UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES MASON and JOANNE PEARSON,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. CV-10-S-02794-CLS**
CITY OF HUNTSVILLE, ALABAMA,	)	
Defendant.	)	

UNITED STATES' RESPONSE TO SUPPLEMENTAL AUTHORITY

The United States of America, by and through its undersigned counsel, respectfully responds to the arguments made by the City of Huntsville, Alabama, regarding the effect of *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"), on the City's pending motion to dismiss. Nothing in *NFIB* affects the settled jurisprudence establishing that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134 is valid Commerce Clause legislation.

1. Pending before this Court is Defendant's motion to dismiss (Doc. 6.). Among other grounds for dismissal, Defendant argues that Title II is not valid Commerce Clause legislation. In a previous brief, the United States explained why the Defendant's argument fails under well-established Commerce Clause doctrine.

See United States' Br. as Intervenor and Amicus Curiae in Opp. to Mot. to Dismiss (Doc. 21) at 50-67 ("United States' Br."). The Defendant now argues that *NFIB*, decided after briefing was completed on this Motion, requires this Court nonetheless to find that Title II is not valid Commerce Clause legislation. See Notice of Supp. Auth. Regarding Mot. to Dismiss (Doc. 32) ("Notice of Supp. Auth.").

2. In *NFIB*, five members of the Supreme Court determined that a provision of the Patient Protection and Affordable Care Act of 2010 that requires individuals who do not obtain a minimum level of health insurance to pay an assessment was not validly enacted pursuant to the Commerce Clause. The minimum coverage provision, Justice Roberts stated, is outside Congress's broad Commerce Clause authority because it "does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." *See* 132 S. Ct. at 2587 (opinion of Robert, C.J.). According to Chief Justice Roberts, the ACA's minimum coverage provision was problematic because it compelled the very activity – the purchase of health insurance – that gave Congress the ability to regulate the individual under its commerce power. *See id.* at 2586; see also *id.* at 2592 (minimum coverage provision not "proper" because it "vests Congress with the extraordinary ability to create the necessary predicate to

the exercise of an enumerated power"). Justice Roberts found it insufficient that individuals "will predictably engage in" health care transactions in the future, because reliance on future activity could convert the Commerce Clause to "a general license to * * * regulate individuals as such, as opposed to their activities." *Id.* at 2591.

3. Justice Robert's opinion thus turns entirely on the conclusion that the Commerce Clause could not authorize legislation requiring individuals who otherwise would not engage in the regulated economic activity to do so. See *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) (those regulated by minimum coverage provision "are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to regulate the uninsured as a class.") (internal quotations omitted); *id.* at 2591 (minimum coverage provision "forces individuals into commerce precisely because they elected to refrain from commercial activity."). Nothing in his opinion purports to diminish the federal government's broad and well-established authority to regulate existing activity that affects interstate commerce. For example, the opinion specifically distinguishes, and does not question, a prior decision upholding legislation that prevented a farmer from growing wheat for his own consumption, because the farmer "was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce."

Id. at 2588 (discussing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)).

4. It is questionable that *NFIB*'s reasoning, which focuses on the protection of individual liberty, could apply to Title II, which regulates only public entities and not individuals. But in any event, Title II does not regulate anything that *NFIB* defined as inactivity.

5. Broadly speaking, with regard to physical accessibility, Title II requires two things of public entities. First, it requires a public entity that is newly constructing a facility or altering an existing activity to make that facility or the altered portion "readily accessible." 28 C.F.R. § 35.151(a). This requirement regulates only the manner in which a public entity will carry out construction, not whether it will construct or alter a facility. Second, Title II provides that, where a public entity actively operates public "services, programs, or activities," individuals with disabilities may not "be excluded from participation in or be denied the benefits of" such activity. 42 U.S.C. § 12132. This requirement does not necessarily require facility modification; it is satisfied so long as the entity "operates each service, program or activity so that [the service, program or activity,] when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). Moreover, public entities may use non-structural means of providing access where such methods are effective in achieving access. 28 C.F.R. § 35.150(b)(1). Again, this requirement

regulates only the manner in which a public entity provides services, programs, or activities, not whether it will provide them in the first place. In both cases, the requirements of Title II are triggered by activity, not inactivity.

6. The City's arguments based on *NFIB* rest on an incorrect understanding of Title II's requirements, which do not contain any of the features that led to the invalidation of the minimum coverage provision as Commerce Clause legislation. Notably, Title II does *not* mandate commercial activity in order to regulate it. See Notice of Supp. Auth. 5 ¶ 6 (arguing that Title II imposes freestanding requirement that a public entity modify its facilities in order to "remedy and correct any existing accessibility issues with its facilities or infrastructural features"). Rather, any obligations that Title II may impose on the City to make facilities accessible stem from activities the City already is carrying out: (1) the act of newly constructing or altering those facilities; or (2) the act of operating services, programs, or activities in existing facilities without ensuring access to individuals with disabilities. If the city takes no covered action with respect to an existing facility – that is, neither alters it nor uses it to provide a public service, program, or activity in a discriminatory way – Title II imposes no obligation at all. See United States' Br. 14-15, 42-43, 66-67 (describing Title II's requirements in more detail). For similar reasons, Title II does not "mandate entry into and participation in a totally distinct market" than those in which the City

already is participating, see Notice of Supp. Auth. 7 ¶ 8; quite to the contrary, it does not require a public entity to offer any new service or program. Nor, finally, do Title II's requirements turn on "inevitable" activity rather than actual activity. See *id.* 7 ¶ 9. Accordingly, *NFIB* has no application here.

Respectfully submitted this the 27th day of September, 2012,

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CERTIFICATE OF SERVICE

This is to certify that, on September 27, 2012, a copy of the foregoing has been served by electronically filing with the Clerk of the Court via the CM/ECF system, which will send notification of the filing to all attorneys of record.

/s/ Carolyn W. Steverson
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