

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3263

BILL M., by and through his father and natural guardian, William M.; JOHN DOE, by and through his mother and natural guardian, Marcia V.; JANE S., by and through her mother and natural guardian, Patricia S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her parents and legal guardians, Sharon and Greg T.; MARCUS J., by and through his parents and legal guardians, Julie and Miles J.; and on behalf of themselves and all other similarly situated,

Plaintiffs-Appellees

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
FINANCE AND SUPPORT; NEBRASKA DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-Appellants

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

MOTION OF THE UNITED STATES TO INTERVENE AS OF RIGHT

The United States hereby respectfully exercises its statutory right under 28 U.S.C. 2403(a) to intervene as of right in the above-captioned appeal to defend the constitutionality of 42 U.S.C. 12202, which abrogates States' Eleventh Amendment immunity to private claims under the Americans with Disabilities Act, 42 U.S.C.

12101 *et seq.* In support of this motion, the United States submits the following information:

1. Defendants' appeal challenges the constitutionality of 42 U.S.C. 12202, which abrogates States' Eleventh Amendment immunity to private claims under the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*

2. Section 2403(a) of Title 28 provides that “[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * shall permit the United States to intervene * * * for argument on the question of constitutionality” (emphasis added). See also Fed. R. App. P. 44(a) (requiring party questioning the constitutionality of a federal statute to provide clerk written notice of the challenge so that Court may notify the Attorney General).

3. The United States has previously intervened to address the constitutionality of 24 U.S.C. 12202 before this Court, including in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000).

WHEREFORE, for the reasons stated herein, the United States exercises its statutory right to intervene in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the above MOTION OF THE UNITED STATES TO INTERVENE AS OF RIGHT were served by first-class mail, postage prepaid, on November 26, 2004, on the following parties:

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