congress need not create a separate record of state constitutional violations committed by elected government officials to justify GERA; legislative history and Supreme Court precedent demonstrating a long history of unconstitutional state sex and race discrimination is sufficient. In rejecting this argument in the present case, the majority found it significant that the Supreme Court has treated separate provisions of the same statute differently for Eleventh Amendment purposes. Op. 14714. But the cited example -- the ADA -- helps illustrate our central point: Classifications that are subject to heightened or strict scrutiny or implicate fundamental rights are treated differently for Eleventh Amendment purposes. In *Lane*, the Court upheld Congress's abrogation of state Eleventh Amendment immunity in Title II of the ADA as applied to cases involving the fundamental right of access to the courts. 541 U.S. at 531. In *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001), however, when it held that Congress did not validly abrogate state sovereign immunity in Title I of the

ADA, the Court addressed claims of disability discrimination that did not implicate fundamental rights or classifications subject to heightened or strict scrutiny. In contrast to the ADA provisions at issue in *Lane* and *Garrett*, the challenged provisions of GERA target the same presumptively invalid classifications targeted by Title VII, and it thus makes no analytical difference that GERA is a separate provision from the 1972 amendments to Title VII.

5. Congress provided for remedies in GERA that are congruent with and in proportion to the Fourteenth Amendment violations that Congress intended to remedy or prevent. GERA does not require employers to provide employees with any substantive benefit; rather, it merely incorporates the remedies that are available in Title VII actions against the federal government under Section 2000e-16. Notably, Congress provided that remedies against state employers "may not include punitive damages," 42 U.S.C. § 2000e-16b(b)(3) and capped liability for compensatory damages at between $50,000 to $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3). Moreover, the damages remedy is available only against employers who "engaged in unlawful intentional discrimination." 42 U.S.C. 1981a(a)(1).[3]

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[3] Contrary to the majority's suggestion (op. 14715), the fact that the Supreme Court in *Hibbs* cited the FMLA's exclusion of state elected officials and their appointees from its coverage as a factor in upholding the Act's remedies as congruent and proportional does not change the Eleventh Amendment analysis here. Unlike the FMLA, GERA does not provide for substantive benefits regardless of whether discrimination is proven. As noted, that is one of many factors that render GERA's remedies congruent and proportional. At the same time, the fact that the FMLA *does* provide for such substantive benefits does not make the FMLA's remedies disproportionate for purposes of the Eleventh Amendment (see *Hibbs*).

The majority's reliance on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and its concerns about state sovereignty (op. 14715) also are misplaced. The "'Eleventh

6. For the foregoing reasons, Congress validly abrogated state Eleventh Amendment immunity when, in GERA, it extended the protections of Title VII to previously-excluded state employees. Even if this Court does not agree that Congress validly abrogated state sovereign immunity for all claims cognizable under the challenged provisions of GERA, however, it should grant rehearing because the panel's decision conflicts with *United States* v. *Georgia*, 546 U.S. 151 (2006), insofar as GERA "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." 546 U.S. at 159. Under *Georgia*, Congress's abrogation of state sovereign immunity must be valid to the extent that GERA creates a private cause of action against the State for conduct that violates the Fourteenth Amendment. *Id.* A large percentage of claims under GERA also would state a claim for an equal protection violation, including claims of intentional disparate treatment on the basis of race or sex.[4] See *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Virginia*, 518 U.S. at 532.

This Court need not determine to what extent complainants' GERA claims

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Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" *Hibbs*, 538 U.S. at 527 (quoting *Fitzpatrick*, 427 U.S. at 456). Moreover, *Gregory* did not involve an Eleventh Amendment challenge or application of the congruence and proportionality test. In *Gregory*, the Court made clear that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States," and "Congress may legislate in areas traditionally regulated by the States." 501 U.S. at 460. Thus, regardless of whether Congress had federalism concerns when it initially decided to exclude state appointees, it had authority under the Fourteenth Amendment to extend Title VII's protections to such appointees.

[4] Here, at least one of complainants' claims on its face alleges such a violation: Jones alleged that she was paid less than similarly-situated men, and that "this was intentionally imposed due to my sex, female and my race, black." ER 9.

also allege constitutional violations, however. As the Supreme Court has repeatedly held, "Congress' power to enforce the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Garrett*, 531 U.S. at 365 (internal quotations omitted). In *Georgia* and *Lane*, because the provision at issue (Title II of the ADA) targets disability discrimination subject to rational-basis review, the Court examined whether plaintiffs' claims either implicated fundamental rights (such as access to the courts, see *Lane*) or challenged conduct that *actually* violates the Constitution (see *Georgia*) . That kind of inquiry is unnecessary here because the challenged provisions of GERA target presumptively invalid classifications based on race and sex.

CONCLUSION

For the foregoing reasons, this case should be reheard by the panel or, in the alternative, by the full Court en banc.

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

NELSON P. COHEN
United States Attorney

MARLEIGH D. DOVER
(202) 514-3511
STEPHANIE R. MARCUS Stephanie R. Marcus
(202) 514-1633
Attorneys, Appellate Staff
Civil Division, Room 7642
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Of Counsel:

VINCENT J. BLACKWOOD
Assistant General Counsel
PAUL D. RAMSHAW
Attorney
U.S. Equal Employment Opportunity Commission
Office of General Counsel

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I hereby certify that on this 21st day of December, 2007, I transmitted the foregoing Petition for Panel Rehearing and for Rehearing En Banc for filing to the Clerk of this Court by causing an original and fifty copies to be sent by Federal Express, and I served the foregoing Petition for Panel Rehearing and for Rehearing En Banc on the following by causing two copies to be sent by Federal Express or first-class mail, postage prepaid, as specified, to:

Brenda B. Page
Attorney General's Office
1031 W. 4th Avenue
Suite 200
Anchorage, AK 99501
(By Federal Express)

Lee Holen
608 W. 4th Avenue
Suite 21
Anchorage, AK 99501
(By Federal Express)

Samuel R. Bagenstos
One Brookings Dr., Box 1120
St. Louis, MO 63130
(By Federal Express)

Kenneth C. Miller
9228 Dansk Ridge Ct., Apt. F
Indianapolis, IN 46250
(By first-class mail)

Stephanie R. Marcus

No. 07-70174

United States Court of Appeals for the Ninth Circuit

STATE OF ALASKA, OFFICE OF THE GOVERNOR, *Petitioner*,

v.

UNITED STATES OF AMERICA and the U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondents,*

and

MARGARET WARD, *Intervenor.*

Appeal from a Decision by the U.S. Equal Opportunity Commission, Appeal Nos. 11A40004 and 11A40005

The State of Alaska's Consolidated Response to Repondents' Petition for Rehearing and Rehearing En Banc and Intervenor's Petition for Rehearing En Banc

TALIS J. COLBERG
ATTORNEY GENERAL
STATE OF ALASKA

By: Brenda B. Page
Assistant Attorney General
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501
907/269-5159
907/258-4978 (fax)
brenda.page@alaska.gov
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. The Panel Majority Properly Applied The Supreme Court's Criteria In Holding That Congress Did Not Validly Abrogate Sovereign Immunity In Enacting GERA 3

A. In Its Abrogation Analysis, The Panel Majority Correctly Considered Whether There Was A Record Of Constitutional Violations Against The High-Level State Employees Covered By GERA 5

B. The Supreme Court's *Hibbs* Decision Supports The Majority's Conclusion That The 1972 Findings Of Discrimination Did Not Justify Enactment Of GERA In 1991 15

II. The Panel Majority's Decision Does Not Conflict With The Supreme Court's Decision In *U.S. v. Georgia* 17

III. The Panel Majority's Decision Does Not Conflict With The Tenth Circuit's Decision In *Fremont County* 22

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

Alaska v. EEOC, 508 F.3d 476 (2007) ..... *passim*

Bates v. Hunt, F.3d 374 (11th Cir. 1993) 10

Biggs v. Krieger, 189 F.3d 989 (9th Cir. 1999) 10

Board of County Commr's, Freemont County v. EEOC,
405 F.3d 840 (10th Cir. 2005) 22, 23

Board of Trustees of the Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 6, 20, 23

Branti v. Finkel, 445 U.S. 507 (1980) 11

City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*

Clos v. Minnesota, 2007 WL 3046229 (D. Minn. September 12, 2007) 20

Connick v. Myers, 461 U.S. 138 (1983) 10

Crumpacker v. Kansas, Dep't of Human Res.,
338 F.3d 1163 (10th Cir. 2003) 14

Elrod v. Burns, 427 U.S. 347 (1976) 11

Escobar Ruiz v. INS, 813 F.2d 283 (9th Cir. 1986) 17

Fazio v. City and County of San Francisco, 125 F. 3d 1328 (9th Cir. 1997) 11

Gregory v. Ashcroft, 501 U.S. 452 (1991) 8, 9

Grizzle v. Oklahoma Dep't of Veterans Affairs,
2006 WL 3227880 (E.D. Okla. November 2, 2006) 20

Hobler v. Breuher, 325 F.3d 1145 (9th Cir. 2003) 11

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) ..... *passim*

Maitland v. Univ. of Minn., 260 F.3d 959 (8th Cir. 2001) 14

McVey v. Stacy, 157 F.3d 271 (4th Cir. 1998) 10

Moran v. Washington, 147 F.3d 839 (9th Cir. 1998) 10

Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) ..... *passim*

Picazo v. Alameida, 366 F.3d 971 (9th Cir. 2004) 17

Pittman v. Oregon, 509 F.3d 1065 (9th Cir. 2007) 20

Quern v. Jordan, 440 U.S. 332 (1979) 20

Shahar v. Bowers, 114F.3d 1097 (11th Cir. 1997) 7

Sugarman v. Dougall, 413 U.S. 634 (1973) 9, 11

Tennessee v. Lane, 541 U.S. 509 (2004) ..... *passim*

United States v. Georgia, 546 U.S. 151 (2006) ..... *passim*

United States v. Patzer, 284 F.3d 1043 (9th Cir. 2002) 17

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) 14

UNITED STATES CONSTITUTION

First Amendment 9, 10, 11

Tenth Amendment 22

Eleventh Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

FEDERAL STATUTES

29 U.S.C. § 203(e) (2) (C) 12

29 U.S.C. § 630(f) 12

42 U.S.C. § 1981 19

42 U.S.C. § 1983 19

42 U.S.C. § 2000e-16a to 16c 1

42 U.S.C. § 2000(f) 12

42 U.S.C. § 12111(7) 12

42 U.S.C. § 12131 *et seq.* 17

FEDERAL REGULATIONS

29 C.F.R. § 1603.100, 1603.201, 1603.202 21

FEDERAL RULES

Fed. R. App. P. 35(a) 2

Fed. R. App. P. 35(b)(1)(B) 2

Fed. R. App. P. 40(a)(2) 3

THE STATE OF ALASKA'S CONSOLIDATED RESPONSE TO RESPONDENTS' PETITION FOR REHEARING AND REHEARING EN BANC AND INTERVENOR'S PETITION FOR REHEARING EN BANC

INTRODUCTION

The State of Alaska, Office of the Governor, opposes the petitions for rehearing and rehearing en banc. The panel majority correctly held that a suit brought against the State by two former members of the Alaska Governor's staff is barred by the Eleventh Amendment because Congress failed to validly abrogate state sovereign immunity when it enacted the Government Employees Rights Act of 1991 ("GERA").[1]

In GERA, Congress extended the protections of certain federal anti-discrimination laws to a previously-excluded class of state employees—the staff, advisors, and policymakers for elected state officials. Congress enacted GERA, however, "with no findings ... as to state practices of discrimination against employees at this level of government."[2] To validly abrogate state sovereign immunity, Congress's enactment must be an appropriate congruent and proportional response to a record of a history and pattern of state constitutional violations in the area of legislation.[3]

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1 42 U.S.C. § 2000e-16a to 16c.

2 *Alaska v. EEOC,* 508 F.3d 476, 479 (2007).

3 *City of Boerne v. Flores,* 521 U.S. 507, 520, 529-30 (1997).

The panel majority concluded that, with no record of a history and pattern of unconstitutional conduct against the high-level state employees covered by GERA, Congress's enactment of GERA was not a proportionate response. The majority rejected the argument that Congress was entitled to rely on previous findings of discrimination against state employees in general, recognizing that the high-level state employees covered by GERA implicate special state interests that warrant a different Eleventh Amendment analysis.[4] This decision is consistent with decisions of the United States Supreme Court, this Court, and other courts of appeals.

Nevertheless, Margaret Ward petitioned for a rehearing en banc and the United States and the Equal Employment Opportunity Commission (hereafter collectively "Ward") followed with a petition for panel rehearing or for rehearing en banc. Neither petition satisfies the criteria for review.

En banc consideration is "not favored" and "ordinarily will not be ordered" unless it is "necessary to secure and maintain uniformity of the court's decisions" or the proceeding "involves a question of exceptional importance," for example, if "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."[5] Ward has not

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[4] *Alaska*, 508 F.3d at 479-82.

[5] Fed. R. App. P. 35(a), 35(b)(1)(B).

identified any decisions that have addressed the issue in this case—whether Congress properly abrogated state sovereign immunity in enacting GERA. Thus, the panel decision does not conflict with any other court on this issue.

Moreover, the decision comports with the analysis and reasoning of the Supreme Court, this Court, and other courts of appeals as to the requirements for abrogation of Eleventh Amendment immunity. The majority did not overlook or misapprehend any point of law or fact, as required for a petition for panel rehearing.[6] Rather, the decision is well-reasoned and supported by Supreme Court precedent. The petitions establish no basis for rehearing or rehearing en banc and should be denied.

ARGUMENT

I. The Panel Majority Properly Applied The Supreme Court's Criteria In Holding That Congress Did Not Validly Abrogate Sovereign Immunity In Enacting GERA

The Eleventh Amendment grants states immunity from suits brought by private citizens in federal court.[7] The Supreme Court has concluded, however, that Section 5 of the Fourteenth Amendment authorizes Congress to enforce rights guaranteed under Section 1 of that amendment by appropriate legislation.[8] In

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6 Fed. R. App. P. 40(a)(2).

7 *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

8 *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000).

determining whether legislation is appropriate, a court must find that Congress has both "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority."[9]

While "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," it may not attempt to substantively redefine the States' legal obligations.[10] Because it is not easy to discern "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," the Supreme Court applies the three-part "congruence and proportionality" test that it established in the *Boerne* decision.[11]

Under the *Boerne* criteria, a court must analyze (1) the constitutional right or rights that Congress sought to enforce when it enacted the legislation; (2) whether there was a record of a history and pattern of constitutional violations to support Congress' determination; and (3) whether the legislation is an appropriate congruent and proportional response to that history and pattern of constitutional violations.[12] In applying the *Boerne* criteria, the panel majority determined that

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9 *Alaska*, 508 F.3d at 478-49 (quoting *Kimel*, 528 U.S. at 73).

10 *Hibbs*, 538 U.S. at 727-28.

11 521 U.S. at 519-20.

12 *Id.* at 529-36; *Tennessee v. Lane*, 541 U.S. 509, 521-34 (2004).

Congress enacted GERA without any findings of state discrimination against the high-level state employees covered by the act—a determination that Ward does not dispute.[13]

Instead, Ward reasserts the argument that Congress could rely or "piggyback" on the findings of race and sex discrimination by state governments that it made in the hearings that proceeded enactment of the Equal Opportunity Act of 1972. This argument ignores a critical point in the decision, however—that the high-level state employees covered by GERA are different than other state employees and that their employment implicates special state interests.[14] Moreover, regardless of the applicable level of scrutiny, because these employees have special duties and obligations that change the level of constitutional protections attached to their employment, a record of violations as to ordinary state employees cannot justify prophylactic legislation as to them.

A. In Its Abrogation Analysis, The Panel Majority Correctly Considered Whether There Was A Record Of Constitutional Violations Against The High-Level State Employees Covered By GERA

A proper abrogation analysis in this case required the Court to determine whether Congress had a record that showed a history and pattern of

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[13] *Alaska,* 508 F.3d at 479-80.

[14] *Id.*

discrimination for the high-level state employees covered by GERA. Ward argues that GERA was "an extension" of Title VII and therefore the record before Congress when it extended Title VII coverage to the states in 1972 was sufficient to sustain its later enactment of GERA. This argument is without merit because, as the panel majority recognized, "separate provisions of the same act may have different effects on Eleventh Amendment immunity."[15]

These different effects can be triggered when an act's provisions apply in a context that implicates constitutional rights differently.[16] In this case, GERA applies to a distinct type of employee. These employees are unlike those covered by Title VII, both in the level of scrutiny applicable and in the strength of a state's interests. For this reason, a record of state conduct that violated the rights of regular state employees would not necessarily establish the same injury as to high-level political appointees.

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[15] *Alaska,* 508 F.3d at 479.

[16] *See Bd. of Trs. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 360 n.1 (2001) (holding that Title I of the Americans With Disabilities Act ("ADA"), in which the state acts as an employee, did not validly abrogate sovereign immunity, but declining to undertake an abrogation analysis for Title II of the ADA, in which the state acts as a sovereign, noting that the titles have different remedial provisions.); *Lane,* 541 U.S. at 523, 531 n.18 (declining to undertake abrogation analysis for Title II as a whole because each different application of the provision must be judged with reference to the historical experience which it reflects) (quotation omitted).

Ms. Ward and Ms. Jones were not ordinary state employees. They worked in politically sensitive positions, as public advocates for the Governor. Courts and Congress both have long recognized "the general and traditional proposition that positions of confidentiality, policy-making or acting and speaking before others on behalf of the chief are truly different from other kinds of employment."[17]

The circumstances of this case provide a good illustration of that different employment context. The Governor of Alaska appointed Ms. Ward and Ms. Jones to work on his behalf. Ms. Ward was Director of the Office of the Governor in Anchorage, with responsibilities that included supervision of "all operations of [the] Governor's Anchorage Office, including personnel."[18] Her charge was to "[p]romote the goals and agenda of Governor Hickel and his administration."[19] Ms. Jones was a Governor's Special Staff Assistant, with responsibilities that included responding to the voluminous correspondence addressed to the Governor and handling 350 to 450 telephone calls per day. As a Special Staff Assistant, she was expected to be an advocate of the Governor's programs in the legislature and with the public. The job description stated that it

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17 *Shahar v. Bowers*, 114 F.3d 1097, 1104 n.14 (11th Cir. 1997).

18 *Alaska*, 508 F.3d at 477.

19 *Id.*

was "a position of political sensitivity."[20] Yet, during their employment, both women were disloyal to the Governor. Ms. Ward was believed to be improperly assisting the Governor's likely opponent for the forthcoming gubernatorial campaign, and Ms. Jones was suspected of assisting her. While employed, they held a joint televised press conference criticizing the Governor.[21]

Because these positions required political loyalty, organizational cohesiveness, and public confidence, the state's decisions regarding their selection and retention are subject to lesser scrutiny and are given a wide degree of deference. As the panel majority discussed, the Supreme Court has recognized that "the authority of the people of the States to determine the qualifications of their most important government officials" is an authority "that lies at the heart of representative government," and "should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."[22] The Supreme Court has explained that a state's sovereign authority to

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[20] *Id.*

[21] *Id.*

[22] *Gregory v. Ashcroft,* 501 U.S. 452, 460, 463 (1991).

govern its own affairs will, in some situations, be given greater deference by federal courts:

> [W]hile the Equal Protection Clause provides a check on such state authority, "*our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives*." This rule "is no more than ... a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders."[23]

This lessened scrutiny is reflected in many decisions related to states' employment of staff, advisors, and policymakers for elected state officials, where the need for smooth operation of government, organizational cohesiveness, loyalty, public perception, and confidentially are heightened. As many cases illustrate, the states' interests fundamentally alter the analysis of constitutional guarantees afforded to these employees.

For example, courts routinely hold in retaliation cases that high-level state employees' First Amendment rights are diminished in comparison with those

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[23] *Id.* at 462 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)) (emphasis added, citations omitted).

of regular state employees.[24] After an administrative assistant on a Governor's staff was terminated for supporting a lawsuit that a dismissed co-worker had filed against the Governor, the Eleventh Circuit held that the termination did not violate the First Amendment because of the special nature of the position:

> [The Governor] is elected to lead and to serve the state and its people—a mission of extraordinary importance. If he is to be successful in this difficult mission, he must make effective use of his limited staff. And the Governor need not allow events to unfold to the point where disruption and inefficiency in the Governor's office become open and obvious, before he constitutionally can discharge an employee.[25]

In fact, in positions in which close working relationships are essential to fulfilling public responsibilities, "a wide degree of deference to the employer's judgment is appropriate."[26]

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[24] *See, e.g., Biggs v. Krieger,* 189 F.3d 989, 994-95 (9th Cir. 1999) (holding that employee's status as a policymaking or confidential employee would be dispositive of any First Amendment retaliation claim); *Moran v. Washington,* 147 F.3d 839, 846 (9th Cir. 1998) (holding that state's interest in avoiding disruption that hinders efficient operation of the management of the state's internal affairs is magnified when the employee asserting the right serves in a confidential, policymaking or public contact role); *McVey v. Stacy,* 157 F.3d 271, 278 (4th Cir. 1998) (holding that "a public employee, who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee").

[25] *Bates v. Hunt,* 3 F.3d 374, 378 (11th Cir. 1993).

[26] *Connick v. Myers,* 461 U.S. 138, 151-52 (1983).

Similarly, while dismissal of a public employee based on political loyalty or affiliation generally violates the First and Fourteen Amendment rights of that employee, this is not true of an employee in a confidential and policymaking position because that employee's rights yield to the state's vital interest in maintaining government effectiveness and efficiency.[27] The Supreme Court also has established a "political function" exception to the strict scrutiny standard ordinarily applied to alienage discrimination, explaining that because the states have a power and obligation to "preserve the basic conception of a political community," its scrutiny will not be so demanding where it deals with matters resting firmly within a state's constitutional prerogative.[28]

As these cases illustrate, courts have long recognized the states' constitutional prerogative in the hiring and retention of its high-level political

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[27] *See Elrod v. Burns,* 427 U.S. 347, 366-68 (1976) (recognizing that state government has a special interest in securing employees who will loyally implement policies of its democratically elected officials); *Branti v. Finkel,* 445 U.S. 507, 517-20 (1980); *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1333-34 (9th Cir. 1997) (holding no First Amendment violation in terminating assistant district attorney—a policy maker—for political reasons, noting that a public agency would be unmanageable if its head had to retain political enemies in positions of confidence); *Hobler v. Breuher,* 325 F.3d 1145, 1152-54 (9th Cir. 2003) (holding that elected official's secretary was confidential employee excepted from First Amendment protection against patronage dismissal because trust and loyalty between policymaker and his or her secretary was necessary to promote the effective implementation of policy).

[28] *Sugarman,* 413 U.S. at 647-48.

appointees. Likewise, Congress repeatedly has acknowledged that these employees are different from regular state employees. When Congress extended Title VII protection to the states in 1972, in the face of extensive findings of discrimination against state employees, it deliberately excluded the employees covered by GERA.[29] It also did so when it enacted the ADA, the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act.[30]

Most notable for this case are Congress's actions in enacting the Family and Medical Leave Act ("FMLA"). In support of the argument that Congress did not have to create a separate record of unconstitutional conduct against the employees covered by GERA, Ward refers to the "long and extensive history of sex discrimination" by states, and to evidence of "persistence of such unconstitutional discrimination" before Congress when it enacted the FMLA.[31] In the face of that evidence, however, Congress *excluded* high-level state employees from FMLA coverage—the very employees covered by GERA.[32]

Moreover, in analyzing whether the FMLA was a valid abrogation of Eleventh Amendment immunity, the Supreme Court in *Hibbs* found "significant"

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29 42 U.S.C. § 2000(f).

30 42 U.S.C. § 12111(7); 29 U.S.C. § 630(f); 29 U.S.C. § 203(e)(2)(C).

31 EEOC Pet. at 9-10 (quoting *Hibbs*, 538 U.S. at 729-30).

32 *Hibbs*, 538 U.S. at 739 (quotations omitted).

the limitations that Congress placed on the scope of the act because such limitations "tend to ensure that Congress' means are proportionate to ends legitimate under § 5."[33] One limitation "of particular importance to the States" was FMLA's express exclusion from coverage "of state elected officials, their staffs, and appointed policymakers."[34] As the panel majority noted, "*Hibbs* suggests that GERA's expansion of the class of covered employees changes the Eleventh Amendment analysis."[35]

The central question in that analysis is whether GERA was enacted to prevent and deter unconstitutional actions or whether it substantively redefined the states' legal obligations. That determination cannot properly be analyzed without a record of unconstitutional conduct against the employees covered by GERA. Although Ward argues that it is not necessary to "parse" the record so finely, the decisions the petitions cite to demonstrate this point are distinguishable from this

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33 *Id.* at 738-39.

34 *Id.* at 740.

35 *Alaska*, 508 F.3d at 480.

case.[36] Unlike the situations in those cases, GERA does not merely involve a different form of discrimination already covered by Title VII. Instead, because high-level employees implicate states' constitutional prerogatives, GERA may have substantively redefined the states' legal obligations by applying a new administrative remedial scheme to those employees.

Although Congress completely reversed its previous exclusion of coverage for high-level state employees by enacting GERA, there is no evidence that discrimination *against those employees* was "an existing evil" that needed to be remedied. The panel majority properly concluded that without a showing specific to those employees, GERA was not an appropriate congruent and proportional response to a history and pattern of constitutional violations—a holding that is consistent with the Supreme Court's Eleventh Amendment decisions.

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[36] *See Maitland v. Univ. of Minn.*, 260 F.3d 959, 963-65 (8th Cir. 2001) (holding that Title VII did not differentiate between men and woman so separate abrogation analysis was not necessary in light of previous decision that Title VII had validly abrogated sovereign immunity); *Warren v. Prejean*, 301 F.3d 893, 899 (8th Cir. 2002) (holding that it was not necessary to conduct separate abrogation analysis for retaliatory conduct covered by Title VII, where Circuit consistently held that Title VII had validly abrogated sovereign immunity); *Crumpacker v. Kansas, Dep't of Human Res.*, 338 F.3d 1163,1169-70 (10th Cir. 2003) (holding that, given evidence of gender discrimination by the states and Congress's recognition that state employees did not have an effective forum to ensure equal employment, retaliation provision of Title VII was congruent and proportional to harm to be remedied).

B. The Supreme Court's *Hibbs* Decision Supports The Majority's Conclusion That The 1972 Findings Of Discrimination Did Not Justify Enactment Of GERA In 1991

While the Supreme Court observed in *Hibbs* that it may be "easier for Congress to show a pattern of state constitutional violations" under a heightened scrutiny standard, it did not relieve Congress of the necessity of making some record or findings related to the subject of its legislation.[37] In arguing that Congress was entitled to rely on its 1972 findings of discrimination for its enactment of GERA, Ward mistakenly relies on the *Hibbs* decision. In fact, *Hibbs* undermines Ward's argument.

In *Hibbs,* the Supreme Court examined whether Congress properly abrogated sovereign immunity when it enacted the FMLA in 1993. Although the FMLA involved a classification subject to heightened scrutiny, the Supreme Court closely examined the extent, type, and specificity of Congress' findings.[38] Notably, Congress did not rely on its existing 1972 findings of discrimination when it enacted the FMLA, but rather considered a wide variety of additional evidence specifically relevant to discrimination in administration of benefits—the subject of the legislation.[39]

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[37] *Hibbs,* 538 U.S. at 736.

[38] *Id.* at 729-735.

[39] *Id.*

In contrast, "[n]othing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policy-makers existed in 1991 when GERA was enacted."[40] The absence of such record is critical because in applying the *Boerne* criteria, "[t]he appropriateness of remedial measures *must be considered in light of the evil presented.* Strong measures appropriate to address one harm may be an unwarranted response to another lesser one."[41]

The issue in this case is not the *extent* of findings before Congress, but rather the *subject* of those findings. Thus, even if the standard for demonstrating the constitutionality of some of the conduct GERA prohibits is difficult to meet, and therefore it is easier for Congress to show a pattern of constitutional violations, Congress still must show some pattern of violations against the employees GERA covers. Under any level of scrutiny, the appropriateness of GERA as a remedial measure must be considered in light of the specific alleged harm it seeks to address—constitutional violations against the high-level state employees covered by GERA.

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[40] *Alaska,* 508 F.3d at 480.

[41] *Kimel,* 528 U.S. at 89 (emphasis added).

II. The Panel Majority's Decision Does Not Conflict with the Supreme Court's Decision in *U.S. v. Georgia*

In the petitions, Ward argues for the first time that, based on the Supreme Court's decision in *U.S. v. Georgia*,[42] Congress need not adduce *any* record of past constitutional violations in enacting GERA "in order to provide a damages remedy in cases in which a Governor is proven to have engaged in unconstitutional discrimination."[43] An argument made for the first time in a petition for rehearing ordinarily is waived and will not be considered by the Court unless the case presents "extraordinary circumstances."[44] Ward has not cited any extraordinary circumstances in support of the new argument and should not be permitted to raise it now. Nevertheless, should the Court decide to consider this argument, the State provides a response.

The Supreme Court's decision in *Georgia* has no application to this case because it is limited to application of Title II of the Americans with Disabilities Act.[45] The Court's decision in *Georgia* was an expansion of its

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[42] 546 U.S. 151 (2006).

[43] Ward Pet. at 13.

[44] *U.S. v. Patzer,* 284 F.3d 1043, 1045 (9th Cir. 2002) (citing *Escobar Ruiz v. INS,* 813 F.2d 283, 285-86 (9th Cir. 1986)); *Picazo v. Alameida,* 366 F.3d 971 (9th Cir. 2004).

[45] 42 U.S.C. §12131 *et seq.; Georgia,* 546 U.S. at 159.

previous decision in *Tennessee v. Lane*[46] and can be correctly understood only in conjunction with that case. In *Lane,* the Court applied the first two steps of its *Boerne* test and found that in enacting Title II Congress had properly established a record of a history and pattern of discrimination against the disabled in state services.[47] The Court declined in *Lane,* however, to apply the third part of the *Boerne* test to Title II as whole.[48] Instead, it left the question whether Title II was an appropriate response to that history and pattern of discrimination to be determined as applied to different contexts of state services.[49]

In *Georgia* the Court addressed whether Title II as applied in prison services was an appropriate response to that history and pattern of discrimination.[50] It concluded that, to the extent Title II prohibited unconstitutional conduct in prison services, the remedy was appropriate. The Court's language is restrictive, however, holding that "insofar as *Title II* creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth

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46 541 U.S. 509 (2004)

47 *Id.* at 524-30.

48 *Id.* at 530-31.

49 *Id.*

50 *Georgia,* 546 U.S. at 154-56.

Amendment, *Title II* validly abrogates sovereign immunity."[51] To contend, as Ward does, that this language "makes clear that Congress need not adduce *any* record of past constitutional violations in order to provide a remedy for state conduct that itself violates the Fourteenth Amendment," is a significant and unwarranted expansion of *Georgia*.[52]

Nothing in *Georgia* suggests that a court can thereafter bypass the other criteria in an abrogation analysis. Under Ward's expansive interpretation, sovereign immunity would be abrogated any time a plaintiff brings a cause of action for a constitutional violation under the ADA, the ADEA, or even 42 U.S.C. § 1981 and 42 U.S.C. § 1983—statutes that primarily enforce constitutional rights—a result that would conflict directly with long-standing decisions holding

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[51] *Id.* at 159 ("Title II" emphasis added; "actually" emphasis omitted).

[52] Ward Pet. at 8.

that the Eleventh Amendment immunizes a state from liability under these statutes.[53]

Moreover, Alaska is not aware that any courts have adopted Ward's argument and applied the Court's analysis in *Georgia* to any statute other than Title II in the two years since that decision. In fact, the two courts addressing the issue expressly rejected such an expansion.[54]

Additionally, the facts in this case are distinguishable from those in *Georgia*. The *Georgia* decision was based on the lower court's holding, and the parties' agreement, that the plaintiff's claims were based on conduct that

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[53] *See, e.g., Kimel,* 528 U.S. at 90 (holding Congress did not validly abrogate sovereign immunity in enacting the ADEA); *Garrett,* 531 U.S. at 374 (holding that legislative record failed to identify pattern of state employment discrimination against the disabled and thus did not support abrogation of sovereign immunity for Title I of the ADA); *Quern v. Jordan,* 440 U.S. 332 (1979) (holding that Section 1983 "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States" as required for an abrogation of sovereign immunity); *Pittman v. Oregon,* 509 F.3d 1065, 1071-72 (9th Cir. 2007) (holding that states enjoy sovereign immunity from suits brought under Section 1981).

[54] *Clos v. Minnesota,* 2007 WL 3046231, at *4 (D. Minn. September 12, 2007) (holding that the Supreme Court's holding in *Georgia* is applicable only to claims under Title II of the ADA and does not abrogate state sovereign immunity for plaintiff's other claims), *overruled in part on other grounds by Clos v. Minnesota,* 2007 WL 3046229 (D. Minn. October 16, 2007); *Grizzle v. Oklahoma Dep't of Veterans Affairs,* 2006 WL 3227880, at *2-4 (E.D. Okla. Nov. 2, 2006) (rejecting argument that the analysis in *Georgia* could be extended to the ADEA).

independently violated the constitution.[55] Hence, the Court had no difficulty in finding that Congress has authority to create a private cause of action for damages against the states "for conduct that *actually* violates the Fourteenth Amendment."[56] No such holding or agreement exists in this case, however. The EEOC acknowledges that most of the claims in this case are not actual independent constitutional violations, noting only that "at least one of complainants' claims on its face alleges such a violation."[57]

Finally, *Georgia*'s holding cannot be applied to GERA claims because of key differences between Title II and GERA. In *Georgia* the Court instructed the district court to consider, on a claim-by-claim basis, whether each claim was an actual constitutional violation and, if not, whether Title II validly abrogated sovereign immunity with respect to that claim.[58] This scheme does not translate to GERA. Unlike Title II, in which a district court can address a multiplicity of claims, including constitutional claims, an administrative law judge under the GERA administrative scheme can hear only GERA claims.[59] In addition, as the

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55 *Georgia,* 546 U.S at 157.

56 *Id.* at 159 (emphasis in original).

57 EEOC Br. at 14 n. 4.

58 *Georgia,* 546 U.S. at 159.

59 29 C.F.R. §§ 1603.100, 1603.201, 1603.202.

The defendants in *Fremont County* were members of a board of county commissioners and, as such, were unable to claim Eleventh Amendment immunity.[64] Thus, the court did not analyze whether GERA was a congruent and proportional response to a record and history of constitutional violations—the central issue in an abrogation analysis and in this case.

As Judge Wallace explained in his concurrence in this case, "[i]t is not that Congress cannot pass a statute such as GERA; it is that it must do so in a prescribed manner. Its failure to do so here requires the conclusion that the constitutional protections on state sovereign immunity have not been met."[65] The panel majority's decision that Congress failed to enact GERA in the manner prescribed for valid abrogation of sovereign immunity does not conflict with the Tenth Circuit's decision in *Fremont County* and does not compel rehearing.

CONCLUSION

The panel majority's decision is well-supported and comports with the decisions of the Supreme Court, this Court and other courts of appeal. Rehearing is not warranted and the petitions for rehearing and rehearing en banc should be denied.

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64 *See Garrett,* 531 U.S. at 369 ("[t]he Eleventh Amendment does not extend its immunity to units of local government").

65 *Alaska,* 508 F.3d at 482.