

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

VILLAGE OF SHILOH, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Case No. 3:21-CV-00807-MAB  
 )  
 NETFLIX, INC., et al. )  
 Defendants. )

**PLAINTIFF VILLAGE OF SHILOH’S MEMORANDUM IN SUPPORT OF  
MOTION TO REMAND**

Plaintiff Village of Shiloh respectfully moves this Court to remand the above case to the Circuit Court of St. Clair County. *City of Fishers, Indiana v. DIRECTV*, No. 20-3478, 2021 WL 3073368 (7th Cir. July 21, 2021) clearly directs that under the *Levin* comity abstention doctrine for state tax-related matters, this type of case should be resolved by a state court. See *Levin v. Commerce Energy Inc.* 560 U.S. 413 (2010). The state law claims in this suit are closely comparable to the claims in *City of Fishers* that the Seventh Circuit determined federal courts should abstain from hearing. It is a novel question of state tax law – whether video streaming services are liable for the same fee that video cable companies now pay under state law. It is a claim that Illinois state courts have not resolved and a federal court is not competent to decide. As the Seventh Circuit stated in *City of Fishers*:

“Regardless of who brought the underlying suit, the district court’s resolution of the merits issues will risk or result in federal court interference with the fiscal affairs of local government – the principal concern of *Levin*”.

Id at \*12 (emphasis supplied)

Defendants’ various attempts to distinguish *City of Fishers* should be dismissed out of hand. Defendants’ arguments, set forth in their response (Dkt. 40) to this Court’s order to show

cause why this matter should not be remanded (Dkt. 34), hinge entirely on the fact that East St. Louis filed a similar but not identical lawsuit in this District against some of the Defendants to this case five days before Village of Shiloh filed its case in state court. Defendants claim that the East St. Louis case “triggers the duty to avoid duplicative litigation” under the first-to-file rule. But all the cases cited by Defendants refer to multiple original filings in federal court. Whether East St. Louis filed “first” in a federal case just a few days before plaintiff Shiloh filed a state case has nothing to do with the applicable abstention principle here, which is based on the necessary avoidance of interference in state fiscal affairs.

The Seventh Circuit’s decision in *City of Fishers* is controlling, regardless of the East St. Louis case. For all the reasons set forth in *City of Fishers* and the reasons discussed herein, this Court should remand the instant case to the Circuit Court of St. Clair County.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Village of Shiloh’s claims under the Cable and Video Competition Law of 2007.**

On June 14, 2021, the Village of Shiloh filed this putative class action against Netflix, Inc., DirectTV, LLC, Dish Network Corp., Dish Network, LLC, Hulu, LLC, and Disney DTC, LLC, (collectively, “Defendant”) in the Circuit Court of St. Clair County, Illinois. The Village of Shiloh seeks declaratory and injunctive relief and damages relating to Defendants failure to pay franchise fees under Illinois’s Cable and Video Competition Law of 2007, 220 ILCS 5/21-100, et seq., on behalf of a putative class of all local units of government in which Defendants provide video service.

The Cable and Video Competition Law of 2007 authorizes Illinois political subdivisions and municipalities to collect franchise fees from any provider of “video service” doing business within their boundaries. 220 ILCS 5/21-801. “‘Video service’ means video programming and

subscriber interaction, if any, that is required for the selection or use of such video programming services, and that is provided through wireline facilities located at least in part in the public rights-of-way without regard to delivery technology, including Internet protocol technology.” 220 ILCS 5/21-201(v). “Video programming”, in turn, means “that term as defined in item (20) of 47 U.S.C. 522”, which defines the term as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station”. 220 ILCS 5/21-201(v). “‘Video service’ . . . does not include any video programming provided by a commercial mobile service provider defined in subsection (d) of 47 U.S.C. 332 or any video programming provided solely as part of, and via, service that enables users to access content, information, electronic mail, or other services offered over the public Internet.” 220 ILCS 5/21-201(v).

The Village of Shiloh alleges that Defendants provide video service within the meaning of 220 ILCS 5/201(v), and do not qualify for the exemption for "video programming provided solely as part of, and via, service that enables users to access content, information, electronic mail, or other services offered over the public Internet." Nonetheless, Defendants have failed to pay franchise fees as required by law. In its complaint, the Village of Shiloh requests a declaration that Defendants provide video service within the meaning of 220 ILCS 5/201(v); a declaration that Defendants have failed to comply with their obligations to register with the Illinois Commerce Commission as a provider of video services and pay the fees required by 220 ILCL 5/21-801; an accounting; and damages.

**B. Prior relevant rulings.**

Notably, this is not the first lawsuit of its kind that Defendants have attempted to remove to federal court. In 2018, the City of Creve Coeur, Missouri filed cases against Defendants (with the exception of Disney DTC, LLC) in Missouri state court based on Defendants’ failure to pay

fees under Missouri’s version of the Cable and Video Competition Law of 2007. *City of Creve Coeur v. DIRECTV, LLC*, No. 4:18cv1453, 2019 WL 3604631 (E.D. Mo. Aug. 6, 2019). Defendants removed both cases to federal court. The federal court remanded under comity abstention, and the Eighth Circuit denied immediate review. *City of Creve Coeur v. DirecTV, LLC*, No. 19-8016, 2019 WL 7945996 (8th Cir. Sept. 12, 2019).

Likewise, in August 2020, four cities in Indiana filed a case against Defendants in Indiana state court based on Defendants’ failure to pay franchise fees to Indiana municipalities under Indiana’s version of the Cable and Video Competition Law of 2007. Again, Defendants removed to federal court, and the district court remanded based on the doctrine of comity abstention. *City of Fishers v. Netflix, Inc.*, 501 F. Supp. 3d 653, 2020 WL 6778426 (S.D. Ind. Nov. 18, 2020). The Seventh Circuit affirmed. *City of Fishers v. DIRECTV*, --- F.4th ---, 2021 WL 3073368 (7th Cir. July 21, 2021).

Most recently, cities in Georgia filed a case against Defendants in Georgia state court based on Defendants failure to pay franchise fees to Georgia municipalities under Georgia’s version of the Cable and Video Competition Law of 2007. Again, Defendants removed the action to federal court, and the district court remanded based on the doctrine of comity abstention. *Gwinnett Cty. v. Netflix, Inc.*, No. 1:21-CV-21-MLB, 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021).

### STANDARD OF REVIEW

As the parties invoking federal jurisdiction, Defendants bear the burden of proving that removal was proper. *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019). Defendants must show by a preponderance of the evidence that all the prerequisites for removal have been met. *Carroll v. Stryker Corp.*, 658 F.3d 675, 680 (7th Cir. 2011). “[D]oubts regarding removal are

resolved in favor of the plaintiff's choice of forum in state court." *Morris v. Nuzzo*, 718 F.3d 660, 668 (7th Cir. 2013).

The Supreme Court has "repeatedly cautioned" that statutes conferring federal jurisdiction "should be read with sensitivity to 'federal-state relations' and 'wise judicial administration.'" Levin, 560 U.S. at 423. This admonition applies with equal force to CAFA, which is "such a jurisdictional statute." *Saskatchewan Mut. Ins. Co. v. CE Design, Ltd.*, 865 F.3d 537, 542 (7th Cir. 2017).

## ARGUMENT

With the Supreme Court's caution in mind, even if Defendants have otherwise established the prerequisites of federal court jurisdiction, the doctrine of comity abstention is still controlling. This case presents significant questions of first impression concerning the proper interpretation of Illinois statutes governing the ability of Illinois municipalities to collect revenues from Defendants. Those questions should be decided by Illinois state courts.

### **A. The Seventh Circuit's decision in *City of Fishers* calls for abstention.**

The Seventh Circuit's decision in *City of Fishers* is exactly on point. The Plaintiffs in *City of Fishers* were a group of Indiana cities that sought a declaration in Indiana state court that Defendants owed them franchise fees under the Indiana Video Service Franchise Act of 2006. *City of Fishers*, 2021 WL 3073368, at \*1. After Defendants removed the case to federal court, the district court remanded the case back to state court based on the doctrine of comity abstention. *Id.* at \* 2.

On appeal from the district court's remand order, the Seventh Circuit concluded that the *Levin* comity abstention analysis applied. *Id.* at \*5 (stating that the Court was "Confident that this case calls for a *Levin* abstention analysis). At the outset, the Seventh Circuit specifically rejected

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