**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

Jock Orville Autio,

**Plaintiff,**

**v.**

**State of Minnesota,**

**and**

**AFSCME/Local # 3139,**

**Defendants.**

**Court File No. 3-96-383**
**The Honorable Paul A. Magnuson**

**MEMORANDUM OF THE UNITED STATES, AS INTERVENOR, IN OPPOSITION TO DEFENDANT STATE OF MINNESOTA'S MOTION TO DISMISS**

## INTRODUCTION

Plaintiff Jock Autio ("Autio") is an employee of Defendant State of Minnesota ("Minnesota").[1] In his Amended Complaint, Autio has alleged, inter alia, that Minnesota violated Title I of the Americans with Disabilities Act[2] (the "ADA") by subjecting him to discriminatory employment practices because he is disabled and by retaliating against him for exercising his rights under the ADA.[3] Minnesota has moved to dismiss Autio's Amended Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure, contending that the Court lacks subject matter

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[1] Amended Complaint at ¶ 10.

[2] 42 U.S.C. § 12101, et seq.

[3] Amended Complaint at ¶¶ 27-34; 38-40.

jurisdiction of this action.[4] Specifically, Minnesota argues that, under the Supreme Court's ruling in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), the Eleventh Amendment bars Autio from suing Minnesota in federal court for violation of the ADA because Section 502 of the ADA, 42 U.S.C. § 12202, is not a valid exercise of Congress' power to abrogate States' Eleventh Amendment rights.

The United States has intervened in this action for the sole purpose of defending the constitutionality of Section 502's abrogation of States' Eleventh Amendment immunity. Minnesota's arguments to the contrary notwithstanding, States are **not** immune from citizens' lawsuits alleging violations of the ADA because the ADA -- which Congress enacted, inter alia, to promote equal protection of the laws for persons with disabilities -- is a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment. Thus, contrary to Minnesota's arguments, Section 502's unequivocal abrogation of States' Eleventh Amendment immunity is constitutionally valid under the Supreme Court's ruling in Seminole Tribe.

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[4] Autio's Amended Complaint consists of two claims under the ADA and three related claims that are based on Minnesota State law. Thus, Minnesota argues that this Court lacks jurisdiction of Autio's State law claims if it lacks subject matter jurisdiction of Autio's claims under the ADA.

## ARGUMENT

### MINNESOTA IS NOT IMMUNE FROM LAWSUITS ALLEGING VIOLATION OF THE ADA.

The Eleventh Amendment generally bars private citizens from suing States and their agencies and instrumentalities in federal courts. Seminole Tribe, 116 S. Ct. 1114, 1124-25, 1127-28 (1996); Papasan v. Alain, 478 U.S. 265, 276 (1986); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100 (1984). But Eleventh Amendment immunity is not absolute. Congress has the power to abrogate States' Eleventh Amendment immunity by statute.[5] Atascadero State Hosp., 473 U.S. at 241-42. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Seminole Tribe, 116 S. Ct. at 1125.

In Seminole Tribe, the Supreme Court held that Congress can lawfully abrogate States' Eleventh Amendment immunity by statute if the statute passes two tests: (1) Congress must have "unequivocally expressed its intent to abrogate immunity" in the language of the statute, and (2) in enacting the statute, Congress must have "acted pursuant to a valid exercise of power." Seminole Tribe, 116 S. Ct. at 1123. As is shown below, Congress' abrogation of States' Eleventh Amendment immunity in Section 502 of the ADA passes both tests.

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[5] States can also waive their Eleventh Amendment immunity. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241-42 (1985).

### A. Congress Unequivocally Expressed its Intent to Abrogate States' Eleventh Amendment Immunity in Section 502 of the ADA.

Under Seminole Tribe, Congress cannot abrogate States' Eleventh Amendment immunity unless it has "unequivocally expressed" its intent to do so in the statute at issue. Seminole Tribe, 116 S. Ct. at 1123. As Minnesota concedes, Congress' abrogation of immunity in Section 502 of the ADA passes this test.[6] Section 502 of the ADA expressly provides that "**[a] State shall not be immune under the eleventh amendment to the Constitution of the United States** from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202 (emphasis added). Thus, Congress' intent to abrogate States' Eleventh Amendment immunity for suits under the ADA could not be plainer.[7]

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But neither Autio nor the United States contends that Minnesota has done so. Thus, waiver is not an issue in this case.

[6] Defendant State of Minnesota's Memorandum in Support of Motion to Dismiss ("Minnesota's Mem.") at 4.

[7] All of the courts which have considered this question are unanimous in holding that the ADA contains Congress' unequivocal expression of intent to abrogate States' Eleventh Amendment immunity. See Duffy v. Riveland, 98 F.3d 447, 452 (9th Cir. 1996); Mayer v. University of Minnesota, 940 F. Supp. 1474, 1477 (D. Minn. 1996); Hunter v. Chiles, 944 F. Supp. 914, 917 (S.D. Fla. 1996); Niece v. Fitzner, 941 F. Supp. 1497, 1500 (E.D. Mich. 1996); Clark v. State of California, 1996 WL 628221, *5 (N.D. Cal. Oct. 1, 1996)(appeal pending on other grounds); Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994); Eisfelder v. Michigan Dep't of Natural Resources, 847 F. Supp. 78, 82-83 (W.D. Mich. 1993); Martin v. Voinovich, 840 F. Supp. 1175, 1187 (S.D. Ohio 1993).

### B. Congress' Abrogation of the States' Eleventh Amendment Rights in Section 502 of the ADA Was a Valid Exercise of its Powers Under Section 5 of the Fourteenth Amendment.

Under Seminole Tribe, Congress has lawfully abrogated States' Eleventh Amendment rights by statute if the statute in question "[w]as ... passed pursuant to a constitutional provision granting Congress the power to abrogate." Seminole Tribe, 116 S. Ct. at 1125. In its motion to dismiss,[8] Minnesota concedes that Congress has the power to abrogate States' Eleventh Amendment rights when it is legislating pursuant to Section 5 of the Fourteenth Amendment ("Section 5").[9] Thus, under Seminole Tribe, the abrogation of States' Eleventh Amendment immunity in the ADA is constitutionally valid if the ADA is a proper exercise of Congress' power under Section 5.

#### 1. Congress Expressly Invoked Its Powers Under Section 5 of the Fourteenth Amendment When It Enacted the ADA.

Minnesota contends that, since Title I of the ADA is applicable to private entities as well as States, the Court cannot properly conclude that Congress enacted Title I pursuant

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[8] Minnesota's Mem. at 5.

[9] Fitzpatrick, 427 U.S. at 445 (upholding Congress' abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964 as a valid exercise of Congress' powers under Section 5 of the Fourteenth Amendment); Seminole Tribe, 116 S. Ct. at 1125, 1128, 1131 n.15 (reaffirming the holding of Fitzpatrick that Congress can abrogate States' Eleventh Amendment immunity by a statute that is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment).

to Section 5 without an express statement by Congress that it did so.[10] This argument suggests that Congress must expressly state that it is acting pursuant to Section 5 with respect to each and every statutory provision that applies to a State in order for the Court to conclude that those statutory provisions are constitutional. But the Supreme Court does not follow this approach. "The ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948). Congress does not need to state that it is acting pursuant to Section 5 in order to enact legislation that is a constitutionally valid exercise of its Section 5 powers. As the Supreme Court noted,

> [i]t is in the nature of [the Court's] review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that [the Court] be able to discern some legislative purpose or factual predicate that supports the exercise of that power. **That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection"**....

EEOC. v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (emphasis added).

Moreover, there is no need for this Court to draw any inferences whatsoever in order to conclude that Congress was invoking its powers under Section 5 because Congress expressly invoked its Fourteenth Amendment power. In Section 2(b) of the

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[10] Minnesota's Mem. at 12-14.

ADA, Congress stated: "It is the purpose of this Act ... to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment ..., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).[11] Since the Fourteenth Amendment governs only State actors, Congress need not have invoked its Fourteenth Amendment powers except insofar as it intended the ADA to apply to States. Thus, contrary to Minnesota's argument, there is no reason to presume that Congress was not invoking these powers for the purpose of enacting Title I of the ADA.

**2. The ADA Is Appropriate Legislation to Enforce the Equal Protection Guarantees of the Fourteenth Amendment.**

Minnesota contends that the ADA is not "appropriate legislation" under Section 5.[12] But a statute is "appropriate legislation" under Section 5 if the statute "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is

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[11] Minnesota's reliance on Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996), is therefore inappropriate. Wilson-Jones addressed the question whether the Fair Labor Standards Act ("FLSA"), a statute that was not directed at discrimination and expressly invoked only the Commerce Clause, could be regarded as an enactment to enforce the Equal Protection Clause. Unlike the FLSA, Congress expressly invoked the Fourteenth Amendment in the text of this anti-discrimination statute. Thus there can be no question that Congress intended the statute to be regarded as Section 5 legislation. See Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997) (limiting Wilson-Jones).

[12] Minnesota's Mem. at 5-12; Defendant State of Minnesota's Reply Memorandum Supporting its Motion to Dismiss ("Minnesota's Reply Mem.") at 2-6.

'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). The ADA satisfies each of these requirements.

The ADA is "appropriate legislation" to enforce the Equal Protection Clause for three separate reasons. Katzenbach, 384 U.S. at 649-50. First, the ADA prohibits discrimination on the basis of disability by government actors. Indeed, the ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). And, as Congress has found, individuals with disabilities comprise:

> a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions . . .

42 U.S.C. § 12101(a)(7). The ADA is, therefore, an enactment to enforce the protections of the Fourteenth Amendment. Morgan, 384 U.S. at 651.[13] Second, the substantive provisions of the ADA are "plainly adapted to that end [i.e., enforcing the Equal Protection Clause]," see id. -- they are designed to ensure that

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[13] See also Niece v. Fitzner, 941 F. Supp. at 1497 (holding that the ADA has "the purpose of furthering 'the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious actions....'") (quoting EEOC v. Calumet County, 686 F.2d 1249, 1252 (7th Cir. 1982)).

persons with disabilities are protected from discriminatory State conduct and are provided with employment opportunities that are equal to those enjoyed by non-disabled individuals. Third and finally, the ADA is "consistent with 'the letter and spirit of the constitution.'" Id. (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)); see id. at 648-49 (Section 5 authorizes Congress not only to provide remedies for violations of the Fourteenth Amendment but also to amplify its substantive protections).[14]

**3. Contrary to Minnesota's Assertions, the Fourteenth Amendment Does Protect Persons with Disabilities from Discrimination.**

Minnesota contends that the ADA is not "appropriate legislation" to enforce the Equal Protection Clause because it creates a new classification of persons -- i.e., persons with disabilities -- whom the Fourteenth Amendment was not designed to protect.[15] But discrimination on the basis of disability is prohibited by the Equal Protection Clause. In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Supreme Court unanimously declared unconstitutional a decision by a city to deny a special use permit for the operation of a group home

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[14] Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., concurring and dissenting) (Congress' power to enforce the Fourteenth Amendment includes "the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").

for people with mental retardation. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "entirely unprotected from invidious discrimination." Id. at 446. Instead, the majority found a violation of the Equal Protection Clause because "the record [did] not reveal any rational basis" for the decision to deny a special use permit -- it revealed, instead, "an irrational prejudice" against persons with mental retardation. Id. at 447, 450.

Minnesota argues that the ADA cannot be regarded as a statute to enforce the Equal Protection Clause because classifications on the basis of disability are not "suspect" or "quasi-suspect." But the terms "suspect" and "quasi-suspect" describe the degree of scrutiny that a court uses to examine legislative actions. It does not govern the power of Congress to legislate pursuant to its plenary power under Section 5. As another judge of this court explained in Mayer v. University of Minnesota, 940 F. Supp. 1474, 1479 (D. Minn. 1996),

> [t]he fact that the Supreme Court has subjected governmental classifications involving suspect classes to a higher level of scrutiny than other classifications does not prevent Congress from finding that another class of persons has been subjected to a history of unequal treatment and legislating pursuant to its enforcement powers under the Fourteenth

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[15] Minnesota's Mem. at 6-11; Minnesota's Reply Mem. at 2-5.

> Amendment to protect that class of persons from arbitrary discrimination.

Moreover, the Supreme Court explained that the rational-basis standard for evaluating most equal protection claims "reflect[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). Thus, the question whether "the line might have been drawn differently ... is a matter for legislative, rather than judicial, consideration." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980). The institutional limitations that generally constrain the judiciary to employ a standard of rational review in evaluating claims based on the Equal Protection Clause are, by definition, inapplicable to Congress. They provide no basis for restricting Congress' power to legislate to enforce the rights created by the Equal Protection Clause of the Fourteenth Amendment under Section 5. Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879) (holding that Congress is authorized by the Fourteenth Amendment to enact whatever legislation it determines is appropriate to secure to all persons "the enjoyment of perfect equality of civil rights and the equal protection of the laws"); Fullilove v. Klutznick, 448 U.S. 448 (1980) (when legislating under § 5, "[i]t is fundamental that in no organ of government, state or federal,

does there repose a more comprehensive remedial power than in the Congress").[16] As Representative Dellums explained during the enactment of the ADA, Congress is "empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are 'able-bodied,' not just those who own property -- but every citizen shall enjoy the equal protection of the laws." 136 Cong. Rec. 11,467 (1990); see also id. at 11,468 (remarks of Rep. Hoyer).

Minnesota cites Oregon v. Mitchell, 400 U.S. at 112, for the proposition that the Equal Protection Clause affords no protection to persons who are not members of a suspect or quasi-suspect class. But Oregon is not relevant to the issues before this Court. In Oregon, a majority of the Court voted to invalidate Congress' attempt to lower the voting age in State elections from 21 to 18. The statute at issue in Oregon was not struck down because it involved age -- a non-suspect characteristic. Rather, it was invalidated because it imposed a

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[16] Accord Katzenbach v. Morgan, 384 U.S. at 648; Oregon v. Mitchell, 400 U.S. 112, 118 (1970); Flores v. Boerne, 73 F.3d 1352 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3017 (U.S., Oct. 15, 1996); Martin v. Voinovich, 840 F. Supp. 1175, 1187 (S.D. Ohio 1993).

See also City of Rome v. United States, 446 U.S. at 156, 175-78 (1980) (holding that, under the Fifteenth Amendment, Congress can ban state activities that, although constitutional, "create the risk" that constitutional rights will be infringed). Cases interpreting the enforcement clauses of the Thirteenth and Fifteenth Amendments inform the Court's reading of the Fourteenth Amendment. See, e.g., City of Rome, 446 U.S. at 207-08 n.1

nationwide voting age by altering qualifications for State elections -- a power committed to the States by the express language of the Constitution -- and because it did not purport to remedy discrimination of any kind.[17] Moreover, any implication in Oregon that Congress was limited in exercising its Section 5 authority to legislate only with regard to suspect classifications was repudiated by the Supreme Court in Maher v. Gagne, 448 U.S. 122 (1980). In Maher, the plaintiff brought a suit under 42 U.S.C. § 1983 against a State official alleging that certain State Aid to Families with Dependent Children ("AFDC") regulations violated the Fourteenth Amendment's Equal Protection and Due Process Clauses by creating arbitrary, but non-suspect, classifications. Id. at 124-125 & n.5. After the parties entered into a consent decree, the plaintiff sought attorney's fees pursuant to 42 U.S.C. § 1988. The State official

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(Rehnquist, J., dissenting) (citing cases); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).

[17] Justice Black took the position that the Constitution reserved to the States the power to establish voter qualifications in State and local elections and, unless necessary to remedy racial discrimination, Congress could not interfere with the States' exercise of that power. See 400 U.S. at 130. Justice Harlan voted to invalidate the legislation because, in his view, the Fourteenth Amendment simply did not encompass "political rights" or, more specifically, the right to vote and, therefore, Congress had no power to legislate with respect to voter qualifications pursuant to Section 5. See 400 U.S. at 140. Justice Stewart, writing for himself, Chief Justice Burger, and Justice Blackmun, agreed with Justice Black that the Constitution reserves to the States the power to set voter qualifications, including reasonable age limitations, and concluded that, unlike the situation presented in Katzenbach v. Morgan, there was no basis for regarding reduction of the minimum voting age to 18 as necessary to prevent invidious discrimination of any sort. See 400 U.S. at 203-206.

argued that such an award was barred by the Eleventh Amendment. The Supreme Court disagreed, holding that "[u]nder § 5 Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claim falls within the category of 'appropriate' legislation." Id. at 132. The Court specifically declined to limit Congress' Section 5 authority to certain types of Fourteenth Amendment claims. See id. at 133 n.16; see also id. at 134-135 (Powell, J., concurring in part).

We are aware of no court of appeals decision that has adopted the approach advocated by Minnesota in this case and limited Congress' Section 5 authority to legislation regarding "suspect" or "quasi-suspect" classifications. To the contrary, the courts of appeals have unanimously upheld the Age Discrimination in Employment Act ("ADEA") as a valid exercise of Congress' Section 5 authority, despite the fact that age is not a suspect classification.[18] [19] Courts of Appeals have also been

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[18] See, e.g., Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 698-700 (1st Cir. 1983); EEOC v. County of Calumet, 686 F.2d at 1251-1252; Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977). See also Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 30 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992).

[19] Minnesota is incorrect in arguing that EEOC v. Wyoming, 460 U.S. 226 (1983), provides a basis for concluding that the ADEA was not a valid exercise of Congress' Section 5 authority. The Court held that the ADEA as applied to States was a valid exercise of Congress' Commerce Clause authority and expressly

unanimous in upholding the constitutionality of the Religious Freedom Restoration Act ("RFRA") as legislation promulgated pursuant to Congress' Section 5 powers.[20]

**4. Congress' Power Under the Fourteenth Amendment Is Not Limited to Prescriptive Legislation.**

Minnesota contends that the ADA is not appropriate legislation under Section 5 because it requires States to take affirmative acts (i.e., make reasonable accommodations) instead of simply prohibiting discriminatory conduct.[21] But Supreme Court jurisprudence does not suggest that Congress' power under Section 5 is limited to prescriptive measures.

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they

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left the Fourteenth Amendment question open. See id. at 243-244 & n.18.

[20] Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 469-70 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d at 1352; United States v. Bauer, 75 F.3d 1366, 1375 (9th Cir. 1996) (dictum suggesting that RFRA is constitutional). Although the Eighth Circuit has not directly addressed the issue, in Hamilton v. Schriro. 74 F.3d 1545 (8th Cir. 1996), Judge McMillian, in a dissenting opinion, expressed the view that RFRA is unconstitutional. Id. at 1559-70 (McMillian, J., dissenting). However, only four months later, in a case which, unlike Hamilton, was decided after the Fifth Circuit's decision sustaining RFRA in Flores, supra, Judge McMillian, writing for himself and Judge Magill, stated that the Eighth Circuit "has at least implicitly held that RFRA is constitutional." In re Young, 82 F.3d 1407, 1417 (8th Cir. 1996).

[21] Minnesota's Mem. at 8-10; Minnesota's Reply Mem. at 4-5.

> contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. (10 Otto) 339, 345-346 (1879). In recent years, the Supreme Court has reiterated this expansive view of Congress' Section 5 powers. In Katzenbach, 384 U.S. at 651, the Supreme Court made clear that Congress' power under Section 5 is not merely prescriptive: "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Similarly, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as "appropriate" legislation under Section 5. It explained 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. at 456 (emphasis added). Since the Supreme Court reaffirmed the holding of Fitzpatrick just last year in Seminole Tribe, there is simply no reason to believe that it would reverse that holding and limit Congress'

plenary authority under Section 5. See 116 S. Ct. at 1125, 1128, 1131 n.15. See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489 (1989) (opinion of O'Connor, J.) (Congress' power to enforce the Fourteenth Amendment includes the power "to adopt prophylactic rules....")

Moreover, Courts have not limited Congressional authority under Section 5 to prescriptive measures in cases involving the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. 1400 et seq., a statute which requires States to take affirmative steps to guarantee "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The four courts of appeals to address the question have held that Congress validly exercised its Section 5 authority to abrogate States' Eleventh Amendment immunity for suits alleging that children with disabilities had been deprived of rights guaranteed by the IDEA. See Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v.Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421 n.7 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1036-1038 (5th Cir. 1983).

**5. The Fourteenth Amendment Can Require Dissimilarly Situated Individuals to Be Treated Differently.**

Relying on Pierce v.King, 918 F. Supp. 932 (E.D.N.C. 1996), Minnesota argues that the reasonable accommodation provisions of the ADA are not appropriate legislation to enforce the Equal Protection Clause because they require "different treatment of dissimilarly-situated individuals."[22] But Congress is not limited to prohibiting unequal treatment of similarly situated individuals when it exercises its broad plenary power under Section 5. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971); see also United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979). The Fourteenth Amendment grants Congress "discretion in determining whether and what legislation is needed" to address such discrimination. Katzenbach v. Morgan, 384 U.S. at 651.

After extensive investigation (and long experience with the analogous non-discrimination requirements contained in Section 504), Congress found that the exclusion of persons with disabilities from employment was not just a result of discriminatory animus; it was also a result of "thoughtlessness

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[22] Minnesota's Mem. at 8 (emphasis omitted).

or indifference -- of benign neglect" to the interaction between "neutral" rules and persons with disabilities.[23] As a result, Congress determined that treating persons with disabilities the same as persons without disabilities was not always sufficient to eliminate discrimination and give persons with disabilities equally meaningful access to employment opportunities. See 42 U.S.C. § 12101(a)(5).[24] Such access is denied when the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more ... major life activities." 42 U.S.C. § 12103(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. Congress is not required to ignore this reality and be satisfied with nominal equality. "The power to 'enforce' [the Equal Protection Clause] may at times also include the power to define

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[23] S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) (quoting without attribution Alexander v. Choate, 469 U.S. 287, 295 (1985)); H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 29 (1990) (same); 136 Cong. Rec. 10,870 (1990) (Rep. Fish); id. at 11,467 (Rep. Dellums).

[24] See also U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 99 (1983); United States v. California Mobile Home Park Management, 29 F.3d 1413, 1417 (9th Cir. 1994); Smith v. Barton, 914 F.2d 1330, 1339 & n.13 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991).

situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." City of Richmond v. J.A. Croson Co., 488 U.S. at 489 (opinion of O'Connor, J.).

The ADA's requirement that States make "reasonable accommodations" for a "qualified individual with a disability" is a thoughtful prophylactic rule designed to level the playing field in employment situations where persons with disabilities are dissimilarly situated from persons without disabilities. 42 U.S.C. § 12201(b)(5). This approach is consistent with Congress' findings that: "discrimination against individuals with disabilities persists in such critical areas as employment ...;" "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, ... and relegation to lesser ... jobs, or other opportunities;" and "the Nation's proper goals regarding individuals with disabilities are to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12102(a). Congress' approach also comports with the ADA's stated purpose of

providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12102(b), and with the Fourteenth Amendment's goal of ensuring that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of its laws." U.S. Const., amend. XIV, sec. 1.

Minnesota suggests that the Equal Protection Clause does not permit dissimilarly situated persons to be treated differently. But, in a series of cases beginning with Griffin v.Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Supreme Court has recognized that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgement that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal

without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

Moreover, in Lau v. Nichols, 414 U.S. 563 (1974), a case involving statutory construction, the Supreme Court again rejected the notion that equality is always realized by treating everyone alike. In that case, involving the education of students who did not speak English, it explained that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Id. at 566. See also Lewis v. Casey, 116 S. Ct. 2174, 2182 (1996) (holding that State has not met its obligation to provide illiterate prisoners with access to courts simply by providing all prisoners access to a law library).

Thus, Minnesota's arguments that legislation to enforce the Equal Protection Clause cannot require dissimilarly situated persons to be treated differently is simply untrue. As the foregoing case law shows, in some instances, equal protection guarantees cannot be enforced without requiring different treatment for persons who are dissimilarly situated.

## CONCLUSION

Minnesota's arguments to the contrary notwithstanding, Section 502 of the ADA is a constitutionally valid abrogation of States' Eleventh Amendment immunity. It passes both tests for constitutionality that the Supreme Court established in Seminole Tribe: (1) Congress "unequivocally expressed its intent to abrogate immunity" in the language of the ADA, and (2) the ADA "was passed pursuant to a constitutional provision granting Congress the power to abrogate." Seminole Tribe, 116 S. Ct. at 1125. For these reasons, the United States respectfully requests that Minnesota's motion to dismiss Autio's Amended Complaint be denied.

Respectfully submitted,

DAVID L. LILLEHAUG
United States Attorney
District of Minnesota

ISABELLE KATZ PINZLER
Acting Assistant Attorney General
Civil Rights Division

ROBERT M. SMALL
Civil Chief
United States Attorney's Office
District of Minnesota
234 U.S. Courthouse
110 S. 4th Street
Minneapolis, MN 55401
(612) 348-1500

JOHN L. WODATCH
JOAN A. MAGAGNA
JEANINE M. WORDEN
Attorneys
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-6556

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