City of Knoxville v. Netflix, Inc.: The Doctrine of Comity in Certified Questions

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I. INTRODUCTION

When compared to traditional cable companies, streaming platforms and their distinctive methods of delivering entertainment make them seemingly untouchable—not only in competitive markets, but also in the courtroom. The Tennessee Supreme Court in *City of Knoxville v. Netflix, Inc.* ("*Netflix*") ruled that Netflix and Hulu did not provide video programming through wireline facilities under the

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Competitive Cable and Video Services Act ("CCVSA").[1] *Netflix* arose out of an action brought in the United States District Court for the Eastern District of Tennessee by the City of Knoxville against Netflix and Hulu ("Defendants").[2] The City of Knoxville argued that Defendants were required to obtain a franchise and pay franchise fees because of their use of public rights-of-way to provide video service.[3] The district court found that several factors, including the "value of comity" and lack of guiding precedent, weighed in favor of certifying a question of state law to the Tennessee Supreme Court ("Supreme Court").[4] The Supreme Court accepted the following certified question: "[w]hether Netflix and Hulu are video service providers, as that term is defined in the relevant provision of [the CCVSA]."[5] Framing the question solely as one of statutory interpretation, the Supreme Court answered in the negative and *held* that Defendants did not provide "video service" within the meaning of the Act.

The issue presented by *Netflix* was one of first impression in Tennessee, and the Supreme Court, as the first state appellate court to consider the issue, supported its interpretation by leaning on the persuasive value of trial courts that had decided cases involving similar statutes.[6] Although the Supreme Court properly answered the certified question, it failed to fully consider all available authority and thus did not address other pressing issues, such as whether a private right of action existed, whether Defendants fell within the "public Internet" exception—and perhaps most importantly, whether the district court was an appropriate forum. By limiting its analysis to only the certified question presented to it, the Tennessee Supreme Court missed an opportunity to engage in dicta that could have provided clarification

1. City of Knoxville v. Netflix, Inc., 656 S.W.3d 106, 115 (Tenn. 2022). The CCVSA requires cable or video service providers to obtain a franchise that gives them the ability to construct and operate a cable service or wireline facility in the public's right-of-way. TENN. CODE ANN. § 7-59-304(a)(1).

2. *Netflix*, 656 S.W.3d at 109–10.

3. *Id.* at 109. Rather than obtaining a franchise like a cable company, streaming platforms rely on third-party internet service providers to deliver their services. *Id.*

4. City of Knoxville v. Netflix, Inc., No. 3:20-CV-00544-DCLC-DCP, 2021 WL 9758753, at *2 (E.D. Tenn. Sept. 8, 2021). The principle of comity is discussed in Part II.

5. *Netflix*, 656 S.W.3d at 110.

6. *See id.* at 113.

and guidance for courts and litigants faced with future issues of "fitting new technology into [] not-so-new statutory scheme[s]."[7] Part II of this Comment provides an overview of the evolution of cable and video service regulation as well as case law relevant to the issue. Part III provides a summary of the facts and procedural history that led to *Netflix*. Part IV analyzes the Supreme Court's reasoning and the impact of its holding. Part V discusses how the Supreme Court's failure to fully analyze the issues raised—including the doctrine of comity—risks future judicial inefficiency by leaving the door open for federal courts to decide disputes more appropriately heard by Tennessee state courts.

II. THE HISTORY OF CABLE REGULATION AND RELEVANT CASE LAW

While recent developments in media consumption have given rise to an influx of legal disputes, cable regulation has long been litigious. The Communications Act of 1934 created the Federal Communications Commission to regulate interstate and international communications by wire and radio.[8] The Communications Act did not explicitly mention cable television because it was not in existence at the time of the act's ratification.[9] Even after cable television became readily accessible to the public, the FCC believed it lacked regulatory authority over the industry.[10] The rapid growth of cable television in the mid-1960s, however, prompted the FCC to reconsider its position.[11] After Congress chose not to pass legislation proposed by the FCC, which would have granted the agency cable regulation authority, the FCC sought an alternative approach.[12] The FCC asserted that its

7. *Netflix*, 656 S.W.3d at 107.

8. *See* 47 U.S.C. § 151 (describing the purpose behind the FCC's creation).

9. Linda A. Rushnak, Notes and Comments, *Cable Television Franchise Agreements: Is Local, State or Federal Regulation Preferable?*, 33 RUTGERS COMPUT. & TECH. L.J. 41, 46 (2006).

10. *Id.*

11. *See* City of Dallas v. FCC, 165 F.3d 341, 345 (5th Cir. 1999) ("[T]he FCC had concluded that it could not effectively discharge its statutory duty to regulate broadcasting in the public interest without regulating cable, whose proliferation could significantly affect broadcasting.").

12. Rushnak, *supra* note 9, at 47–48. In 1968, the FCC initiated proceedings against Southwestern Cable Company on the grounds that the company's systems

ancillary jurisdiction under the Communications Act of 1934 allowed it to regulate cable carriers in a manner consistent with the public interest.[13] The Supreme Court agreed and held that the Communications Act of 1934 authorized the FCC to issue rules that were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" as required by "public convenience, interest, or necessity."[14] Moreover, municipalities retained discretionary power in granting franchises to cable carriers within their communities.[15]

Almost two decades later, Congress sought to, among other things, clarify the intersection of regulatory authority between the FCC and municipal governments through the Cable Communications Policy Act of 1984 ("Cable Act").[16] The Cable Act codified the FCC's previously established regulations, including the requirement that cable providers obtain franchises prior to providing cable service.[17] The Cable Act ultimately affirmed the FCC's overall national control while vesting regulatory power over the local franchising process in state and local governments.[18] The justification for imputing franchising power in state and local governments was strongly premised on the fact that cable providers must use public rights-of-way to construct and maintain networks to provide services within a locality.[19] Thus,

limited the carriage of radio system signals, inconsistent with public interest. United States v. Sw. Cable Co., 392 U.S. 157, 160 (1968).

13. *See Sw. Cable Co.*, 392 U.S. at 165 ("[T]he Commission has, since 1960, gradually asserted jurisdiction over [community antenna television systems]" based on concerns that cable television could have an "adverse impact upon potential and existing service[s].").

14. *Id.* at 178 (quoting 47 U.S.C. § 303(r)).

15. American Civil Liberties Union v. FCC, 823 F.2d 1554, 1558–59 (D.C. Cir. 1987).

16. *Id.* at 1559; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as 47 U.S.C. §§ 521 et seq.).

17. *See* Rushnak, *supra* note 9, at 50 ("With respect to franchising, the 1984 Cable Act codified the regulations previously promulgated by the FCC."); *see also* 47 U.S.C. § 541(b)(1) (delineating general franchise requirements).

18. Rushnak, *supra* note 9, at 49–50.

19. City of Chicago v. FCC, 199 F.3d 424, 429–30 (7th Cir. 1999) (citing New York State Comm'n of Cable Television v. FCC, 749 F.2d 804 (1984)).

Tennessee, along with many other states, historically allowed counties and municipalities to grant local franchises.[20]

In 2008, the Tennessee General Assembly reformed the state's franchising system and enacted the Competitive Cable and Video Services Act ("CCVSA").[21] The CCVSA, like similar statutes in other states, largely mirrors the Cable Act and incorporates many of its definitions.[22] Under the CCVSA, "[a]ny entity . . . seeking to provide cable or video service over a cable system or video service network facility" is required to obtain a franchise.[23] Additionally, the holder of a state-issued franchise must pay a franchise fee, a cost that can subsequently be passed along to subscribers.[24] Though franchise fees are "intended as a form of compensation for the provider's occupancy of the public rights-of-way within a municipality or county,"[25] such fees are the functional equivalent of taxes in many states, including Tennessee, where most cities and counties allocate franchise fee revenue to their general funds.[26] As such, the emergence of streaming platforms which provide their services using the existing infrastructure of franchise-holding third-party providers, has led to an increase in

20. City of Knoxville v. Netflix, Inc., 656 S.W.3d 106, 108 (Tenn. 2022).

21. TENN. CODE ANN. §§ 7-59-301–318. As new competitors within the cable market sought cable franchises, the process of applying within thousands of localities proved inefficient. *Netflix*, 656 S.W.3d at 108. Many states sought to simplify and modernize the approach. *Id.* The CCVSA was Tennessee's resolution. *Id.* The new legislation offered cable and video service providers the option of applying for a state-issued certificate of franchise authority. *Id.*

22. *See, e.g.*, TENN. CODE ANN. § 7-59-303(3) ("'Cable service' [] has the meaning set forth in 47 U.S.C. § 522(6)."); TENN. CODE. ANN. § 7-59-303(8) ("'Franchise' has the meaning set forth in 47 U.S.C. § 522(9)."); ARK. CODE ANN. § 23-19-202(3) ("'Cable service' means the same as defined in 47 U.S.C. § 522."); TEX. UTIL CODE § 66.002(2) ("'Cable service" is defined as set forth in 47 U.S.C. Section 522(6).").

23. TENN. CODE ANN. § 7-59-304(a)(1).

24. *Id.* §§ 7-59-304(b)(3)(B), -305(f)(2)(A).

25. *Id.* § 7-59-306(i)(1).

26. TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT REVENUE IN TENNESSEE AND THE EVOLVING MARKET FOR CABLE TELEVISION, SATELLITE TELEVISION, AND STREAMING VIDEO SERVICES 29–30 (Sept. 2019), https://www.tn.gov/content/dam/tn/tacir/2019publications/2019CordCutting.pdf. [hereinafter TACIR Report].

"cord cutting"[27] and a litany of litigation by local governments attempting to supplement decreases in revenue by alleging noncompliance with franchising laws on the part of streaming providers.[28]

Municipalities that have sued streaming platforms to collect franchise fees have been largely unsuccessful. State courts engaging in statutory interpretation have consistently held that state franchising laws do not authorize a private right of action against non-franchise holders or that streaming platforms do not fall within the scope of such statutes.[29] For example, in *City of Lancaster v. Netflix, Inc.*, a California court considered whether a local government was authorized under the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") to bring a private claim against Netflix and Hulu, who had provided video services without a franchise.[30] The court found that, because the legislature expressly granted the California Public Utilities Commission "sole authority to compel a non-franchise holding 'video service provider' to comply with [the] statutory requirements," local governments lacked the right to bring a private action.[31] Although the statutory scheme provided for a private right of action, that right was limited to disputes with franchise holders.[32] In holding that no express or implied private right of action existed against non-franchise holders, the *Lancaster* court effectively dissuaded municipal governments from filing future lawsuits under DIVCA and similarly worded statutes.

Despite finding that no private right of action existed, the court continued its analysis, addressing the defendants' contention that DIVCA did not apply to them since they neither owned nor operated

27. "The term 'cord cutting' is now a common descriptor for the practice of forgoing cable or satellite television in favor of subscribing to internet-based alternatives." TACIR Report at 11.

28. *See* discussion *infra* pp. 808–816 (Because streaming platforms rely on third-party internet service providers and do not obtain their own franchises, they do not pay franchise fees, or "taxes," to local governments.).

29. *See, e.g.*, City of Lancaster v. Netflix, Inc., No. 21STCV01881, 2022 WL 1744233, at *5 (Cal. Super. Ct. Apr. 13, 2022); Gwinnett Cnty. v. Netflix, Inc., No. 20-A-07909-10, 2022 WL 678784, at *2 (Ga. Super. Ct. Feb. 18, 2022).

30. No. 21STCV01881, 2022 WL 1744233, at *1–5 (Cal. Super. Ct. Apr. 13, 2022), *aff'd*, 318 Cal. Rptr. 3d 423, 431 (Cal. Ct. App. 2024).

31. *Id.* at *5.

32. *Id.* at *2.

facilities in any public rights-of-way.[33] This indicates that the court did not deem it necessary to stop its analysis solely because it had concluded the plaintiffs could not sue. By considering the applicability of DIVCA to Netflix and Hulu, the court demonstrated a careful approach to ensuring that all relevant arguments were considered, particularly when they might influence the scope or interpretation of the law in future cases. The court engaged in further statutory interpretation to "ascertain legislative intent" and determine whether DIVCA applied to defendants.[34] In rejecting the plaintiff's argument as too narrowly focused on isolated provisions of the statute, the court looked instead at the statute's overall structure to find that Netflix and Hulu did not "use" the public right-of-way or provide "video programming" as defined in DIVCA.[35] Once it determined that DIVCA did not apply to defendants, the court found that it "need not address" whether the defendants fell within the "public Internet" exception, suggesting that the argument was irrelevant.[36]

In a similar case, *Gwinnett County v. Netflix, Inc.*, a Georgia court held that local governments did not have a cause of action against streaming platforms operating without a franchise.[37] After determining that the Georgia legislature's explicit authorization for civil actions against state franchise holders meant no private action could be brought against non-franchise holders, the court turned to the nature of the services provided by the streaming platforms.[38] Like the *Lancaster*

33. *Id.* at *6.

34. *Id.* at *6–8.

35. *Id.* at *6–14 (noting that the plaintiff's interpretation could not "be harmonized with the rest of the statute," the court listed each of the provisions that would need to be revised to support plaintiff's assertion).

36. *Id.* at *14. The court also declined to rule on whether DIVCA violated the Internet Tax Freedom Act and on constitutional questions. *Id.*

37. *Gwinnett*, No. 20-A-07909-10, 2022 WL 678784, at *2 (Ga. Super. Ct. Feb. 18, 2022), *aff'd* Gwinnett Cnty. v. Netflix, Inc., 885 S.E.2d 177 (Ga. Ct. App. 2023).

38. *Id.* at *3. Although the court did not explicitly state why it continued its analysis, its strong language suggested an intent to dissuade future litigants from bringing similar claims under the statutory scheme at issue. *See id.* at *6 ("Applying the Television Act—which contemplates fees for providers that offer facilities-based service—to non-facilities-based streaming services would be akin to applying a tax on horses to cars simply because cars have horsepower. If the Television Act applies to these Defendants, then nothing stops local governments from seeking franchise fees

court, the *Gwinnett* court connected franchise fees to physical occupation of rights-of-way and concluded that the state legislature could not have intended that entities obtain franchises for constructing and operating networks that they do not occupy.[39] The *Gwinnett* court, however, expanded its analysis beyond the scope of that reached by the *Lancaster* court by finding that, even if a private right of action existed, the defendants' services fell within the "public Internet" exception.[40] Thus, while both the *Lancaster* and *Gwinnett* courts could have ended their analyses after determining that a right of action did not exist, they chose to discuss additional provisions in the respective statutes. This approach of extending analysis beyond the immediate questions promotes judicial efficiency by guiding future litigants on how courts may interpret similar issues, thereby providing clearer legal precedents and reducing the need for repetitive litigation over the same or similar statutory provisions.

Although state courts are best situated to interpret their particular state's statutes, cases requiring such statutory interpretation are often filed in federal courts. Some federal courts that have decided cases involving state law franchise fee requirements have ruled similarly to state courts.[41] Other federal courts, however, have given credence to the notion that franchise fees are effectively taxes and declined to exercise jurisdiction over such cases on the basis of comity abstention principles.[42] For example, in *City of Fishers v. DIRECTV*,

from other streaming providers that could not possibly be within the Television Act's scope.").

39. *Id.* at *6.

40. *Id.* at *8–9.

41. *See, e.g.*, City of Reno v. Netflix, Inc., 558 F. Supp. 3d 991, 999–1000 (D. Nev. 2021), *aff'd* 52 F.4th 874, 877 (9th Cir. 2022) ("[L]ocal governments . . . do not have a private right of action."); Borough of Longport v. Netflix, Inc., No. 21-15303 (SRC) (MAH), 2022 WL 1617740, at *3–4 (D. N.J. May 20, 2022), *aff'd* 94 F.4th 303, 307 (3d Cir. 2024) (refusing to "permit[] the municipalities to seek redress where it is not otherwise provided by statute").

42. The United States Supreme Court in *Younger v. Harris* noted that "the notion of 'comity,'" rests on "a proper respect for state functions" and "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. 37, 44 (1971). In *Levin v. Commerce Energy, Inc.*, the Court explained that "The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction . . . . Comity's constraint has particular force

four Indiana cities sought a declaratory judgment in state court against multiple streaming platforms, alleging that the platforms offered "video service" and were obligated to pay franchise fees.[43] The streaming platforms removed the case to the United States District Court for the Southern District of Indiana, which subsequently remanded the case, relying on the doctrine of comity abstention.[44] The Seventh Circuit affirmed the district court's decision to remand, reasoning that the franchise fees, which were deposited to general accounts, constituted taxes, and a state court would thus be a more appropriate forum.[45] In making this determination, the Seventh Circuit found the Fourth Circuit's *DIRECTV, Inc. v. Tolson* reasoning instructive.[46] In *Tolson*, the Fourth Circuit established that, due to the risk of federal interference in local tax administration, the principle of comity required a broad interpretation of the term "tax."[47]

Similarly, in *Village of Shiloh v. Netflix*, the United States District Court for the Southern District of Illinois granted a local government's motion to remand after the streaming platform defendants removed the case from Illinois state court.[48] The *Shiloh* court relied heavily on *Levin v. Commerce Energy, Inc.*, in which the United States Supreme Court "made clear that the comity doctrine serves to 'restrain [] federal courts from entertaining claims for relief that risk disrupting state tax administration.'"[49] The court also supported its decision to remand with the Seventh Circuit's "thorough

when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." 560 U.S. 413, 422 (2010).

43. *City of Fishers*, 5 F.4th 750, 752 (7th Cir. 2021).

44. *Id.*

45. *Id.* at 753, 758 ("In 1870 . . . the Court underscored that '[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'") (citing Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1870)).

46. *See id.* at 755 (citing DIRECTV, Inc. v. Tolson, 513 F.3d 119, 125 (4th Cir. 2008)).

47. *Tolson*, 513 F.3d at 125. In determining whether a government-imposed charge was a tax, the Fourth Circuit considered three factors, each of which supported its holding that franchise fees are essentially taxes. *Id.*

48. Vill. of Shiloh v. Netflix, Inc., No. 3:21-CV-807-MAB, 2022 WL 873822, at *7 (S.D. Ill. Mar. 24, 2022).

49. *Id.* at *3 (quoting Levin v. Com. Energy, Inc., 560 U.S. 413, 417 (2010)).

explanation in dicta" concerning comity in the *City v. Fishers v. DIRECTV* case.[50] Additionally, the court noted that the *Gwinnett* case[51] was remanded on the basis of comity after being removed to a federal court in Georgia.[52] The court acknowledged that, while it had discretionary power in declining federal jurisdiction, "every other court that has been asked to answer this question in nearly identical cases around the country have chosen to remand."[53]

While some federal courts have decided to interpret state franchising laws or have declined to exercise jurisdiction on the basis of comity, others have sought help from state supreme courts. These courts rely on a certification procedure which allows a federal court to certify a question of state law to the highest court of the state.[54] For example, in *City of Maple Heights v. Netflix, Inc.*, the United States District Court for the Northern District of Ohio found itself ill-equipped to answer issues concerning Ohio franchising laws and certified two state-law questions to the Supreme Court of Ohio.[55] In certifying questions to state supreme courts, federal courts recognize the value of state courts interpreting state statutes. Although federal courts are not required to certify questions of state law to the state's highest court, doing so "save[s] time, energy, and resources and helps build a cooperative judicial federalism."[56] Regardless of which court

50. *Id.* at *5, 13; *see* City of Fishers v. DIRECTTV, 5 F.4th 750, 758 (7th Cir. 2021) (Although the Seventh Circuit found that the defendants had waived their right to argue opposition to abstention, it still engaged in a thorough discussion of why such an argument would be unavailing.).

51. Gwinnett Cnty. v. Netflix, Inc., No. 20-A-07909-10, 2022 WL 678784, at *2 (Ga. Super. Ct. Feb. 18, 2022).

52. Gwinnett Cnty. v. Netflix, Inc., 885 S.E.2d 177, 180–81 (Ga. Ct. App. 2023); *see also* Gwinnett Cnty. v. Netflix, Inc., No. 1:21-CV-21-MLB, 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021) ("The Supreme Court's comity doctrine requires a 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts . . . . Accordingly, courts should 'in all cases' refrain from interfering 'with the fiscal operations of the state governments.'").

53. *Vill. of Shiloh*, 2022 WL 873822, at *6.

54. *See* 17A VIKRAM DAVID AMAR, FEDERAL PRACTICE & PROCEDURE § 4248 (3d ed. 2024) (explaining the certification procedure).

55. City of Maple Heights v. Netflix, Inc., 215 N.E.3d 500, 501 (Ohio 2022).

56. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974); *see also* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) ("The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling

addresses issues concerning the applicability of state franchising laws to streaming services, statutory interpretation will guide the court's analysis.

The Tennessee judiciary, while having only recently considered the issue of whether streaming platforms must obtain franchises, has long relied on the principles of statutory interpretation in cases involving similar statutes. In *Level 3 Communications, LLC v. Roberts*, the Tennessee Court of Appeals considered whether an internet provider delivered "telecommunication services" as the term was used in the tax statute at issue.[57] The court noted the importance of considering "what the Legislature explicitly included as taxable . . . and what it explicitly excluded" and held that the internet provider's services did not constitute "telecommunications services" under the statute.[58] In *James Cable Partners, L.P. v. City of Jamestown*, the Tennessee Court of Appeals considered whether the Cable Act preempted or prohibited the grant of an exclusive franchise.[59] Faced again with the need to interpret a statute, the court acknowledged its duty to discern legislative intent and refused to "extend or contradict . . . the language contained" in the statute.[60] Though the *Level 3* and *James Cable* cases illustrate the important role of state courts in gleaning legislative intent through interpretation of statutes implicating state taxation, such disputes are not always filed in state courts. In those cases, Tennessee Supreme Court Rule 23 authorizes the Supreme Court to answer a question of law certified to it by a federal court which has determined that the question "will be determinative of the cause" and "there is no controlling precedent in the decisions of the Supreme Court of Tennessee."[61] The Tennessee Supreme Court has found that "answering certified questions not only furthers judicial efficiency and

decision of a state court."). In *Pullman*, the Supreme Court also noted that the "doctrine of abstention [is] appropriate to our federal system whereby the federal courts, 'exercising a wide discretion', restrain their authority because of 'scrupulous regard for the rightful independence of state governments' and for the smooth working of the federal judiciary." 312 U.S. at 501.

57. No. M2012-01085-COA-R3-CV, 2013 WL 5373143, at *4 (Tenn. Ct. App. 2013).

58. *Id.* at *6, *9.

59. 818 S.W.2d 338, 340 (Tenn. Ct. App. 1991).

60. *Id.* at 342.

61. TENN. SUP. CT. R. 23 § 1.

comity, but also protects [Tennessee's] sovereignty against encroachment from the federal courts."[62] Thus, in the absence of Tennessee Supreme Court precedent, certification is an appropriate procedure.

III. *CITY OF KNOXVILLE V. NETFLIX, INC.*

In the 2022 case *City of Knoxville v. Netflix, Inc.*, the Tennessee Supreme Court addressed the inevitable issues of "fitting new technology into a not-so-new statutory scheme."[63] The statutory scheme at issue was the Competitive Cable and Video Services Act, which requires cable and video service providers to obtain a franchise and, in exchange, pay franchise fees.[64] The City of Knoxville filed a suit for declaratory judgment in the United States District Court for the Eastern District of Tennessee against Netflix and Hulu ("Defendants"), asserting that Defendants were "video service providers" in violation of the CCVSA because they were providing services without obtaining a franchise or paying franchise fees.[65] Defendants both filed motions to dismiss arguing that they were not "video service providers" under the CCVSA.[66]

Prior to ruling on the motions to dismiss, the district court found that the applicable question of state law was "determinative of the cause" and that there was no precedent upon which it could rely.[67] It found that the "value of comity—allowing Tennessee state courts to address in the first instance the issue of Tennessee statutory law—weigh[ed] in favor" of certification.[68] The district court entered an order staying the case and certified the following question of law to the Tennessee Supreme Court: "[w]hether Netflix and Hulu are video service providers, as that term is defined in the relevant provision of the CCVSA."[69]

62. Haley v. Univ. of Tenn., 188 S.W.3d 518, 523 (Tenn. 2006).

63. City of Knoxville v. Netflix, Inc., 656 S.W.3d 106, 107 (Tenn. 2022).

64. *Id.* at 108 (citing TENN. CODE ANN. §§ 7-59-304(a)(1), -306(a)).

65. *Id.* at 109–10.

66. *Id.* at 110.

67. City of Knoxville v. Netflix, Inc., No. 3:20-CV-00544-DCLC-DCP, 2021 WL 9758753, at *2 (E.D. Tenn. 2021).

68. *Id.*

69. *Id.*

The CCVSA defines "video service" as "the provision of video programming by a video service provider through wireline facilities located, at least in part, in the public rights-of-way."[70] Neither party disputed that Defendants streamed their content through wireline facilities located in the public rights-of-way.[71] Rather, the parties disagreed as to whether such "wireline facilities" included those owned, constructed, or operated by a third party such that Defendants were video service providers subject to franchise requirements.[72] Considering the CCVSA as a whole and focusing primarily on the connection between franchise holding and "physical occupation of public rights-of-way," the Supreme Court concluded that entities that do not own or construct wireline facilities within a locality do not need a franchise or owe a franchise fee.[73] Thus, the Court answered the certified question negatively, holding that Defendants did not provide "video service" and were not "video service providers" under the CCVSA.[74]

IV. *NETFLIX* ANALYZED

In determining whether Defendants were "video service providers," the Supreme Court relied heavily on the link between a franchise holder's use of public rights-of-way and its obligation to compensate a locality through the payment of franchise fees.[75] The Supreme Court supported its conclusion with persuasive trial court decisions, including *Gwinnett* and *Lancaster*, both of which analyzed statutory schemes similar to Tennessee's.[76] While the Supreme Court's

70. TENN. CODE ANN. § 7-59-303(19).

71. *Netflix*, 656 S.W.3d at 111.

72. *Id.*

73. *Id.* at 111–15.

74. *Id.* at 115.

75. *Id.* at 109, 112–13 ("The [CCVSA] . . . ties the franchise-fee obligation to physical occupation of public rights-of-way in specific localities—consistent with the principal justification for cable franchising."). The court further stated, "the [CCVSA] expressly connects payment of the franchise fee with physical occupation of the public rights-of-way." *Id.* at 112.

76. *Id.* at 113 (first citing Gwinnett Cnty. v. Netflix, Inc., No. 20-A-07909-10, 2022 WL 678784, at *6–7 (Ga. Super. Ct. Feb. 18, 2022); then citing *City of Lancaster v. Netflix, Inc.*, No. 21STCV01881, 2022 WL 1744233, at *8–9 (Cal. Super. Ct. Apr. 13, 2022)).

ruling aligned with the *Gwinnett* and *Lancaster* decisions, it stopped short of reaching all of the questions answered by those courts. For example, the Supreme Court declined "to reach" Defendants' uncertified question as to whether the CCVSA authorized a private right of action.[77] Additionally, the Supreme Court declined to weigh in on Defendants' argument that their programming fell within the "public Internet" exception.[78] The Court reasoned that, because it agreed with Defendants' "wireline facilities" argument, there was no need for further analysis.[79] The Supreme Court's approach thus stands in contrast to that of the trial courts on which it relied. Whereas those courts exhibited a willingness to conduct a more comprehensive review of arguments beyond the immediate issue, the Supreme Court chose a more focused approach.

In addition to persuasive trial court authority, the TACIR Report reinforced the Supreme Court's interpretation of the CCVSA.[80] In the Report, the Tennessee Advisory Commission predicted a decrease in local revenue as streaming-based options would lead to an increase in "cord cutting."[81] The Court noted that the Advisory Commission's prediction was based on its understanding that streaming platforms were not required to obtain franchises.[82] Notably, the Supreme Court did not discuss the Advisory Commission's analysis of franchise fees as taxes. Finally, the Supreme Court found that its interpretation of "video service provider" also aligned with "administrative and judicial interpretations of related statutory schemes," which provided "instructive" reasoning despite involving different technologies.[83] Though the Supreme Court's reliance on persuasive trial court authority and the TACIR Report provided a proper foundation for its interpretation of the CCVSA, a closer examination reveals areas where the court could have expanded its analysis to address additional issues.

77. *Id.* at 110 n.1.

78. *Id.* at 110 n.2.

79. *Id.*

80. *See id.* at 113 ("This conclusion comports with a 2019 report by the Tennessee Advisory Commission on Intergovernmental Relations concerning the 'effects of cord cutting . . . on local government revenue in Tennessee.'").

81. *Id.* (quoting TACIR Report, *supra* note 26, at 2).

82. *Id.*; *see also* TACIR Report, *supra* note 26, at 32, 59.

83. *Netflix*, 656 S.W.3d at 114.

V. OPINION AND CRITIQUE OF COURT'S OPINION

Though the Tennessee Supreme Court appropriately applied the persuasive authority referenced in its opinion, a thorough analysis of that authority reveals a missed opportunity for meaningful discourse with far-reaching impacts. Whereas the *Gwinnett* and *Lancaster* courts demonstrated a willingness to analyze additional issues even after finding that no private right of action existed, the Supreme Court ended its analysis without any discussion of the many other implicated issues.[84] Though the Court was only obligated to answer the question certified to it, it could have provided a "thorough explanation in dicta"[85] as to whether a private right of action existed or whether the "public Internet" exception exempted streaming platforms from the CCVSA. Because the Supreme Court had already engaged in a comprehensive analysis of the CCVSA, it would have been judicially efficient to address all pertinent issues, regardless of whether they were certified to the court.[86] The Supreme Court's reliance on the *Gwinnett* and *Lancaster* courts as well as the similarity of the CCVSA to the statutes analyzed in those cases suggests that the Supreme Court would have ruled on these issues exactly as those courts did. Just as those decisions offered guidance, the Tennessee Supreme Court could have done the same.

Glaringly absent from the *Netflix* opinion is any discussion of the "value of comity" that the district court relied on in certifying the question to the Supreme Court, suggesting that the court only analyzed a portion of the persuasive authority available. It is worth questioning whether the court knew that the very *Gwinnett* case it relied on had been remanded to the deciding state court, on the basis of comity.[87]

84. *Id.* at 115.

85. *See* Vill. of Shiloh v. Netflix, Inc., No. 3:21-CV-807-MAB, 2022 WL 873822, at *5 (S.D. Ill. Mar. 24, 2022) (discussing the Seventh Circuit's explanation in *City of Fishers v. DIRECTV*, 5 F.4th 750, 758 (7th Cir. 2021), of why an argument was unavailing in dicta).

86. In *Haley v. Univ. of Tenn.*, the Supreme Court declined to answer additional questions from the petitioner because they were "outside the scope of the question certified to [it] by the district court," suggesting that it could answer other questions *within* the scope of the question certified to it. 188 S.W.3d 518, 524 (Tenn. 2006).

87. *See* Gwinnett Cnty. v. Netflix, Inc., No. 1:21-CV-21-MLB, 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021) ("Defendants seek federal court intervention in

Had the Supreme Court considered the principle of comity in answering the question certified to it by the district court, it might have led the Supreme Court to ask its own question—that is, whether the federal court was an appropriate forum for litigants disputing, for all intents and purposes, local tax revenue. The mere fact that the district court found it necessary to certify the question to the Tennessee Supreme Court is a good indication of the answer. The Supreme Court's exclusion of any comity analysis does nothing to dissuade future litigants from filing similar cases in federal courts, where they may very likely be dismissed or remanded, resulting in the use of additional court resources.

The Supreme Court's acceptance of the certified question promoted short-term judicial efficiency insofar as it provided the district court with the proper interpretation of the CCVSA, allowing the case to be decided on the merits rather than dismissed on discretionary grounds. But the CCVSA is only one of many state-level statutory schemes that will give rise to legal issues in which technology and taxation intersect. The Supreme Court benefitted from the "instructive" reasoning provided to it by other cases, despite those cases involving different technologies and statutes.[88] By failing to thoroughly consider all the available persuasive authority, it missed an opportunity to provide that benefit to future courts and litigants. Furthermore, state tax-related issues may often be filed in federal courts, which may choose to address them directly rather than certify to the state supreme court.[89] This approach, however, involves federal courts "entertaining claims for relief that risk disrupting state tax administration."[90] By bypassing state courts, federal courts may

matters over which the State of Georgia and its municipalities have traditionally 'enjoy[ed] wide regulatory latitude'—specifically, utility regulation and gross revenue fees.") (citing Levin v. Com. Energy, Inc., 560 U.S. 413, 431 (2010)).

88. *See* City of Knoxville v. Netflix, Inc., 656 S.W.3d 106, 114 (Tenn. 2022) ("To be sure, those cases [relied on] different technologies and statutes. But their reasoning is instructive, and it supports our conclusion.").

89. *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) ("Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative . . . . Comity persuades; but it does not command.").

90. Levin v. Com. Energy, Inc., 560 U.S. 413, 417 (2010).

inadvertently create confusion and inefficiency in the legal process. In conclusion, while the Tennessee Supreme Court certainly illustrated brevity in *City of Knoxville v. Netflix, Inc.*, it simultaneously failed to promote long-term judicial efficiency.