No. 21-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITY OF ASHDOWN, ARKANSAS

Plaintiff-Appellant

v.

NETFLIX, INC. AND HULU, LLC

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Arkansas
Texarkana Division
Civil Action No. 4:20-cv-04113-SOH

ANSWERING BRIEF OF APPELLEE NETFLIX, INC.

Jennifer H. Doan
Cole Alan Riddell
HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75503

Gregory G. Garre
Jean A. Pawlow
Peter E. Davis
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200
gregory.garre@lw.com

Mary Rose Alexander
Robert C. Collins III
LATHAM & WATKINS LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611

Counsel for Defendant-Appellee Netflix, Inc.

SUMMARY OF CASE

The Arkansas Video Service Act (VSA) requires "video service providers" to pay franchise fees to municipalities in exchange for the right to "install, construct, and maintain facilities in the [municipality's] public rights-of-way." Ark. Code Ann. § 23-19-205(b). The VSA also excludes entities that provide "video programming" through "a service that enables end users to access content . . . offered over the public Internet." *Id.* § 23-19-202(15)(B)(ii). No provision of the VSA authorizes private enforcement by municipalities, or by anyone else. Netflix does not install, construct, or maintain facilities in any public rights-of-way in Arkansas. Netflix instead makes video content available as part of a library of streaming content that customers can access over the public Internet. Netflix therefore does not need a franchise and has no obligation to pay franchise fees under the VSA.

On December 23, 2020, the City of Ashdown filed a putative class action complaint against Defendants Netflix, Inc., and Hulu, LLC, in the U.S. District Court for the Western District of Arkansas, claiming that the VSA requires Defendants to obtain a franchise and pay franchise fees. The district court granted Defendants' motions to dismiss. The questions presented are whether the district court correctly determined that: (1) Ashdown has no private cause of action under the VSA; and (2) the VSA does not apply to Defendants in any event.

Netflix requests 15 minutes of oral argument per side.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1A, Defendant-Appellee Netflix, Inc., states that it is not the subsidiary of any parent corporation and that no publicly-held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

ADMINISTRATIVE DECISIONS

STATUTES

Ark. Code Ann.

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This appeal concerns the effort of one Arkansas city to impose franchise fees on Netflix's streaming service in contravention of the text, history, and design of the Arkansas Video Service Act (VSA). Under the VSA, franchise fees are premised on a video service provider's physical occupation and use of the public rights-of-way. That is clear from the text and structure of the VSA and this Court's decisions, as the City of Ashdown itself seems to recognize in its opening brief. Netflix, however, does not use the public rights-of-way. It does not "install, construct, [or] maintain facilities in the public rights-of-way." Ark. Code Ann. § 23-19-205(b). Nor does it employ "extensive physical facilities and substantial construction upon" public rights-of-way. *Guidry Cablevision/Simul Vision Cable Sys. v. City of Ballwin*, 117 F.3d 383, 385 (8th Cir. 1997). Netflix instead makes content available as part of a library of streaming content that customers can view over the public Internet. App. 3; R. Doc. 1 ¶ 10. "Thus, in the most practical sense," Netflix "has not 'used' the City's public right-of-way." *Guidry*, 117 F.3d at 386.

The City of Ashdown nevertheless sued Netflix seeking to force it to obtain a franchise and pay franchise fees under the VSA. Ashdown's theory—formulated over seven years after the VSA was enacted—is that Netflix owes it (and every other Arkansas municipality) up to 5% of Netflix's "gross revenue" as defined in the VSA merely because Netflix makes content available for access over the public Internet—

without installing, constructing, or maintaining any facilities in the public rights-of-way. It sought judicial redress even though no provision of the VSA confers on municipalities a right to sue to enforce the Act's terms. The district court correctly rejected those arguments and dismissed the case, joining a growing consensus of courts around the country that have done the same.

First, whatever its requirements, the VSA does not confer on Ashdown a private right of action to sue Netflix, or anyone else, for franchise fees. The VSA does not expressly authorize local governments to go to court to enforce the VSA. Nor could such a cause of action be implied. Indeed, extending a cause of action to Ashdown would undercut the VSA's goals: ensuring "uniform regulation of video service providers, assur[ing] equality of treatment of video service providers, and encourag[ing] new video service providers to enter the state." Arkansas Video Service Act, 2013 Ark. Laws Act 276, S.B. 101, § 3.

Second, the VSA does not apply to Netflix in any event. The VSA governs only companies that "construct" or "operate" facilities in the public rights-of-way. *See* Ark. Code Ann. §§ 23-19-205(b), 23-19-202(5)(A)(i); 47 U.S.C. § 522(9). Netflix does not undertake such actions in the public rights-of-way, and Ashdown does not allege otherwise. In any event, the VSA excludes any video content provided "as part of and via a service that enables end users to access content . . . offered over the public Internet." *Id.* § 23-19-202(15)(B)(ii). As the district court

recognized, Netflix's content satisfies that exclusion: It is provided to Netflix customers as part of and via a service that enables customers to access content over the public Internet; indeed, it can *only* be accessed over the public Internet. App. 274-75; R. Doc. 96 at 6-7.

A contrary result would subject companies that offer video content over the public Internet to local taxation despite the fact that they do not use any public right-of-way, with the ultimate financial impact borne by customers and residents. It would yield unintended windfalls to local governments by requiring entities to pay franchise fees when they have no physical presence in the public rights-of-way. It would jeopardize the availability of popular streaming services, especially if those services were subjected to crippling taxes by local jurisdictions across the country. And it would make this Court an outlier as a growing chorus of federal and state courts across the country have rejected claims brought under similar laws.

The district court's decision should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that the VSA does not confer on Plaintiff-Appellant a private cause of action, where the VSA contains no express cause of action and extending a cause of action to local governments is inconsistent with the statutory text, purpose, and history.

- *Cent. Okla. Pipeline, Inc. v. Hawk Field Servs., LLC*, 400 S.W.3d 701 (Ark. 2012)
- *Young v. Blytheville School Dist.*, 425 S.W.3d 865 (Ct. App. Ark. 2013)
- Ark. Code Ann. § 23-1-104
- Ark. Code Ann. § 23-19-210

2. Whether the district court correctly determined that the VSA does not apply to Defendant-Appellee Netflix, where Netflix does not install, construct, or maintain facilities in the public rights-of-way and merely makes video streaming content available over the public Internet.

- *Guidry Cablevision/Simul Vision Cable Sys. v. City of Ballwin*, 117 F.3d 383 (8th Cir. 1997)
- *City of El Dorado v. Coats*, 299 S.W. 355 (Ark. 1927)
- *Ark. Dep't of Corrections v. Shults*, 541 S.W.3d 410 (Ark. 2018)
- Ark. Code Ann. § 23-19-202
- Ark. Code Ann. § 23-19-203
- Ark. Code Ann. § 23-19-205

STATEMENT OF THE CASE

A. Franchise Fees

A franchise is "a contract between the city and the party or corporation to whom it is granted," adopted "for the public benefit." *City of El Dorado v. Coats*,

299 S.W. 355, 358 (Ark. 1927). The classic example involves a local government granting a franchise to a utility "to construct and operate a system for furnishing light and water in the city," in exchange for a franchise fee. *City of El Dorado v. Citizens' Light & Power Co.*, 250 S.W. 882, 883 (Ark. 1923).

Like other contracts, the franchise arrangement benefits both parties. The utility receives the right to physically enter the public rights-of-way to provide a valuable service, and the local government receives a franchise fee—typically a percentage of the utility's revenue from occupying and using the public rights-of-way. In *Coats*, for example, the franchise holder paid the municipality "2 per cent of the gross receipts" for the "right to erect, maintain, and operate a system of pipes" in "the streets, alleys, and public grounds." 299 S.W. at 356. For decades, utilities have paid franchise fees to local governments for the right to put wires and equipment on or in public lands and rights-of-way.

Video franchises, negotiated by cable companies seeking to extend cable service to local residents, follow the same model: The video service provider pays a franchise fee in exchange for the right to "construct and operate facilities in the local rights-of-way." Third Report and Order, *In re Implementation of § 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 34 FCC Rcd. 6844, 6875 (Aug. 2, 2019); *see also* 47 U.S.C. § 522(9) ("franchise" authorizes "construction or operation of a cable

system"). The latter half of that bargain is critical. Video service providers obtain local franchises and pay franchise fees, this Court has explained, because their services "necessarily involve extensive physical facilities and substantial construction upon and use of public rights-of-way in the communities they serve." *Guidry Cablevision/Simul Vision Cable Sys. v. City of Ballwin*, 117 F.3d 383, 385 (8th Cir. 1997) (quoting *In re Def'n of a Cable Television Sys.*, 5 FCC Rcd. 7638, 7639 (1990)); *see City of Chicago v. FCC*, 199 F.3d 424, 433 (7th Cir. 1999) (same). Absent such construction or physical use of the public rights-of-way, there is no basis for a franchise requirement or a franchise fee. *See Guidry*, 117 F.3d at 385.

B. Arkansas Video Service Act

Before 2013, video service providers seeking to build in public rights-of-way in Arkansas negotiated franchises directly with each local government. This local franchising regime, however, presented obstacles for "new video service providers" seeking to enter "the state marketplace." Arkansas Video Service Act, 2013 Ark. Laws Act 276, S.B. 101, § 3. AT&T, for example, sought to install or operate new equipment in the public rights-of-way to provide its U-Verse video service, but it encountered difficulty negotiating individual franchise agreements with each municipality in which it sought to operate.[1]

---

[1] *See* U.S. Dep't of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* (Nov. 2008), at 6-7, 70-73; Joel Walsh, *City Opposes Cable Law*, Nw. Ark. Democrat Gazette (Mar. 8, 2013),

Those concerns led the Arkansas state legislature to enact the Arkansas Video Service Act in 2013. Passed on an emergency basis, the VSA seeks to "ensure[] uniform regulation of video service providers, assure[] equality of treatment of video service providers, and encourage[] new video service providers"—like AT&T (with its U-Verse) and Verizon (with its FIOS)—"to enter the state." 2013 Ark. Laws Act 276, § 3. It achieves that goal by creating "a simplified process for the issuance of a state franchise" under the control of the Arkansas Secretary of State. *Id.*

The VSA requires "video service provider[s]" to obtain a franchise, defined as an "initial authorization" to "construct[] or operat[e] a cable system." Ark. Code. Ann. § 23-19-203(a)(1); *id.* § 23-19-202(5)(A)(i) (adopting definition in 47 U.S.C. § 522(9)). A "video service provider" is defined as "a provider of video service." *Id.* § 23-19-202(16). "Video service," in turn, means "the delivery of video programming to subscribers," where that "programming" meets two requirements: first, it "is [programing] generally considered comparable to video programming delivered to viewers by a television broadcast station, cable service, or digital television service, without regard to the technology used to deliver the video service, including Internet protocol technologies"; and second, "the service is provided

---

https://www.nwaonline.com/news/2013/mar/08/city-opposes-cable-law/. Verizon faced similar challenges obtaining access to the public rights-of-way to deploy its FIOS system. *See* Robert W. Crandall et al., *Does Video Delivered over a Telephone Network Require a Cable Franchise?*, 59 Fed. Commc'ns L.J. 251, 253-54 (2007).

primarily through equipment or facilities located in whole or in part in, on, under, or over any public right-of-way." *Id.* § 23-19-202(15)(A)(i)-(ii).

Importantly, the VSA contains an exception for programming transmitted over the public Internet. Under that exception, "video programming" is not "video service" if it is "[p]rovided as part of and via a service that enables end users to access content, information, electronic mail, or other services offered over the public Internet." *Id.* § 23-19-202(15)(B)(ii).

To obtain a franchise, video service providers may apply for "a certificate of franchise authority . . . [from] the Secretary of State," "elect[] to [n]egotiate a franchise with a political subdivision," or "adopt" an existing local franchise. *Id.* § 23-19-203(a)(1)(B)-(C). The VSA provides certain obligations on and benefits to holders of state-issued certificates of franchise authority. On the obligation side, the holder must pay a percentage of its "gross revenue"—*i.e.*, a franchise fee—to each "political subdivision where it provides video service." *Id.* § 23-19-206(b).[2] That franchise fee requirement does not extend to local franchises negotiated with a

[2] "Gross revenue" means "all consideration of any kind or nature . . . derived by the holder of a certificate of franchise authority from the operation of the video service provider's network to provide video service within the political subdivision." Ark. Code Ann. § 23-19-206(a)(3)(A). The "provider's network" is defined as "the optical spectrum wavelengths, bandwidth, or other current or future technological capacity used for the transmission of video programming over wireline directly to subscribers within the geographic area within the political subdivision." *Id.* § 23-19-206(a)(4).

political subdivision or to local franchises adopted by the video service provider. Franchise holders also must designate "a sufficient amount of capacity" on their network for certain public access channels. *Id.* § 23-19-209(b)(1)(A). On the benefit side, the VSA authorizes "the holder of a certificate of franchise [] to install, construct, and maintain facilities in the public rights-of-way over which the political subdivision has jurisdiction." *Id.* § 23-19-205(b); *see also id.* § 23-19-202(5)(A)(i) (incorporating federal definition of franchise as "an initial authorization to . . . construct[] or operat[e] a cable system"). Franchise holders are also given "the rights, powers, and duties provided for telephone and telegraph companies" under Arkansas law—including the right "to procure the condemnation of the property, lands, rights, privileges, and easements." *Id.* §§ 23-19-205(a), 23-19-103.

The VSA contains public enforcement provisions but no private right of action. First, the Arkansas Public Service Commission (APSC) "ha[s] the right, and it is made its duty, to file suit against any person or corporation in any court of competent jurisdiction . . . to compel compliance" with the VSA. *Id.* § 23-1-104. Second, the VSA provides that "[r]egulation of a person holding a certificate of franchise authority . . . shall be exclusive to the Secretary of State." *Id.* § 23-19-210(d). The VSA also states that it "shall not be interpreted to prevent a video service provider, a political subdivision, or a franchising entity from entering into a

negotiated franchise agreement with a political subdivision or seeking clarification of its rights and obligations under federal or state law." *Id.* § 23-19-210(b).

C. Netflix's Streaming Service

Netflix offers its members online access to a streaming library of documentaries, feature films, and shows. App. 3; R. Doc. 1 ¶ 9. Netflix does not offer live content. Nor does it offer content on any predetermined or set schedule. *See* App. 271; R. Doc. 96 at 3. The selection of content is instead user-driven: Members can access Netflix's content at a time and place of their choosing on any Internet-connected device.

Netflix members stream video content from Netflix's library using their personal device (*e.g.*, a computer, television, or smart phone) and broadband Internet connection. App. 3; R. Doc. 1 ¶¶ 10, 11. That Internet connection is supplied by a third-party Internet Service Provider (ISP). App. 271; R. Doc. 96 at 3. ISPs provide broadband Internet using a variety of technologies, including wired (*e.g.*, DSL, cable, fiber), fixed wireless, mobile, or satellite technologies. *Id.*[3] Some of those technologies, like DSL, cable, and fiber, have wireline facilities located in a city's public rights-of-way; others, like fixed wireless, mobile, and satellite, often do not.

---

[3] *See also* Fourteenth Broadband Deployment Report, *In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269, FCC 21-18 (Jan. 19, 2021), at 12-16.

See App. 4; R. Doc. 1 ¶ 15; *supra* Fourteenth Broadband Deployment Report at 12-27.

Because Netflix merely makes content available to its members over the public Internet, it does not install, maintain, or construct any facilities in the public rights-of-way. Netflix does not control or own any facilities in the public rights-of-way, nor does it provide content directly to customers using any such facilities. Netflix instead makes video content accessible "through the subscribers' existing facilities controlled and operated by third part[y]" ISPs. App. 271; R. Doc. 96 at 3. For those reasons, Netflix has not applied to the Secretary of State for a certificate of franchise authority and does not pay franchise fees.

D. Procedural History

The City of Ashdown, Arkansas, filed this putative class action lawsuit on December 23, 2020, against Netflix and Hulu, alleging violations of the VSA and seeking damages. Ashdown's theory, developed seven years after the VSA's enactment, is that Netflix is a "video service provider," subject to the VSA, because it offers video programming that is comparable to cable companies and broadcast stations through Internet-connected devices. App. 3; R. Doc. 1 ¶¶ 9-10. Ashdown does not claim that Netflix installs, operates, or constructs any facilities in the public rights-of-way. Ashdown instead alleges that Netflix's members obtain content by

way of "broadband Internet connections" that "rely upon wireline facilities located in whole or in part in the public right(s)-of-way." App. 4; R. Doc. 1 ¶ 15.

Based on those allegations, Ashdown contends that Netflix has violated the VSA. Ashdown claims that Netflix was required to apply for a certificate of franchise authority from the Secretary of State and pay a quarterly franchise fee to each local government where it operates. App. 5; R. Doc. 1 ¶¶ 16-18. Ashdown seeks damages, including 5% of Netflix's gross revenues derived from operations in its municipality. App. 10; R. Doc. 1 ¶¶ 38-43. Ashdown's complaint does not identify any statutory provision authorizing it to bring a private lawsuit to enforce the VSA.

The district court dismissed Ashdown's action for failure to state a claim. Noting that there were "numerous arguments as to why this action should be dismissed," the court found "two of these arguments dispositive." App. 273; R. Doc. 96 at 5. First, the court held that "the VSA does not authorize Plaintiff to bring this action": it does not afford municipalities a private cause of action to sue video service providers. App. 275, 276; R. Doc. 96 at 7, 8. Second, the court held that Defendants are not "video service providers" subject to the VSA because they satisfy "the public internet exclusion": they offer their video content as part of and via a service that enables users to access content over the public Internet. App. 275; R. Doc. 96 at 7.

SUMMARY OF ARGUMENT

The district court correctly rejected Ashdown's claim that Netflix owed it franchise fees under the VSA for making streaming content available over the public Internet.

I. The VSA is not privately enforceable. It does not expressly confer on local governments like Ashdown any cause of action. No provision of the VSA purports to confer a private right of action on municipalities, or anyone else. The only VSA provision Ashdown cites preserves authority granted by *other* statutes—and Ashdown does not claim it has a right to sue under any other statute.

Nor is there any basis for this Court to imply a cause of action. The VSA expressly vests enforcement authority in the Arkansas Public Service Commission, and regulatory authority in the Secretary of State; it does not suggest that cities have a right to sue non-franchise holders to force them to obtain franchises, let alone authorize private damages suits for past-due franchise fees. Giving local governments a right to sue would undermine the VSA's express purpose: to bring uniformity to video franchises in Arkansas. This case underscores that concern. One Arkansas city seeks to impose franchise fees on two video streaming services (Netflix and Hulu), but no others. Allowing this lawsuit to proceed would result in inconsistent treatment of video streaming services and local governments alike.

II. Even if it were privately enforceable, the VSA does not apply to Netflix. Like other franchising regimes, the VSA applies only to entities that "construct" or "operate" facilities in the public rights-of-way. *See* Ark. Code Ann. §§ 23-19-205(b), 23-19-202(5)(A)(i). Ashdown does not allege that Netflix uses the public rights-of-way in that way, and Netflix does not. Applying the VSA to companies like Netflix would render broad swaths of the VSA meaningless. It would also upend the fundamental bargain underlying all franchise regimes: that franchise fees are paid in exchange for a tangible benefit or service provided by the local government.

Moreover, as the district court held, the VSA does not apply because Netflix makes content available to its customers over the public Internet. The VSA excludes "video programming" provided "as part of and via a service that enables end users to access content . . . or other services offered over the public Internet." *Id.* § 23-19-202(15)(B)(ii). That provision applies to Netflix's video content, which is made available as part of a streaming library over the public Internet—rather than pushed out over private cable or telephone lines. Accordingly, as the district court concluded, the public-Internet exception alone bars Ashdown's claim.

In response, Ashdown offers a hodgepodge of unpersuasive—and at times conflicting—theories. Ashdown principally asserts that the public-Internet exception is directed to ISPs, but that reading is inconsistent with the statutory text and case law. Even if the exclusion were limited to content made accessible by ISPs,

it would still apply in this case. The public-Internet provision excludes from the definition of video service certain kinds of *video programming*—not certain kinds of providers or services. Assuming it applies only to "video programming" provided to "users" by ISPs, then Netflix's content still qualifies. For, as Ashdown recognizes, it is the ISP that transmits Netflix's video content to Netflix's customers.

A contrary result would subvert the aims of the VSA and franchise fees generally, and open up Internet streaming services to considerable liability from local governments simply for making content available over the public Internet. A growing number of courts around the country have repudiated that result as illogical, unnecessary, and erroneous in similar lawsuits brought under analogous state statutory schemes. The district court correctly reached that same conclusion here. There is no reason for this Court to chart its own course.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews "de novo" a district court decision granting a motion to dismiss, "applying the same standards as the district court." *Varner v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004). To withstand a motion to dismiss, "a complaint must contain sufficient factual allegations to 'state a claim that is plausible on its face.'" *Smithrud v. City of Paul*, 746 F.3d 391, 397 (8th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).

ARGUMENT

This appeal turns on the meaning of the Arkansas Video Service Act. When interpreting state statutes, federal courts apply "that state's rules of statutory construction." *Behlmann v. Century Sur. Co.*, 794 F.3d 960, 963 (8th Cir. 2015). "The primary rule of statutory interpretation" in Arkansas is "to give effect to the intent of the legislature." *Ark. Dep't of Corrections v. Shults*, 541 S.W.3d 410, 412 (Ark. 2018). Arkansas courts "first construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Id.* In conducting that review, courts "reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." *Id.* But courts may "not read into a statute language that was not included by the legislature." *Id.*

Those principles resolve this case. As the district court explained, Ashdown's suit fails under a plain meaning construction of the VSA.[4]

---

[4] A growing number of courts across the country have reached the same conclusion in suits brought under statutes similar to the VSA. *See Gwinnett County v. Netflix, Inc.*, Civil Action File 20-A-07909-10, at 4-23 (Sup. Ct. Ga. Feb. 18, 2022) (unpublished), available at Add. 1; *City of New Boston v. Netflix, Inc.*, 2021 WL 4771537, *4 (E.D. Tex. Sept. 30, 2021) (unpublished); *City of Lancaster v. Netflix, Inc.*, 2021 WL 4470939, *3 (Sup. Ct. Cal. Sept. 20, 2021) (unpublished); *City of Reno v. Netflix, Inc.*, 2021 WL 4037491, *6-7 (D. Nev. Sept. 3, 2021) (unpublished) (appeal pending); *Kentucky v. Netflix, Inc.*, Civ. Action No. 15-CI-01117 (Ky. Cir. Ct. Div. II Aug. 23, 2016) (unpublished), available at Add. 29.

I. THE VSA IS NOT PRIVATELY ENFORCEABLE

This lawsuit fails at the threshold because Ashdown does not have a cause of action. A basic prerequisite for any lawsuit, state or federal, is statutory authorization for the plaintiff's suit—commonly known as a cause of action. *See Cross v. Fox*, 23 F.4th 797, 800 (8th Cir. 2022); *Branscumb v. Freeman*, 200 S.W.3d 411, 416-17 (Ark. 2004). That authorization may be "express[]" or, rarely, "implied." *Cent. Okla. Pipeline, Inc. v. Hawk Field Servs., LLC*, 400 S.W.3d 701, 712 (Ark. 2012); 2 David Newbern et al., Ark. Civil Prac. & Proc. § 4:8 (5th ed. 2021). Ashdown's complaint is based solely on alleged violations of the VSA. But Ashdown does not—because it cannot—show that the VSA expressly or impliedly grants it a cause of action to sue non-franchise holders like Netflix.

A. The VSA Does Not Create An Express Cause Of Action

The VSA does not expressly authorize local governments to file lawsuits to enforce its provisions. None of the Act's ten sections authorizes local governments to seek relief in court: They do not permit private enforcement of the Act's franchise requirements; and they do not permit damages suits for allegedly unpaid franchise fees.

In contending otherwise, Ashdown relies on one provision—titled "Applicability of other laws." The relevant provision states:

> Except as otherwise stated in this subchapter, this subchapter shall not be interpreted to prevent a video service provider, a political

> subdivision, or a franchising entity from entering into a negotiated franchise agreement with a political subdivision or seeking clarification of its rights and obligations under federal or state law or to exercise a right or authority under federal or state law.

Ark. Code Ann. § 23-19-210(b); *see* Ashdown Br. 21. But that provision does not authorize *anything*; it instead simply makes clear that the VSA should not be read to eliminate any preexisting right or authority.

The provision's text—stating that the VSA "shall not be interpreted to prevent" the exercise of another right or authority—makes that plain. The section title—"Applicability of *other* laws"—confirms as much. Ark. Code Ann. § 23-19-210(b) (emphasis added). Provisions of this sort are ubiquitous in the Arkansas Civil Code and merely reflect the legislature's intent to ensure that a newly enacted statute is not interpreted to eliminate a preexisting right or authority. *See, e.g.*, *id.* § 23-18-703(b) ("Nothing in this subchapter shall be construed as limiting or diminishing the authority of the commission to order, require, promote, or engage in any other energy resource practices or procedures."); *see also Doe v. Gillespie*, 867 F.3d 1034, 1044 (8th Cir. 2017) (rejecting cause-of-action argument based on provision that "declares what is 'intended' by the statute, but does not include an operative provision").[5] Ashdown does not claim "a right or authority" to sue outside the VSA, nor could it.

[5] In the context of the VSA, section 23-19-210(b) indicates that franchise holders and local governments may seek to clarify their rights or obligations under an existing, negotiated franchise. As noted, franchises are "contracts"—and, depending on their terms, they can be enforced as such in court. *See Coats*, 299 S.W. at 356,

The contrast between the VSA and the express causes of action actually provided throughout the Arkansas Civil Code underscores that the legislature knows how to create a cause of action when it wishes. For example, the legislature expressly authorizes suits for persons injured by railroads: "When any adult person is wounded by railroad trains running in this state, he or she may sue in his or her own name." Ark. Code Ann. § 23-12-903. It also provides a private cause of action for violations of the Quarry and Open Pit Mine Blasting Control Act: "Any person adversely affected by a violation of this subchapter or any rules or orders issued pursuant to this subchapter shall have a private right of action for relief against the violator." *Id.* § 20-27-1315. And so on. Ashdown has not identified any such provision in the VSA, and there is none.[6]

359; *supra* at 4-5. In *Southwestern Electric Power Co. v. Coxsey*, for example, the court allowed a lawsuit based on the "interpretation of the franchises already in existence." 518 S.W.2d 485, 487 (Ark. 1975). That has no bearing on this case. It is undisputed that Netflix does not have a franchise or any agreement with the City of Ashdown. App. 5; R. Doc. 1 ¶ 17. Just like a party may not bring a lawsuit seeking to force another party to sign a contract, so a local government cannot sue to force another party to obtain a franchise.

[6] Ashdown has abandoned its argument that section 23-19-207 authorizes private lawsuits like this one. That provision states that "[i]f a court of competent jurisdiction finds that the holder of a certificate of franchise authority is not in compliance with this subchapter, the court shall order the holder of the certificate of franchise authority to cure the noncompliance." Ark. Code Ann. § 23-19-207(c)(1). That provision does not authorize local governments (or anyone else) to sue to enforce the VSA. But more importantly, it addresses only "*the holder* of the certificate of franchise authority." *Id.* (emphasis added). It is undisputed that Netflix does not hold a certificate of franchise authority. *See also Gwinnett County*, 20-A-

B. There Is No Basis To Imply A Cause Of Action

Lacking an express cause of action, Ashdown bears a heavy burden of establishing an implied cause of action under the VSA. Ashdown cannot meet that burden.

"The Arkansas Supreme Court has been reluctant to infer a private cause of action from criminal or regulatory statutes." 2 Ark. Civil Prac. & Proc. § 4:8. Just as Arkansas courts "will not read into a statute language that was not included by the legislature," *Shults*, 541 S.W.3d at 412, they do not presume that a statute contains an implied right of action when an express right of action is not conferred. *Young v. Blytheville School Dist.*, 425 S.W.3d 865, 871 (Ct. App. Ark. 2013); *cf. Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) ("affirmative evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent the essential predicate for implication of a private remedy simply does not exist") (internal quotation marks omitted).

The only situations in which Arkansas courts have implied a right of action concern circumstances in which: (1) the "legislature explicitly expressed [such] an intent"; (2) the plaintiff is part of a "special class of citizens" protected by the statute; and (3) a private right of action would not "circumvent the clear intent of the statute."

07909-10, at 5-6 (rejecting similar argument); *City of New Boston*, 2021 WL 4771537, at *4 (same); *City of Lancaster*, 2021 WL 4470939, at *3 (same).

Cent. Okla., 400 S.W.3d at 712.[7] Even then, it is not enough that a statute "imposes a duty"; there must be affirmative evidence that the legislature intended to create a private right and remedy in favor of the party bringing the lawsuit. *Young*, 425 S.W.3d at 871; *see also* 2 Ark. Civil Prac. & Proc. § 4:8. Ashdown does not make that showing here.

1. The VSA does not "explicitly express[]" an intent to allow local governments to bring private lawsuits. *See Cent. Okla.*, 400 S.W.3d at 712. As noted above, there is no textual authorization for local governments to enforce the Act against non-franchise holders like Netflix. *See supra* at 17-18.

To the contrary, the VSA creates an alternative enforcement mechanism. As the district court explained, the Arkansas Public Service Commission has "the right, and it is made its duty, to file suit against any person or corporation in any court of competent jurisdiction . . . to compel compliance with the provisions of this act." App. 277 (quoting Ark. Code Ann. § 23-1-104); R. Doc. 96 at 9. The legislature's

[7] Most of the relevant Arkansas case law arises in the common-law tort context, rather than (as here) the regulatory context. Those decisions consider, for example, whether a statute imposes a tort duty on a particular party, or whether a statutory violation constitutes negligence *per se*. *Cent. Okla.*, 400 S.W.3d at 712; *Branscumb*, 200 S.W.3d at 416-17. The standard for implying a private right of action in a purely statutory case like this one would be, if anything, even more difficult to satisfy. The court's role here is limited to effectuating legislative intent—not making the kind of policy judgments involved in common-law decision making. In any event, Ashdown lacks an implied cause of action under any standard.

choice to provide the APSC such authority expressly weighs against the legislature doing so impliedly for local governments. *See Baptist Health v. Murphy*, 373 S.W.3d 269, 288 (Ark. 2010) (holding under *expressio unius* canon that express grant of damages remedy precludes implied remedy for injunctive relief); *see also Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). The grant of authority to the APSC also indicates that private enforcement is unnecessary to ensure compliance: Video service providers cannot escape their obligations given the APSC's "duty" to enforce the VSA in court.

Recognizing an implied right of action also would contravene the express purpose of the VSA: to ensure uniform and equal treatment of video service providers. *See Cent. Okla.*, 400 S.W.3d at 712. As described above, the legislature enacted the VSA on an emergency basis, declaring it "immediately necessary" to "ensure[] uniform regulation of video service providers, assure[] equality of treatment of video service providers, and encourage[] new video service providers to enter the state." 2013 Ark. Laws Act 276, § 3; *supra* at 6-7. The VSA's text and structure reflect those goals, establishing a "simplified process for the issuance of a state franchise" in control of the Secretary of State. *Id.* Implying a cause of action in favor of local governments here would eliminate any hope for state-wide uniformity. Cities across Arkansas could sue content providers seeking to force

them to apply to the Secretary of State for franchises, and demanding millions of dollars in damages. Each local government would become its own de facto franchising authority, deciding which content providers to sue and which ones not to sue. This lawsuit underscores that concern. A single Arkansas city has decided to sue—and seeks to impose franchise requirements on—just two (of many) Internet content services. Allowing lawsuits like this one to proceed would torpedo the legislature's goal of ensuring "uniform regulation" and "equal[] treatment of video service providers." *Id.* It is no surprise that Ashdown is apparently the first (and only) Arkansas municipality since the VSA was enacted in 2013 to claim the law creates a private cause of action.

Faced with similar statutory schemes, other courts have correctly declined to recognize an implied cause of action for local governments. In Nevada, for example, a district court found that a similar statute's similar purpose—creating "a uniform system at the state level for the management, approval, and enforcement of franchise fees"—was "inconsistent" with an implied cause of action. *City of Reno*, 2021 WL 4037491, at *6, *7. Other courts have reached similar conclusions. *See City of New Boston*, 2021 WL 4771537, at *4 (explaining that implying a cause of action "would undermine the regulatory scheme set forth in the statute and its overall purpose to centralize the issuance of franchises in one statewide body"); *City of Lancaster*, 2021 WL 4470939, at *4 (refusing to imply a cause of action because state statute

contained express enforcement mechanisms to achieve "the statute's policy objectives"); *Gwinnett County*, 20-A-07909-10, at 8 (holding that statutory text did not "support[] an implied cause of action").

2. None of Ashdown's counterarguments is persuasive. Ashdown's main response—that because it is owed franchise fees under the Act, it has a cause of action—misunderstands both the test for an implied cause of action and the structure of the VSA. *See* Ashdown Br. 22-23. On the first score, a statutory "duty" does not alone create an implied cause of action. *See Young*, 425 S.W.3d at 871. Rather, the "determinative consideration is whether the legislative branch intended to provide a private *remedy*." 2 Ark. Civil Prac. & Proc. § 4:8 (emphasis added). The court in *Young*, for example, recognized that an educational statute "impose[d] a duty" on schools to maintain certain policies and standards, but nonetheless held that there was no privately enforceable right given the absence of evidence that the legislature intended to create "a private right of action or [] any kind of remedy." *Id.* at 871-72. Here, not only is Ashdown unable to identify any evidence that the legislature intended that it enforce the statute, all evidence indicates the legislature intended *not* to grant a private right or remedy to local governments. *See supra* at 21-23.

Ashdown's statutory-duty argument also misunderstands the VSA's structure. The Act imposes franchise fees only on "[a] video service provider offering video service in a political subdivision *under a certificate of franchise authority*." Ark.

Code Ann. § 23-19-206(b) (emphasis added); *see also id.* § 23-19-206(a)(3)(A) (defining "gross revenue" for purposes of calculating franchise fee as revenue "derived by the holder of a certificate of franchise authority"). Video service providers apply for "a certificate of franchise authority" from "*the Secretary of State*"—not from any local government. *Id.* § 23-19-203(a)(1)(C) (emphasis added). Those provisions vest decisionmaking for who owes franchise fees in the Secretary of State: A company does not owe fees under the VSA unless the Secretary of State grants it a certificate of franchise authority.[8] Ashdown's complaint implicitly recognizes as much, as it seeks a declaration ordering Netflix "to file an application with the Secretary of State for a state-issued certificate of franchise authority." App. 10; R. Doc. 1 ¶ 43d.

The upshot of the VSA's centralization of franchise-fee authority in the Secretary of State is that Ashdown has no unqualified right to receive—and Netflix no mandatory duty to pay—franchise fees. Ashdown's entitlement to fees instead depends on the regulatory actions of a different governmental body. The absence of an unqualified right on the plaintiff's part—and the absence of a mandatory duty on the defendant's—confirms that Ashdown has no implied right of action. *See Young*,

[8] Section 23-19-210(d) confirms that conclusion, providing that "regulation of a person holding a certificate of franchise authority issued under this subchapter *shall be exclusive to the Secretary of State* as provided in this subchapter." *Id.* § 23-19-210(d) (emphasis added).

425 S.W.3d at 871-72; *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (implied cause of action proper only where provision "unambiguously conferred a mandatory benefit" on plaintiff) (internal quotation marks omitted).

Ashdown's related argument (at 23) that the VSA was enacted "for the benefit of individual municipalities" fails both because such intent is insufficient to imply a right of action and because the legislature was not in fact focused on protecting municipalities like Ashdown. First, a vague intent to benefit a particular party does not create a cause of action; as discussed, there must be affirmative evidence the legislature intended to provide the plaintiff a *remedy*. *See supra* at 21. Second, the VSA does not "express[] an intent to protect" local governments "as a special class of citizens." *Cent. Okla.*, 400 S.W.3d at 712. The legislature's focus was instead on ensuring "uniform regulation" and "equal treatment of video service providers," to enable "new video service providers to enter the state." 2013 Ark. Laws Act 276, § 3; *supra* at 6-7. Ashdown cites the legislature's remark that the previous regime was also "inequitable to . . . government entities." Ashdown Br. 23 (quoting 2013 Ark. Laws Act 276, § 3) (omissions in original). But to the extent that was a concern, the legislature addressed it by creating a "uniform" and "simplified process for the issuance of a state franchise"—not by authorizing local governments to take matters into their own hands. 2013 Ark. Laws Act 276, § 3.

Ashdown's ultimate tactic is to flip the legal test. It insists—contrary to all indications—that "there is simply no evidence of any legislative intent to *deny* municipalities like Ashdown a remedy." Ashdown Br. 23 (emphasis added). But it is Ashdown's burden—and a heavy one—to show that the legislature intended to *grant* Ashdown a judicial remedy. *Cent. Okla.*, 400 S.W.3d at 712; *Young*, 425 S.W.3d at 871.[9] It has not come closing to meeting that burden.[10]

II. THE VSA DOES NOT APPLY TO NETFLIX

Even if Ashdown had a cause of action under the VSA, it would not matter because, by its terms, the VSA does not apply to Netflix. The Act applies only to companies that construct, install, or maintain facilities in the public rights-of-way; it

---

[9] Ashdown also reverses the test in arguing that it has a cause of action because the VSA does not expressly state that the APSC's jurisdiction is "exclusive." Ashdown Br. 22. That argument would require the legislature explicitly to foreclose a remedy, rather than expressly provide one. That is not how implied causes of action work. Ashdown's related reference to the *Coxsey* decision is inapposite because, as discussed above, that case involved "the court's interpretation of the franchises already in existence." 518 S.W.2d at 487; *see supra* at 18-19 n. 5. Later cases confirm that reading. *See Cullum v. Seagull Mid-South, Inc.*, 907 S.W.2d 741, 744 (Ark. 1995) (noting that *Coxsey* "hinged on the interpretation of the service area in the franchises issued and established by the PSC"). Moreover, *Coxsey* focused on the distinct question whether the APSC had exclusive *adjudicatory* authority, rather than exclusive enforcement authority. 518 S.W.2d at 486-87.

[10] Ashdown has rightly abandoned any argument that it has a cause of action based on the Declaratory Judgment Act. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (explaining that "the Declaratory Judgment Act" does not "provide a cause of action" and "the availability of [declaratory] relief presupposes the existence of a judicially remediable right"); *see also City of New Boston*, 2021 WL 4771537, at *3 (rejecting similar declaratory-judgment argument).

does not reach entities, like Netflix, that merely make content available to end users over the public Internet without any physical presence in the public rights-of-way. Moreover, as the district court concluded, the VSA explicitly exempts from its coverage video content that is offered over the public Internet, like Netflix's. The VSA therefore does not apply to Netflix. A contrary conclusion would upend the VSA's structure and purpose, and subject online streaming services—and in turn the residents who use them—to duplicative and unnecessary taxes.[11]

A. Netflix Is Not Subject To The VSA Because It Does Not Construct Or Operate Facilities In The Public Rights-Of-Way

At the outset, the VSA, like other franchise arrangements, applies only to companies that use—*i.e.*, "construct" or "operate"—facilities in the public rights of way. *See* Ark. Code Ann. §§ 23-19-202(5)(A)(i), 23-19-205(b); 47 U.S.C. § 522(9). Because Netflix does not use the public rights-of-way in that way—and because Ashdown does not allege otherwise—it is not subject to the VSA. The district court had no reason to reach this issue because it determined—correctly—that Netflix is

[11] The VSA does not apply to Netflix for additional reasons, including that Netflix does not provide "video programming." As Netflix explained in the district court, Netflix's content is not live, linear, scheduled, or channelized, and thus is not "comparable to video programming delivered to viewers by a television broadcast station, cable service, or digital television service." App. 65 (quoting Ark. Code Ann. § 23-19-202(15)(A)(i)); R. Doc. 24 at 11. Several other courts have rejected similar lawsuits on this ground. *See Gwinnett County*, 20-A-07909-10, at 22-23; *City of Lancaster*, 2021 WL 4470939, at *10-12; *Kentucky*, 15-CI-01117, at 14-17. The district court did not reach this issue because it concluded that the public-Internet exception applied. App. 275 n.4; R. Doc 96 at 7 n.4.

exempt from the VSA under the public-Internet exception. But this argument provides an independent basis for affirming the decision below even before considering the applicability of the public-Internet exception. *See Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1248 (8th Cir. 2012) (appellate court may affirm dismissal on "any grounds supported by the record").

1. The only way to harmonize the VSA's provisions is to construe its franchise requirement to apply only to companies that physically use—through installation, construction, operation, or maintenance—the public rights-of-way. Otherwise, more than a half dozen provisions in the VSA make no sense.

To begin with, the VSA defines a "franchise" as "an initial authorization . . . to construct[] or operat[e] a cable system." Ark. Code Ann. § 23-19-202(5)(A)(i) (incorporating definition in 47 U.S.C. § 522(9)). The VSA expressly authorizes franchise holders "to install, construct, and maintain facilities in the public right of way" in order "[t]o enable the provision of video service." *Id.* § 23-19-205(b). To exercise that right, the VSA authorizes "a video service provider" to "peacefully enter upon the right-of-way of a political subdivision." *Id.* § 23-19-205(e)(1). Local governments must additionally "provide the holder of a certificate of franchise authority with open, comparable, nondiscriminatory, and competitively neutral access to the public rights-of-way in its jurisdiction." *Id.* § 23-19-205(c). Similar provisions referencing the franchise holder's right to construct or operate facilities

in the public rights-of-way—and the concomitant obligations of local governments to preserve those rights—abound. *See, e.g.*, *id.* §§ 23-19-205(a), 23-17-101 (right to construct, operate, and maintain utility lines); 23-17-103 (right to condemnation). None of those provisions makes any sense applied to entities, like Netflix, that do not themselves place or operate facilities in the rights-of-way.

The legislature's intent to limit the VSA to companies that construct or operate facilities in the public rights-of-way is also apparent from the VSA's definition of "gross revenue," which determines the amount of the franchise fee. "Gross revenue" is limited to earnings derived from "the *operation* of the video service provider's network to provide video service within the political subdivision." Ark. Code Ann. § 23-19-206(a)(3)(A) (emphasis added). The "provider's network" is defined as the technological "transmission of video programming *over wireline directly to subscribers* within the geographic area within the political subdivision." *Id.* § 23-19-206(a)(4) (emphasis added). Put together, those provisions limit gross revenue to earnings from the provider's operation of a network that transmits video programming over wireline directly to subscribers. That can only mean one thing: The Act's franchise-fee requirement applies only to entities that provide video programming directly to subscribers through facilities they operate in the public rights-of-way; indirect transmission by way of an ISP-supplied connection to the public Internet does not qualify. *See also infra* at 38-39.

Section 23-19-209 confirms this meaning. It requires franchise holders to "designate a sufficient amount of capacity on its video service network" for "public, education, or government access channels." Ark. Code Ann. § 23-19-209(a), (b)(1)(B). Companies that do not operate or maintain their own network in the public rights-of-way cannot satisfy that mandate. After all, if an entity merely makes its content available for customers to stream over the public Internet through another party's network, it cannot "designate" any "capacity on *its* video service network" for public programming.[12]

Applying the VSA to entities that do not construct or operate facilities in the public rights-of-way would contravene the purpose and history of franchises. As this Court explained in *Guidry*, the basis for "local cable franchising" is the "active interaction between cable operators and local governments" necessary to negotiate

[12] Additional support comes from section 23-19-210(a), which states: "The General Assembly intends that this subchapter be consistent with the Cable Communications Policy Act of 1984, as it existed in January 1, 2013." Ark. Code Ann. § 23-19-210(a). As of 2013 (and today), that Act exempts from local franchising any "facility that serves subscribers without using any public right-of-way." 47 U.S.C. § 522(7)(B); *see* Telecommunications Act of 1996, § 301, Pub. L. 104-104, 110 Stat. 56. As discussed in more detail below, this Court has rightly interpreted that provision to require "extensive physical facilities and substantial construction upon and use of public rights-of-way." *Guidry*, 117 F.3d at 385. The Arkansas state legislature "is presumed to know the prior construction" of that provision, and presumptively "adopted" that reading through the VSA. *Etchu-Njang v. Gonzales*, 403 F.3d 577, 582 (8th Cir. 2005); *Ark. Pub. Serv. Comm'n v. Allied Tel. Co.*, 625 S.W.2d 515, 517 (Ark. 1981).

for the "extensive use of public rights-of-way." 117 F.3d at 385. A franchise, the FCC has explained, reflects a "fundamental bargain" between the video service provider and the state or local government: The provider pays a fee, and receives in return the right to "construct and operate facilities in the local rights-of-way." Third Report and Order, 34 FCC Rcd. at 6875. Arkansas has long taken the same view of franchises. *See supra* at 4-6. But companies that do not construct or operate facilities in the public rights-of-way receive no "service or benefit" from obtaining a franchise. *Guidry*, 117 F.3d at 385. Nor do local governments incur any "cost" or "disruption" when Netflix's customers access content over the public Internet. *Id.* Just as there was no basis for a franchise requirement in *Guidry*, there is no justification for a franchise requirement here.

Faced with similar statutory schemes, other courts have reached the same conclusion. Because Netflix "do[es] not own or operate infrastructure in any public rights-of-way," one California court explained, it is not subject to franchise fees. *City of Lancaster*, 2021 WL 4470939, *5, *6. The court based that conclusion on the text and structure of California's franchise fee statute, which contained materially similar definitions of franchise and gross revenue, and materially similar authorizations to franchise holders. *Id.* The court also relied on the premise of franchise fees, reflected in case law and FCC decisions: that they "compensate local entities" for "construction" or "operation" in the public rights-of-way. *Id.* at *6-8;

see City of Chicago, 199 F.3d at 433 (rejecting franchise fee because "construction of a cable system over the public right-of-way" was "not necessary"); *see also Gwinnett County*, 20-A-07909-10, at 14 ("The [Georgia] General Assembly could not have intended to require that Defendants obtain authorization for the construction or operation of networks that Defendants do not need or have.").

2. The VSA's focus on facilities-based providers necessarily excludes Netflix. Netflix does not "install, construct, or maintain" facilities in the public rights-of-way, Ark. Code Ann. § 23-19-205(b), and Ashdown does not allege otherwise. Netflix does not "construct[] or operat[e]" any equipment or facilities in the public rights-of-way, *id.* § 23-19-202(5)(A)(i), 47 U.S.C. §522(9), and Ashdown does not allege otherwise. Netflix has no reason to "peacefully enter upon the right-of-way of a political subdivision," *id.* § 23-19-205(e)(1), and Ashdown does not allege otherwise. Netflix does not "operat[e]" a network that provides "video programming over wireline directly to subscribers," *id.* § 23-19-206(a)(3)-(4), and Ashdown does not allege otherwise. Netflix cannot "[d]esignate a sufficient amount of capacity on its video service network" for "public, education, or government access channels," *id.* § 23-19-209(a), (b), and Ashdown does not allege otherwise.

Ashdown's contrary argument (at 8)—that the VSA applies because Netflix "us[es] broadband wireline facilities located at least in part in public rights-of-way"—is erroneous because applying the VSA to Netflix based on a *third-party's*

use of public rights-of-way would read out of the statute all the provisions just discussed. *See supra* at 28-32; *see also City of Lancaster*, 2021 WL 4470939, *9 (setting out chart with "provisions in the statute [that] would need to be revised to resolve inconsistencies or result in surplusage"). And to do so would be inconsistent with the interpretive mandate accorded Arkansas courts: to "reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." *Shults*, 541 S.W.3d at 412. Given how out of step that theory is with the statutory scheme, it is no surprise that it took Ashdown more than seven years after the VSA was enacted to come up with it.

Ashdown's position is also inconsistent with the Eighth Circuit's decision in *Guidry*, 117 F.3d 383. Ashdown does not dispute, nor could it, that "use [of] the municipalities' public rights-of-way" is a prerequisite for franchise fees. Ashdown Br. 22, *see id.* at 23. The Eighth Circuit (among others) has long interpreted "use" to require "extensive physical facilities and substantial construction upon" the public-rights of way. *Guidry*, 117 F.3d at 385. The question in *Guidry* was whether a cable company "uses a public right-of-way," such that it may be charged franchise fees under federal law, when "its transmission lines cross underneath . . . a public street." *Id.*[13] The Court concluded that the answer was no. Merely "burying cables

[13] Netflix has separately argued that federal law preempts Ashdown's attempt to impose franchise fees on companies that do not construct or operate facilities in the

underneath" the city street, without any "equipment" on the public rights-of-way, the Court explained, did not qualify as "use." *Id.* at 384, 386. The ordinary meaning of use, considered alongside the purpose of franchise fees, requires "extensive physical facilities" or "substantial construction" upon the public rights-of-way. *Id.* at 385; *see also City of Chicago*, 199 F.3d at 433 (taking similar view of limited scope of franchise fees). The *Guidry* court's holding forecloses Ashdown's argument that Netflix "uses" the public rights-of-way by making its content available on third-party ISPs' networks. If physically crossing the public right-of-way is not "use," then the transmission of signals by way of customers' "existing facilities controlled and operated by third part[y]" ISPs certainly is not. App. 271; R. Doc. 96 at 3.

Because Netflix does not use the public rights-of-way as required by the VSA, it is not subject to the VSA.

B. The Public-Internet Exception Applies

Even if the VSA otherwise applied to non-facilities-based services like Netflix, the Act's public-Internet exception would apply to exempt those services from franchise fees under the Act. As the district court explained, Netflix's video content is provided "as part of and via a service that enables end users to access

---

public rights-of-way. App. 68-73; R. Doc. 24 at 14-19. The district court had no reason to consider that issue given its conclusion that the VSA does not apply to Netflix.

content, information, electronic mail, or other services offered over the public Internet." App. 274 (quoting Ark. Code Ann. § 23-19-202(15)(B)(ii)); R. Doc. 96 at 6. The VSA therefore does not apply on its terms. Ashdown's smattering of counterarguments, joined in part by amicus Creve Coeur, Missouri, is unpersuasive.

1. The VSA expressly excludes certain video content provided over the public Internet. The VSA applies only to providers of "video service." Ark. Code Ann. § 23-19-203(a)(1); *supra* at 7. The definition of "video service," in turn, "excludes video programming . . . [p]rovided as part of and via a service that enables end users to access content, information, electronic mail, or other services offered over the public Internet."[14] *Id.* § 23-19-202(15)(B), (B)(ii). That exception is tailor made to exclude content like Netflix's.

First, Netflix's streaming content is "provided" to customers "over the public Internet." That fact is apparent from the face of Ashdown's complaint, which alleges that Netflix subscribers "typically use a broadband Internet connection, such as DSL or fiber optic cable to receive" Netflix's content. App. 4; R. Doc. 1 ¶ 15. The complaint also states that when a subscriber "wants to view Netflix programming,"

---

[14] Ashdown misquotes the public-Internet exception at several points in its brief. It states that "[t]he exception's plain language requires that Defendant's video programming be 'provided solely as part of and via a service that enables end users to access content . . . over the public Internet.'" Ashdown Br. 12; *see also id.* at 19. The word "solely" does not appear in the provision. *Compare City of Reno*, 2021 WL 4037491, at *6-7 (similar statute in Nevada but using the word "solely").

the "Internet service provider will connect the subscriber" to Netflix's content. App. 4; R. Doc. 1 ¶ 12; *accord* Ashdown Br. 8. That content is also accessed over the *public* Internet, regardless of whether Netflix's customers pay a fee to view Netflix's content. Just as many public parks charge fees for entry and just as public toll roads assess fees for passage, so customer fees to access Netflix's library of content do not transform the public Internet into a private Internet.

Second, Netflix's video content is provided "as part of and via a service that enables end users to access" that content. Ark. Code Ann. § 23-19-202(15)(B)(ii). Netflix offers its customers a library of streaming content, and customers may choose among a wide array of shows, movies, documentaries, short films, and more. *See* App. 3; R. Doc. 1 ¶¶ 9, 11. Each piece of content is provided to customers "as part of" Netflix's streaming library. That content is also provided "via" Netflix's streaming service; Netflix does not make its content available through any other platforms.

The Arkansas state legislature intended the public-Internet exception to cover Internet streaming services like Netflix. As of 2013, when the VSA was enacted, streaming services like Netflix were widespread. *See, e.g.*, Final Rule on Accessible Emergency Information, 78 Fed. Reg. 31770-01, 31772 (May 24, 2013). Ashdown does not contend that such services were subject to franchise fees before the VSA, nor could it. There is no indication the legislature sought to change that and, for the

first time, subject Internet streaming services that do not use the public rights-of-way to franchise fees. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (statutes "do[] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"). Nor, presumably, did Ashdown understand the VSA to make such a major change, as it took Ashdown over seven years to come up with its theory in this case.

Far from seeking to impose franchise fees on existing content providers, the legislature's goal was to enable "*new* video service providers to enter the state." 2013 Ark. Laws Act 276, § 3 (emphasis added). Unlike Netflix, those new entrants—like AT&T—did not seek to provide content over the public Internet. Rather, AT&T sought to provide its subscribers video service using Internet-protocol technology (U-Verse) through dedicated, private wireline. *See supra* at 6-7. The VSA enabled such providers to gain state-wide access to the public rights-of-way to "extend[] fiber-optic lines" and use "enhanced copper wire" to "carry video signals the last few thousand feet to the home." Crandall, 59 Fed. Commc'ns L.J. at 255. Content transmitted over the public Internet, like Netflix's streaming content, is quite different. As Ashdown recognizes, Netflix's customers access that content using the same Internet connection they use to access any other content over the public Internet, and that content travels to customers through ISPs' existing facilities, not any Netflix facilities in the public rights-of-way. *See* App. 3; R. Doc.

1 ¶¶ 10-11. The public-Internet exception ensures that services like Netflix are not subjected to franchise fees, while also enabling video services that operate wireline facilities in the public right-of-way using Internet-protocol technology (like AT&T's U-Verse) to apply for a state-wide franchise to gain necessary access to the public rights-of-way.[15] For those reasons, other courts have determined that Netflix is subject to similar public-Internet exceptions in other state statutes.[16]

2. Ashdown (joined in part by amicus) offers a number of alternative—and unpersuasive—readings of the public-Internet exception.

a. Latching onto the words "part of" in the definition, Ashdown first asserts that the public-Internet exception does not apply because video content is "the

---

[15] The legislature's focus on providers like AT&T, which use Internet protocol technology over their own private wirelines, refutes Ashdown's argument that applying the public-Internet exception to content providers like Netflix would "render[] almost meaningless the VSA's express inclusion of 'video programming' provided via 'internet protocol technology.'" Ashdown Br. 20 (quoting Ark. Code Ann. § 23-19-202(15)(A)(i)).

[16] *See Gwinnett County*, 20-A-07909-10, at 19-21; *City of Reno*, 2021 WL 4037491, at *3-5. One state court has concluded, without meaningful analysis, that the public-Internet question could not be resolved at the motion-to-dismiss stage because the plaintiff had alleged that Netflix delivered content through a "private Network of local ISPs." *City of Creve Coeur v. Netflix, Inc.*, Case No. 18SL-CC02819, at 8 (Mo. Cir. Ct. Dec. 30, 2020) (unpublished); App. 237. Ashdown, by contrast, alleges—consistent with actual practice—that the subscriber's ISP delivers content directly to the subscriber. *See* App. 4 (alleging that customers receive Netflix's content "from servers either inside of, or directly connected to, the subscriber's Internet service provider's network within their local region"); R. Doc. 1 ¶ 13.

entirety of"—rather than "part of"—Netflix's service. Ashdown Br. 14-15. Assuming that provision requires the video content to be only a portion of, rather than the entirety of, a service, Netflix's streaming service would qualify. Netflix offers its users access to a wide array of video content as part of a broad, interactive library of streaming content, and each piece of that content is made available as "part of" Netflix's service. *See Gwinnett County*, 20-A-07909-10, at 20. But as the district court recognized, Ashdown's portion-of-the-service requirement "reads too much into the statute." App. 274; R. Doc 96 at 6. The public-Internet exception applies when video content is provided as "part of" a service—and that requirement is met here "regardless of whether Defendants provide multiple services or just one." *Id.*

A multiple services requirement would also make very little sense. Why should payment of a franchise fee turn on whether a content provider also offers non-video content? That interpretation would mean that Internet streaming services could avoid paying a franchise fee simply by posting blogs on their websites. Ashdown offers no reason why the legislature would have exempted companies that offer some additional non-video content, but not companies that only operate a video streaming service.[17] That distinguishes this case from *Gordon v. Virtumundo, Inc.*,

[17] Ashdown can hardly be heard to complain that this interpretation renders "part of" surplusage given that its argument that Netflix is subject to the VSA would read

where the Ninth Circuit suggested that similar statutory language could have a narrower meaning than the text indicates given the "unique nature of the subject matter" of the statute before it, the Controlling Assault of Non-Solicited Pornography and Marketing Act. 575 F.3d 1040, 1050, 1051 (2009).

b. Ashdown's argument (at 15) that Netflix's content is not provided over the "public Internet" because Netflix customers pay a fee and use login credentials is equally unpersuasive because, as ordinarily understood, the term public does not mean free. *See, e.g.*, *Public*, Webster's Third New International Dictionary (1986) (defining "public" as "accessible to . . . all members of the community"); . Public toll roads, public parks, public golf courses—all can charge fees and check identification. *See, e.g., City of Reno*, 2021 WL 4037491, *4 ("nothing in that definition states or suggests paying a fee renders the 'Internet' not public"); *Gwinnett County*, 20-A-07909-10, at 20 (same). Moreover, the word "public" modifies "Internet"—not website. Whether Netflix charges a fee or requires login credentials for its website "does not affect whether the delivery method is the public internet." App. 275; R. Doc. 96 at 7. Because third-party ISPs deliver Netflix's content to customers, just as they deliver other content over the public Internet, the public-Internet exception applies.

---

a half dozen or more provisions out of the VSA. *Supra* at 28-32; *see Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) ("[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage.").

Implicitly recognizing the weakness of its ordinary-meaning argument, Ashdown pivots and argues that "'public Internet' is a term of art that has specialized meaning in the communications industry," and that meaning excludes Netflix. Ashdown Br. 20; *see Borden v. United States*, 141 S. Ct. 1817, 1828 (2021) (plurality) (noting that "terms of art *depart* from ordinary meaning") (internal quotation marks omitted). Ashdown does not point to any source adopting its preferred meaning. Nor could it. The FCC has stated that the "public Internet" is simply the ability to use "broadband networks" to access content available online. *See* Policy Statement, *In re Appropriate Framework for Broadband Access to the Internet over Wirelines Facilities*, CC Docket No. 02-33, FCC 05-151 (rel. Sept. 23, 2005), at ⁋ 4. The FCC has also stated that the "public Internet" refers to an Internet connection that "carr[ies] 'any and all' Internet traffic." *See* Report and Order, *In re Rural Health Care Support Mechanism*, WC Docket No. 02-60, FCC 12-150 (rel. Dec. 21, 2012), at ¶ 13 n. 27. Netflix's content, which is transmitted by an ISP to its customers, easily qualifies as traffic delivered over the public Internet.[18]

---

[18] Ashdown obliquely mentions the "methods Defendants use to route their content over the internet," suggesting they make Netflix's content non-public. Ashdown Br. at 20. That may be a reference to Netflix's "Open Connect server," a content delivery network (CDN) that helps improve subscribers' video quality by housing content closer to the customer's access point. Ashdown fails to "develop[]" any argument on that score and thus has forfeited it. *Sturgis Motorcycle Rally, Inc. v. Rushmore Photos & Gifts, Inc.*, 908 F.3d 313, 324 (8th Cir. 2018). Any such argument would be meritless in any event. For as Ashdown recognizes, the ISP is

c. Finding little success on the text, Ashdown shifts to a new, and equally unpersuasive, position: that the public-Internet exception is limited to ISPs. Ashdown Br. 17-20. Here Ashdown is joined by amicus Creve Coeur, Missouri, which argues at length that the public-Internet exception protects only ISPs from franchise fees. That argument is both wrong and irrelevant because Netflix's content is made available to customers by ISPs.

Ashdown's new ISP-only argument requires some unpacking. The argument starts with the Internet Tax Freedom Act (ITFA), which Ashdown and amicus contend contains language similar to that in the VSA that refers to ISPs. ITFA bars taxes on "Internet Access" and defines "Internet Access" as "a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet"; the definition also excludes certain "voice, audio, or video programming." Ashdown Br. 18 (quoting ITFA § 1105(5)). That definition (and prohibition on state taxes), Ashdown argues, was designed to apply to ISPs. According to Ashdown, Arkansas then adopted the public-Internet exception to

---

responsible for delivering Netflix's content over "broadband Internet connections." App. 4; R. Doc. 1 ¶ 15; *see* Report and Order, *In re Preserving the Open Internet Broadband Indus. Pracs.*, 25 FCC Rcd. 17905, 17948 n. 235 (Dec. 23, 2010) ("Unlike broadband providers, third-party CDN providers do not control the last-mile connection to the end user."), *vacated on other grounds*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

shield ISPs from franchise fees to avoid "run[ning] afoul of the ITFA." *Id.* at 19. That argument fails on multiple fronts.

First, Ashdown offers no evidence that the Arkansas legislature had ITFA in mind when it enacted the VSA, or that it intended to constrict the reach of the broadly worded public-Internet exception in the VSA to ISPs. Indeed, it is unclear why the legislature would have been concerned about the issue if, as Ashdown contended below, franchise fees do not even qualify as taxes under ITFA. App. 146; R. Doc. 43 at 2.[19] If the legislature had intended the exception to cover only ISPs, it would have been much simpler to use the term "internet service provider."[20] The legislature used the broader term "service," and that choice should be given effect. *See Shults*, 541 S.W.3d at 412 (statute should be construed "just as it reads, giving the words their ordinary and usually accepted meaning in common language").

Second, the text of the public-Internet exception differs in material ways from the definition in ITFA. ITFA does not even use the term "public Internet," which

---

[19] Further calling that argument into doubt, ITFA excludes "voice, audio, or video programming" from its prohibition on taxation of Internet access, as Ashdown notes. Ashdown Br. 18 (quoting ITFA § 1105(5)).

[20] In addition, the FCC has long indicated that ISPs are not subject to franchise fees for providing broadband service, undermining the argument that the legislature intended the provision to reach only ISPs. *See, e.g.*, Declaratory Ruling and Notice of Proposed Rulemaking, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 02-77 (Mar. 14, 2002), at ¶ 105.

Ashdown claims is a "term of art." Ashdown Br. 20; *see Borden*, 141 S. Ct. at 1828 (plurality) (rejecting "term-of-art claim" when "proposed term does not appear in" statute). And ITFA's definition is distinct in other ways as well. ITFA's definition of "Internet Access," upon which Ashdown relies, refers to "a service that enables users to *connect to the Internet* to access content . . . offered over the Internet." 47 U.S.C. § 151 note, § 1105(5)(A) (emphasis added). That language has been understood to refer to ISPs, which "connect" users to the Internet. But the VSA's public-Internet exception refers to "a service that enables users to *access content* . . . offered over the public Internet." Ark. Code Ann. § 23-19-202(15)(B)(ii) (emphasis added). That language bears a much closer resemblance to ITFA's separate—and broader—definition of an "Internet Access Service." *See* 47 U.S.C. § 151 note, § 1101(d)(3)(D) (defining "Internet Access Service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet."). Courts have consistently—and correctly—understood that language to reach beyond ISPs. *See, e.g.*, *White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 373 (5th Cir. 2005) (similar language encompasses email providers); *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d 1087, 1094 (N.D. Cal. 2007) (similar language includes social media). Indeed, even the cases upon which Ashdown relies make clear that language "is not limited to traditional ISPs." *Gordon*, 575 F.3d at 1051. That flaw permeates Ashdown's ISP-only argument, which addresses the

distinct definition of "Internet Access"—rather than the more similar, and more expansive, definition of "Internet Access Service."[21]

In addition, it would make little sense for the VSA to exempt only ISPs' video content. After all, ISPs—unlike Netflix—install and operate facilities in the public rights-of-way. There is no conceivable basis in the purpose, intent, or history of franchise fees to charge Netflix a franchise fee for video content that is transmitted to subscribers by ISPs, but to exempt facilities-based ISPs for providing their own content over their own networks in the public rights-of-way. And, to the extent Ashdown believes the public-Internet exception protects only video content produced by ISPs, that threatens to render the provision a nullity, because Ashdown does not identify any example of an ISP making available their own video content.

Finally, even if Ashdown and amicus were correct that the public-Internet exception addresses only content provided by ISPs, the provision would still apply to Netflix. Ashdown's core claim is that the public-Internet exception "ensure[s]

---

[21] Most of amicus's arguments likewise address the definition of "Internet Access," rather than "Internet Access Service." *See* Creve Coeur Amicus Br. 7 (citing comments Netflix made about the term "internet access"); *see also id.* at 10 (citing snippets of legislative history discussing meaning of "Internet Access"). Perhaps recognizing the weakness in its argument that the VSA intended to adopt ITFA's reference to ISPs in its definition of "Internet Access," amicus seeks to rely on other state or federal statutes that it says incorporated ITFA. *Id.* at 14-16. But the question here is what the public-Internet exclusion means in the VSA. Amicus' roundabout claim that the VSA somehow incorporated ITFA by way of other state statutes incorporating ITFA is unpersuasive and unsupported.

that ISPs" are not "assessed a video service provider fee" for video programming "going over their wires and cables." Ashdown Br. 19. But if Netflix's content satisfies the exception sufficient to protect ISPs from franchise fees for delivering Netflix's content, then, as the public-Internet exception excludes certain "video programming"—not certain providers or services—it also satisfies the exception sufficient to protect Netflix from franchise fees. Again, the public-Internet exception applies to any "*video programming* . . . provided as part of and via a service that enables users to access content . . . over the public Internet." Ark. Code. Ann. § 23-19-202(15)(B), (15)(B)(ii) (emphasis added). If ISPs are protected by this exception vis-à-vis Netflix's content, that can only be because (in Ashdown's view) Netflix's content is "video programming provided as part of and via a service that enables end users to access . . . other services offered over the public Internet." The VSA does not distinguish between programming that meets that definition and is supplied by an ISP, and programming that meets the definition and is made available by an Internet content producer like Netflix. Both are exempt from the Act.

C. Subjecting Netflix To A Franchise Requirement Would Upend The VSA And Inflict Harmful And Unintended Consequences On Content Services And Consumers

Applying the VSA to Internet streaming services like Netflix would undermine the structure and purpose of the VSA, and rewrite the basis for franchise fees. As discussed, the VSA requires only providers that need physical access to the

public rights-of-way to obtain franchises. The public-Internet exception furthers that limited goal by ensuring that services whose customers access content through the existing facilities of third parties are not charged franchise fees. Other provisions in the VSA confirm that the VSA is addressed to facilities-based providers, rather than companies that make content accessible over the public Internet. *See supra* at 29.

Applying the VSA to companies that merely make content accessible over the public Internet would undercut that purpose. Indeed, if the basic bargain underlying franchises is eliminated, there would be very little stopping municipalities from seeking franchise fees—up to 5% of gross revenue—from practically any entity making streaming content available over the Internet. That could include everything from local newspapers streaming news reports to "churches that provide online streaming of their services and other religious programming." *Gwinnett County*, 20-A-07909-10, at 13. The legislature passed the VSA to ensure uniform regulation of video service providers and afford new providers access to the public rights-of-way—not to open up Internet streaming services of all kinds to such fees. Until Ashdown brought this lawsuit in 2020, there is no evidence that any Arkansas municipality had a different understanding.

Requiring streaming services like Netflix to obtain franchises and pay franchise fees would also render large swaths of the VSA irrelevant. As discussed, at least a half dozen provisions are premised on the provider's installation, operation,

or construction in the public rights-of-way. *See supra* at 29-32. This Court should not adopt an interpretation that negates all of those provisions.

Applying the VSA to companies like Netflix could also result in double taxation, contrary to the Arkansas legislature's intent. Arkansas imposes a 3% tax upon gross receipts derived from the sale of "specific digital products," which include Netflix's streaming service. Ark. Code. Ann. §§ 26-52-103(34), 26-52-301(1)(B). Netflix pays that tax in Arkansas. Ashdown offers no justification for attempting to impose on Netflix both a digital products tax and a franchise fee when Netflix does not install or operate facilities in the public rights-of-way.

Finally, applying the VSA to Netflix would yield an unintended windfall to local governments—at considerable costs to consumers. In the case of a company that does not install or operate facilities in the public rights-of-way, "the [c]ity has provided no service or benefit," nor has it incurred any "cost." *Guidry*, 117 F.3d at 385. The franchise fees simply raise general revenue for the municipality. Those fees can be passed on to consumers, who would face the prospect of paying a 5% charge for every online video subscription service, even though such content imposes no added burden to the city and is delivered by the same ISPs over the same ISP networks. *See* Ark. Code Ann. § 23-19-206(k) ("A video service provider may identify and collect the amount of the video service provider fee as a separate line item on the regular bill of each subscriber."). The VSA, like other franchise fee

arrangements, was never intended to generate such a "financial windfall for local entities" at the expense of those that merely stream content over the public Internet. *City of Lancaster*, 2021 WL 4470939, at *8.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated: March 4, 2022

Respectfully submitted,

s/ Gregory G. Garre

Gregory G. Garre
Jean A. Pawlow
Peter E. Davis
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2207
gregory.garre@lw.com
jean.pawlow@lw.com
peter.davis@lw.com

Mary Rose Alexander
Robert C. Collins III
Latham & Watkins LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611
(312) 876-7700
mary.rose.alexander@lw.com
robert.collins@lw.com

Jennifer H. Doan
Cole Alan Riddell
HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75503
(903) 255-1000
jdoan@haltomdoan.com
criddell@haltomdoan.com

Counsel for Defendant-Appellee Netflix, Inc.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 28A(h)

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 12,581 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief was prepared using Microsoft Word 2016 in 14-point Times New Roman font.

Pursuant to Eighth Circuit Rule 28(A)(h), I further certify that Appellee's Brief and Addendum have been converted to Adobe PDF format by printing to Adobe PDF from the original word processing file, and has been provided to the Court and counsel for Appellant. The brief and Addendum have been scanned for viruses using a commercial virus scanning program, which reports the brief and Addendum to be virus free.

Respectfully submitted,

s/ Gregory G. Garre
Gregory G. Garre

Counsel for Defendant-Appellee Netflix, Inc.

Dated: March 4, 2022

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Fed. R. App. P. 25(a)(2)(A)(ii) I caused Appellee's Answering Brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit on March 4, 2022. Within five days of receipt of notice that the foregoing document has been filed, Appellee will serve each party separately represented with a paper copy of the brief.

I further certify that ten paper copies of Appellee's Brief will be provided to the Court within five days after receipt of notice that the foregoing document has been filed pursuant to Rule 28A(d).

Chad Trammell (AR-95125)
Trammell Piazza Law Firm, PLLC
418 North State Line Avenue
Texarkana, Arkansas 71854
(870) 779-1860
chad@trammellpiazza.com

Austin Tighe
Nix Patterson LLP
3600 N. Capital of Texas Hwy.
Bldg. B, Suite 350
Austin, Texas
(512) 328-5333
atighe@nixlaw.com

Counsel for Plaintiff-Appellant City of Ashdown

Melissa R. Smith
Texas State Bar No. 24001351
GILLAM & SMITH, LLP
303 South Washington Avenue
Marshall, Texas 75670
Telephone: (903) 934-8450
Facsimile: (903) 934-9257
Email: melissa@gillamsmithlaw.com

Andrew Thompson ("Tom") Gorham
Texas State Bar No. 24012715
GILLAM & SMITH, L.L.P.
102 N. College, Suite 800
Tyler, Texas 75702
Telephone: (903) 934-8450
Facsimile: (903) 934-9257
Email: tom@gillamsmithlaw.com

Victor H. Jih
Russell L. Kostelak
Ryan S. Benyamin
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071
Telephone: (323)
210-2900 Facsimile: (866) 974-7329
E-mail: vjih@wsgr.com
rkostelak@wsgr.com
benyamin@wsgr.com

Counsel for Defendant-Appellee Hulu, LLC

s/ *Gregory G. Garre*
Gregory G. Garre