



On October 19, 2021, Netflix and Hulu separately filed motions to dismiss Maple Heights's Complaint. In these motions to dismiss, Netflix and Hulu argue, *inter alia*, that they do not provide video service under Ohio law because: (1) they do not offer video programming comparable to broadcast television under O.R.C. § 1332.21(I); (2) they offer their content over the public Internet, which they claim is exempt under O.R.C. § 1332.21(J); and (3) they do not own, operate, or use video service networks in public rights-of-way under O.R.C. § 1332.21(J).

Plaintiff Maple Heights disagrees on each of these points and argues that Netflix and Hulu are subject to the requirements of O.R.C. §§ 1332.21, *et seq.* Plaintiff contends, *inter alia*: (1) Netflix and Hulu offer the same types of television shows, movies, and other video content as broadcast television and, therefore, provide video programming under O.R.C. § 1332.21(I); (2) Netflix and Hulu do not offer their video programming over the public Internet and, even if they did, Netflix and Hulu's video programming is not offered as "part of and via a service that enables users to access content, information, electronic mail, or other services offered over the public internet," as required by O.R.C. § 1332.21(J); and (3) they are video service providers under O.R.C. §§ 1332.21, *et seq.* even if Netflix and Hulu do not own, operate, or use video service networks.

In its motion to dismiss, Hulu also argues that Maple Heights is an improper party to bring this suit. To support this standing argument, Hulu points to O.R.C. § 1332.24(C), which gives the Director of Commerce authority to seek injunctions against the unauthorized provision of video services, enter into written assurances of voluntary compliance, or assess civil penalties pursuant to an administrative adjudication. According to Hulu, the Ohio

legislature granted the Director of Commerce, not municipalities, the power to bring actions against persons who provide unauthorized video services.

In response, Maple Heights argues it has standing to bring this suit. First, Maple Heights points to O.R.C. § 1332.33, which gives municipalities and townships a private right of action to sue video service providers who underpay their franchise fees based on the results of an audit. Second, Maple Heights asserts that even if this suit falls outside the scope of O.R.C. § 1332.33, the Court should infer that the Ohio legislature intended municipalities and townships to bring enforcement actions against video service providers that provide video service without the Director of Commerce's authorization.<sup>2</sup>

### III. Questions of Law to be Answered

1. Whether Netflix and Hulu are video service providers under Ohio law.<sup>3</sup>
2. Whether Maple Heights can sue Netflix and Hulu to enforce Ohio's video service provider provisions.<sup>4</sup>

### IV. Name of Each Party

- Plaintiff City of Maple Heights, Ohio
- Defendant Netflix, Inc.
- Defendant Hulu, LLC

### V. Names, Addresses, and Telephone Numbers of Counsel for Each Party

Plaintiff City of Maple Heights, Ohio is represented by:

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<sup>2</sup> See [Cort v. Ash, 422 U.S. 66 \(1975\)](#); see also [Anderson v. Smith, 196 Ohio App. 3d 540, 544 \(Ohio Ct. App. 2011\)](#).

<sup>3</sup> See [Ohio Rev. Code § 1332.21\(M\)](#).

<sup>4</sup> See [Ohio Rev. Code §§ 1332.24, 1332.33\(D\)](#); [Cort v. Ash, 422 U.S. 66 \(1975\)](#).

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**VI. Designation of One of the Parties as the Moving Party**

None of the parties moved for certification. Because these issues are raised in Defendants' motions to dismiss, the Court designates Defendants Netflix and Hulu as the moving parties.<sup>5</sup>

**VII. Conclusion**

The Court **CERTIFIES** the above questions of law to the Ohio Supreme Court. In accordance with Rule 9.03(A), the Clerk of the United States District Court for the Northern District of Ohio is instructed to serve copies of this certification upon all parties or their counsel and file this certification order under the seal of this Court with the Clerk of the Ohio Supreme Court.

IT IS SO ORDERED.

Dated: July 1, 2021

*s/ James S. Gwin*  
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JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>5</sup> [Ohio S. Ct. Prac. R. 9.02\(E\)](#).