

FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

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FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CITY OF RENO,

No. 21-16560

Plaintiff-Appellant,

D.C. No.

v.

3:20-cv-00499-MMD-WGC

NETFLIX, INC.; HULU, LLC,

OPINION

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted September 19, 2022
San Francisco, California

Before: Susan P. Graber, Michelle T. Friedland, and Lucy H. Koh, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Nevada Law / Declaratory Judgment Act

The panel affirmed the district court's dismissal for failure to state a claim of the City of Reno's complaint alleging that Netflix, Inc. and Hulu, LLC failed to pay franchise fees for the video streaming services they provide.

Reno's complaint sought damages and declaratory relief under Nevada's Video Service Law ("VSL") and the federal Declaratory Judgment Act, respectively. The panel affirmed the dismissal because the VSL does not provide a private right of action and the Declaratory Judgment Act provides an affirmative remedy only when a cause of action otherwise existed.

Specifically, the panel first addressed the VSL. The VSL does not expressly create a private right of action for cities to sue for unpaid franchise fees. The test under Nevada law for whether a statute creates an implied right of action is set forth in *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96 (Nev. 2008). The panel held that all three *Baldonado* factors weigh against recognition of an implied right of action here. The VSL's express provisions for enforcement by the Nevada Attorney General and the Consumer's Advocate in the Office of Attorney General strongly suggest that the legislative scheme does not include other rights of action. The VSL does not clearly confer a special benefit on local governments. Finally, nothing in the legislative history suggested an intent to permit a private right of action. The panel concluded that under *Baldonado*, the VSL does not confer a right of action on Reno.

Concerning the federal Declaratory Judgment Act, the panel held that it does not provide a cause of action when a party, such as Reno, lacks a cause of action under a separate statute and seeks to use the Act to obtain affirmative relief. Here, Reno's suit was offensive, not defensive, and Reno lacked an independent cause of action, so the Declaratory Judgment Act provided no basis for relief.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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PER CURIAM:

Plaintiff City of Reno appeals the dismissal for failure to state a claim of its complaint alleging that Defendants Netflix, Inc. and Hulu, LLC failed to pay franchise fees for the video streaming services they provide. Reno’s complaint seeks damages and declaratory relief under Nevada’s Video Service Law (“VSL”), Nev. Rev. Stat. § 711.020 *et seq.*, and the federal Declaratory Judgment Act, 28 U.S.C. § 2201, respectively. Because the VSL does not provide a private right of action and the Declaratory Judgment Act provides an affirmative remedy only when a cause of action otherwise exists, we affirm.

I.

A.

Historically, cable operators have paid franchise fees to state and local governments in exchange for the use of public rights-of-way. *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm’n*, 923 F.3d 1163, 1165 (9th Cir. 2019). Before 2007, each local government in Nevada “ha[d] the authority to grant local franchises for the operation of a community antenna or cable television system within its jurisdiction.” J. Assemb. Nev., 74th Sess., at 1711 (Nev., Apr. 20, 2007). In 2007, however, the Nevada legislature passed the VSL, “repeal[ing] the existing statutory scheme of regulating video service through

local franchises and replac[ing] it with a statutory scheme . . . intended to promote more competition in the market for such service.” *Id.*

The VSL requires each “video service provider” to “obtain[] a certificate of authority” from the Secretary of State. Nev. Rev. Stat. § 711.470. A certificate of authority “is a state-issued franchise granting the holder of the certificate with the authority to . . . [p]rovide video service in each service area designated in the application and affidavit filed with the Secretary of State.” Nev. Rev. Stat. § 711.510(2). Although the VSL preempts most local regulation of the provision of video service, Nev. Rev. Stat. § 711.400, it allows local governments to “manage the use of any public right-of-way or highway by video service providers,” including “[i]nspect[ing] the construction, installation, maintenance or repair work performed on such facilities,” Nev. Rev. Stat. § 711.640(2), (3)(b), and it permits them to impose franchise fees that do not exceed five percent of a video service provider’s gross annual revenue from subscribers within the local government’s jurisdiction, Nev. Rev. Stat. § 711.670(3).

Under the VSL, “[a]ny action to recover a disputed underpayment of a franchise fee from a video service provider must be commenced and prosecuted by the Attorney General on behalf of the affected local governments.” Nev. Rev. Stat. § 711.680(4). In addition, “[a] video service provider or a local government may file with the Bureau of Consumer Protection [in the Office of the Attorney

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