In the

United States Court of Appeals

For the Seventh Circuit

No. 20-3478

CITY OF FISHERS, INDIANA, *et al.*,

Plaintiffs-Appellees,

v.

DIRECTV, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:20-cv-02351 — **Jane Magnus-Stinson**, *Judge*.

ARGUED APRIL 21, 2021 — DECIDED JULY 21, 2021

Before FLAUM, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. In the lawsuit underlying this appeal, a group of Indiana cities seeks a declaration that Netflix and other video streaming platforms owe them past and future franchise fees under an Indiana statute. The cities filed the action in state court, but the defendant streaming platforms removed the case to federal court. Relying on the doctrine of comity abstention, the district court declined to exercise federal jurisdiction and remanded the case. At this early

stage, the only question before us is whether the district court properly abstained under the teachings of *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), and like cases. We conclude that it did and therefore affirm.

I

The Indiana Video Service Franchises Act of 2006 regulates the way cable television companies do business within the Hoosier state. See Ind. Code § 8-1-34. By the Act's terms, anyone offering "video service" must enter into a franchise agreement with the Indiana Utility Regulatory Commission in exchange for use of a public right-of-way. *Id.* § 8-1-34-16(a), (b). For years, traditional cable and communications companies like Comcast and AT&T have signed the franchise agreements and paid the required fees.

The direct beneficiaries of this arrangement are local governments. Video service providers must pay quarterly franchise fees to government "units," including counties, municipalities, or townships within the provider's service area. *Id.* §§ 8-1-34-24(a), 36-1-2-23. Indiana law requires that the Commission survey the participating units on an annual basis about revenue from the franchise agreements. See *id.* § 8-1-34-24.5(b). According to the Commission's most recent annual report, the units that responded to the survey earned franchise fees totaling $19.4 million in 2019. The Commission also reported that most units deposit the franchise fees into general operating accounts, to be spent on public safety, road maintenance, infrastructure, and the like.

Although enacted in 2006, the Act is arguably behind the times. Most people do not consume media today in the same way they did 15 years ago. Traditional cable television, for

example, has been supplanted in many ways by on-demand streaming platforms like Netflix or Hulu. This modernization has left municipalities questioning whether streaming platforms, too, should be paying a fair share of franchise fees before enjoying the financial benefit of Hoosiers' business. Many cities seem to have concluded that these streaming platforms offer "video service" within the meaning of the Act and should have applied for franchise agreements with the Commission some time ago. To date, though, the streaming platforms have not applied for franchise agreements, and thus have avoided the Act's fee obligations.

In August 2020, the cities of Fishers, Indianapolis, Evansville, and Valparaiso challenged that status quo by filing a putative class action lawsuit in Marion Superior Court against Netflix, Disney, Hulu, DIRECTV, and DISH Network. The cities sought a declaration that the streaming platforms provide "video service" as defined by the Act and therefore must pay past and future franchise fees. For their part, the defendant streaming platforms responded by removing the case to federal court under 28 U.S.C. §§ 1441 and 1453. The platforms explained that the district court had jurisdiction over the lawsuit under both the traditional diversity jurisdiction statute, see 28 U.S.C. § 1332(a), and under the Class Action Fairness Act of 2005, see 28 U.S.C. § 1332(d).

The cities did not dispute the district court's subject matter jurisdiction over the case, but instead filed a motion to remand to state court on abstention grounds. Invoking the comity abstention doctrine articulated most recently in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), the cities argued that federal courts have long declined to exercise jurisdiction over cases involving local revenue collection and taxation.

The district court, the cities pressed, should chart that same course here and return the case to Indiana state court.

The district court agreed with the cities and remanded, relying on the *Levin* comity abstention doctrine. The streaming services now appeal from that determination.

II

We begin with appellate jurisdiction. "An order remanding a case to state court is a final order that is reviewable on appeal unless there is some other prohibition on review." *Hammer v. United States Dep't of Health & Human Servs.*, 905 F.3d 517, 525 (7th Cir. 2018). That prohibition is ordinarily found in 28 U.S.C. § 1447(d), which states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." But that is not the case here. In *Quackenbush v. Allstate Insurance Co.*, the Supreme Court clarified that § 1447(d) does not bar appellate jurisdiction over abstention-based remand orders and held that such orders are appealable under 28 U.S.C. § 1291. See 517 U.S. 706, 715 (1996).

With confidence in our own appellate jurisdiction to consider the propriety of the district court's abstention-based remand order, we proceed to the merits.

A

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). That duty reflects the "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*,

491 U.S. 350, 359 (1989). Because a decision to abstain pushes against this obligation, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River*, 424 U.S. at 813.

Within the tax and revenue world, a federal court's obligation to stay its hand comes most often from the Tax Injunction Act. Enacted in 1867, the TIA provides that a district court "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In practice, then, the TIA ensures that challenges to state taxes are litigated, if at all, in the state courts. It does not, however, bar federal adjudication of collection suits initiated by states or municipalities. See *Jefferson County v. Acker*, 527 U.S. 423, 433–34 (1999) ("[A] suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description."). Because the cities initiated this collection suit, all agree that the TIA does not defeat federal jurisdiction.

But our overview of the law in this area does not end there. Alongside the TIA sits a judicially created and related doctrine: comity abstention. "[T]he comity doctrine is more embracive than the TIA," and "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Levin*, 560 U.S. at 421, 424. That class of cases includes those presenting challenges to "state taxation of commercial activity," on the understanding that revenue collection is a core function of state governments. *Id.* at 421.

Because the comity abstention doctrine often overlaps with the limitations imposed by the TIA, the doctrine is seldom invoked. Leading treatises and casebooks on the law of

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