No. __-____

IN THE
Supreme Court of the United States

CITY OF CIBOLO, TEXAS,
Petitioner,

v.

GREEN VALLEY SPECIAL UTILITY DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 7 U.S.C. § 1926(b), a rural utility association that receives a federal loan for water or wastewater infrastructure enjoys monopoly protection for "[t]he service provided or made available" by the association during the term of the loan. A § 1926 loan may fund water service, wastewater service, or both services. In this case, the Fifth Circuit held that a rural association that received a loan to fund its water service is entitled to § 1926(b) protection for its sewer service as well. The Fifth Circuit also concluded that the rural association had "provided or made available" wastewater service because it had the authority and the obligation under state law to provide that service, even though the association did not plead that it actually had the capacity to furnish wastewater service to customers. The questions presented are:

1. Whether "[t]he service" protected by § 1926(b) refers to the service funded by the federal loan, as the Eighth Circuit has held, or to all services provided by a federal loan recipient, as the Fifth Circuit held in this case.

2. Whether an association seeking to demonstrate that it has "provided or made available" a protected "service" must show that the service is being or can promptly be furnished, as the Fourth, Sixth, Eighth, and Tenth Circuits have held, or need only show that it has a legal duty under state law to provide that service, as the Fifth Circuit has held.

PARTIES TO THE PROCEEDINGS

Petitioner City of Cibolo, Texas, was the defendant in the district court and the appellee in the court of appeals.

Respondent Green Valley Special Utility District was the plaintiff in the district court and the appellant in the court of appeals.

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The City of Cibolo, Texas, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit.

INTRODUCTION

In this case, the Fifth Circuit reached the opposite conclusion as the Eighth Circuit on a question of federal statutory interpretation that has great importance for the balance of federal and state power to regulate water and wastewater development in rural and urbanizing areas. The Fifth Circuit held here that 7 U.S.C. § 1926(b), which protects "[t]he service provided or made available" by recipients of certain federal loans for rural water and wastewater infrastructure, protects not only the service funded by the federal loan, but also any other service provided by the same rural utility. App. 8a. The court expressly rejected the Eighth Circuit's well-reasoned opinion holding that "[t]he service" in § 1926(b) refers only to the service funded by the federal loan. App. 4a & n.5.

In so doing, the Fifth Circuit reversed the dismissal of a complaint in which the only fact the respondent rural association had pleaded to establish that it had "provided or made available" the service it sought to protect was a state certification obligating it to serve the area. The court relied on circuit precedent holding that, "[w]here a [state certification] imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926(b)." App. 3a-4a (citing *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996) (per curiam)). That approach to determining when a utility has "provided or made available" a service conflicts with the rule applied by the four other federal courts of appeals to have

considered the question. Those circuits (the Fourth, Sixth, Eighth, and Tenth) require an association to establish that a service is already being, or can promptly be, furnished to qualify for protection under § 1926(b).

Both questions are significant in light of the nation's unmet water and wastewater infrastructure needs, and the traditional role of state and local governments in determining how best to meet those demands. Particularly in places where suburban growth is transforming formerly rural areas, the Fifth Circuit's expansive approach maximizes the degree of federal intrusion into a traditional area of state regulation and exposes homeowners to great uncertainty regarding the availability of basic water and sewer services. The court of appeals' decision also exacerbates existing uncertainty regarding the scope of § 1926(b), which has been the subject of frequent litigation between municipalities and rural associations.

In the 56 years since § 1926(b) was enacted, this Court has never considered its reach. Guidance from the Court will provide much-needed clarity and uniformity regarding the balance of federal and state authority to regulate rural water infrastructure.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is reported at 866 F.3d 339. The orders of the district court (App. 10a-20a, 21a-32a) are not reported (but are available at 2016 WL 5793797 and 2016 WL 3963224, respectively).

JURISDICTION

The court of appeals entered its judgment on August 2, 2017. On October 17, 2017, Justice Alito extended the time for filing a certiorari petition to and including December 29, 2017. App. 66a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Texas Water Code and of Title 7 of the United States Code are reproduced at App. 33a-65a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. State law generally governs the granting of authority to provide water and wastewater (i.e., sewer) services to homes and businesses. In Texas, the Public Utility Commission of Texas authorizes public utilities to provide retail water and wastewater services by granting distinct Certificates of Convenience and Necessity ("CCN") for each service. A CCN gives its holder the exclusive right to provide the specified service in a given geographic area, App. 1a & n.1 (citing Tex. Water Code § 13.242(a)), and obligates the holder to provide "continuous and adequate service" to customers in that area, Tex. Water Code § 13.250(a). State law defines various circumstances under which the Utility Commission may revoke a CCN, *see id.* §§ 13.254, 13.255, including the failure to provide such service.

Water and wastewater services can be provided by several different kinds of entities. In urbanized areas, those services are typically provided by municipal governments, like petitioner City of Cibolo. App. 2a. State law also frequently authorizes the creation

of other entities to provide services in unincorporated (often rural) areas. *See*, *e.g.*, Ohio Rev. Code Ann. § 6119.01; Okla. Stat. Ann. tit. 82, § 1324.3; *Rural Water Sys. # 1 v. City of Sioux Ctr.*, 202 F.3d 1035, 1037 (8th Cir. 2000) (describing kinds of entities authorized to provide water services under Iowa law). Respondent Green Valley is a Special Utility District created under Texas Water Code § 65.011, which authorizes the creation of such districts for specified purposes, including "to . . . acquire sources of water supply," "to build, operate, and maintain facilities for the transportation of water," "for the establishment . . . of fire-fighting facilities," and "for the protection, preservation, and restoration of the purity and sanitary condition of water within the district." *Id.* § 65.012. A provider of water service does not necessarily provide wastewater service, and vice versa. *See* GAO Report[1] at 2; *see also Public Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 514, 521 (8th Cir. 2010) (District created in 1967 to provide water service did not provide wastewater service until 2008).

As cities expand into previously rural areas, conflicts can arise as to which entity — a rural association or the expanding city government — should provide water and wastewater services to area residents. State law typically provides mechanisms for resolving those conflicts. Under the Texas Water Code, a municipality that annexes an area for which a utility district holds a CCN may file an application for "single certification" with the Utility

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[1] U.S. Gov't Accountability Office, *Rural Water Infrastructure: Federal Agencies Provide Funding but Could Increase Coordination to Help Communities*, GAO-15-450T (2015) ("*GAO Report*"), https://www.gao.gov/assets/670/668826.pdf.

Commission. Tex. Water Code § 13.255(b). Granting such an application has the effect of revoking the utility district's CCN for the disputed area and granting it to the city. *Id.* The Utility Commission may also order district property, such as its water and wastewater facilities, transferred to the municipality, subject to a requirement that the municipality compensate the district financially. *Id.* § 13.255(c)-(d). The Utility Commission may also require the municipality to compensate the district for non-transferred property rendered valueless when the district loses its certification to serve customers in given area. *Id.*

2. This case involves the interpretation of a federal statute that affects the authority of state officials to allocate responsibility for providing water and wastewater services to state residents. That statute, 7 U.S.C. § 1926, creates a loan program to fund water and wastewater infrastructure and provides limited monopoly protection to recipients of those federal loans.

Section 1926 was enacted as part of the Agricultural Act of 1961, which extended various kinds of credit and other financial support to farmers.[2] The statute authorizes the U.S. Department of Agricul-

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[2] *See* Agricultural Act of 1961, Pub. L. No. 87-128, tit. III, 75 Stat. 294, 307, codified in part, as amended, at 7 U.S.C. § 1921 *et seq.*; *see also* S. Rep. No. 87-566, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2243-44 (describing the Agricultural Act as a bill with the aim "to improve and protect farm prices and farm income, to increase farmer participation in the development of farm programs, to adjust supplies of agricultural commodities in line with the requirements therefor, to improve distribution and expand exports of agricultural commodities, to liberalize and extend farm credit services, to protect the interest of consumers, and for other purposes").

ture ("USDA") to make water and wastewater loans to "associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies" serving rural residents. 7 U.S.C. § 1926(a). Implementing regulations define "rural" to mean "any area not in a city or town with a population in excess of 10,000 inhabitants." 7 C.F.R. § 1780.3(a).[3]

At the time of its 1961 enactment, § 1926 expanded the USDA's then-existing authority to make water and wastewater loans by authorizing the agency to fund projects serving all rural residents, not just farmers.[4] The Senate Report stated that funding "service to other rural residents" in addition to farmers would reduce "the cost per user" of rural water systems and made the loans "more secure." S. Rep. No. 87-566, at 67, 1961 U.S.C.C.A.N. 2309.

To help ensure that § 1926(a) loans are repaid, § 1926(b) grants utilities that receive federal loans a functional monopoly with respect to "[t]he service provided or made available" by the loan recipient. 7 U.S.C. § 1926(b). The statute does not define "[t]he service" or what it means for a service to be "provided

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[3] Section 1926 is administered by the Rural Utilities Service ("RUS"), a division within the USDA. *See* 7 C.F.R. §§ 1780.3(a), 1782.1. Older cases refer to the Farmers Home Administration or "FmHA," which administered the program prior to 1994. *See Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 654 F.3d 1058, 1061 (10th Cir. 2011).

[4] *See* S. Rep. No. 87-566, at 67, 1961 U.S.C.C.A.N. 2309 ("[L]oans to associations cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents.").

or made available." In its entirety, § 1926(b) provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Id.

Section 1926 preempts state infrastructure regulation — and shields rural utilities from competition — to the extent that state action would "curtail[]" or "limit[]" "[t]he service provided or made available" by a utility with an outstanding USDA loan. According to the Senate Report, the purpose of § 1926(b) is "to assist in protecting the territory served by such an association facility" — that is, the rural water or sewer facility funded by the federal loan — "against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." S. Rep. No. 87-566, at 67, 1961 U.S.C.C.A.N. 2309. Section 1926(b) thus represents a limited incursion on state and local authority over utility regulation for the purpose of facilitating the repayment of federal loans.

3. Section 1926 affects thousands of local communities throughout the nation. In fiscal year 2016, the USDA made water and wastewater loans

totaling $1.2 billion to 622 systems. *See* RUS Progress Report[5] at 28-29. As of September 2016, 15,853 loans were outstanding, totaling approximately $12 billion. *Id.* at 13. Section 1926 loans are repayable in terms up to 40 years, the time allowed under state law, or the useful life of the facility, whichever is less. *See* 7 C.F.R. § 1780.13(e).

An association may have more than one § 1926 loan outstanding at any given time. *See*, *e.g.*, *Guthrie*, 654 F.3d at 1061. Ninety-five percent of relevant USDA funds support either a water system or a wastewater system, and the remaining 5 percent "made improvements to both water and sewer systems." RUS Progress Report at 7. The first question presented in this case will be implicated in any dispute involving an association that has an outstanding loan funding one service but claims protection for a non-funded service. The second question will inform whether a rural association with a state-law duty to provide service but no actual facilities capable of providing that service (i.e., no pipes in the ground) may claim § 1926(b)'s monopoly protection.

B. Factual Background

Respondent Green Valley Special Utility District is a special utility district created under Texas Water Code § 65.011. App. 1a-2a & n.2. There is no dispute that Green Valley is an "association" within the meaning of § 1926. App. 3a-4a. Green Valley holds two CCNs, one for wastewater service and one for water service, covering territory in three Texas counties. App. 2a.

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[5] USDA, Rural Dev., RUS, *Water & Environmental Programs: FY 2016 Progress Report* (2016) ("RUS Progress Report"), https://www.rd.usda.gov/files/WEP-AnnualProgressReport2016Final.pdf.

In 2003, Green Valley applied for and received a $584,000 loan under § 1926. *Id.* The loan, which remains outstanding, funded improvements to Green Valley's water service and is secured by Green Valley's water revenues. *Id.* It was not used to pay for wastewater infrastructure. App. 3a.

Petitioner City of Cibolo is a municipality on the suburban fringe of San Antonio, Texas, whose territory partially overlaps with Green Valley's territory. App. 2a. On March 8, 2016, the City filed an application with the Utility Commission under Texas Water Code § 13.255 seeking "single certification" of the City as sole provider of wastewater service in the portion of the City's territory covered by Green Valley's CCN. *Id.* Granting the City's application would mean that Green Valley loses its authority under state law to provide wastewater service in the area of overlap, but remains the exclusive water provider. *Id.* The Utility Commission's final decision in the § 13.255 proceeding is subject to review, including consideration of the preemptive ambit of § 1926(b), in state district court in Travis County, Texas. *See* Tex. Water Code § 13.255(e).

C. Proceedings Below

1. In May 2016, Green Valley filed suit in federal district court, seeking an injunction requiring the City to dismiss its petition before the Utility Commission and prohibiting it from commencing any similar proceeding to "alter[] the physical area or exclusive nature" of Green Valley's CCNs. *See* Pl.'s Original Compl. at 5-6, No. 1:16-cv-00627-SS, Dkt. 1 (W.D. Tex. filed May 27, 2016) ("Compl."). The complaint alleged that Green Valley's CCNs grant Green Valley the exclusive right and obligation to provide water and wastewater services in the area

covered by each CCN. *Id.* ¶ 10. It asserted that Green Valley "provides or makes available water and wastewater service" to the disputed area, but did not otherwise describe the services Green Valley claims to make available. *Id.* ¶ 15.

The City moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that "[t]he service" protected by § 1926(b) is the water service secured by the federal loan, not Green Valley's non-funded wastewater service. In response, Green Valley contended that its "'service area'" is "'sacrosanct'" under § 1926(b), which should "be liberally interpreted to protect [USDA]-indebted rural water associations from municipal encroachment.'" App. 31a (quoting *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam)) (alteration in original). Green Valley argued that § 1926(b) prohibits the City from providing either water or wastewater service in the area for which Green Valley holds a CCN for as long as the USDA loan is outstanding. App. 25a.

The district court granted the City's motion to dismiss. App. 32a. In doing so, it relied on the Eighth Circuit's decision in *Public Water Supply*, which at the time was the only court of appeals decision addressing the question whether § 1926(b)'s protections extend beyond the service funded by a federal loan. App. 26a. *Public Water Supply* held that the phrase "[t]he service provided or made available" in § 1926(b) means "the type of service financed by the qualifying federal loan." 605 F.3d at 520. Following the Eighth Circuit's conclusion, the district court held that, because Green Valley's federal loan funded only its water service, Green Valley could not rely on § 1926(b) to preclude the

City from seeking to offer wastewater service in Green Valley's territory. App. 15a-20a, 26a-31a.[6]

2. Green Valley appealed. In its brief on appeal, the City asked the Fifth Circuit to take judicial notice of Green Valley's publicly filed responses to the City's requests for admission in the ongoing Utility Commission proceedings, and related documents from those proceedings. *See* Brief of Appellee City of Cibolo at iv & n.2, 21, 23-27, No. 16-51282 (5th Cir. filed Jan. 30, 2017). The documents, which were filed as an addendum to the City's brief, showed Green Valley admitting that, on the date of the City's § 13.255 application, Green Valley had no wastewater customers in the disputed area, had not constructed a wastewater treatment facility, and did not hold the necessary state permits to provide wastewater service. *See* Addendum to Appellee's Brief, Attachs. C & D at 25-27, 31-34, No. 16-51282 (5th Cir. filed Jan. 30, 2017) ("Cibolo 5th Cir. Add.").

The Fifth Circuit reversed the dismissal of Green Valley's complaint. App. 9a. It did not address the new documents from the Utility Commission proceeding. It observed that Green Valley holds a CCN for its wastewater service and stated that, under Fifth Circuit precedent, "[w]here a CCN imposes a duty on a utility to provide a service, that utility has

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[6] The district court initially dismissed the complaint with leave to amend, noting that Green Valley had not pleaded which service its federal loan supports. App. 31a. Green Valley filed an amended complaint acknowledging that only its water service is funded by the loan. It claimed, however, that its water and wastewater services are "integrated" because they "share employees, a board of directors, a general manager, and an operating account." App. 5a & n.7. Because Green Valley sought protection for its non-funded wastewater service, the court dismissed the complaint with prejudice. App. 10a-20a.

'provided or made available' that service under § 1926(b)." App. 3a-4a & n.3 (citing *North Alamo Water Supply*, 90 F.3d at 915-16).

Having concluded that Green Valley provides or makes available wastewater service, the court of appeals turned to the dispute over the meaning of "[t]he service" to which § 1926(b)'s protection from competition applies. App. 4a. The court acknowledged that "[t]he only circuit that has considered this issue" — the Eighth Circuit — "found that § 1926(b) applies only to 'the type of service financed by the qualifying federal loan.'" *Id.* (quoting *Public Water Supply*, 605 F.3d at 520). It stated that "[t]he trouble with the [Eighth Circuit's] reading" was that "the statute does not include any language limiting 'service' to those services that have received federal financing." App. 5a. Rejecting "the Eighth Circuit's reasoning in *Public Water Supply*," App. 5a n.8, the Fifth Circuit held that "[t]he service" protected by § 1926(b) means *any* service provided by a federally indebted utility, including services (such as Green Valley's wastewater service) that are not funded by a federal loan, *see* App. 4a-8a.

In reaching that conclusion, the Fifth Circuit reasoned that "§ 1926(b)'s plain language does not limit the statute's protection to services that have received federal financing." App. 8a; *see* App. 4a-8a. Absent statutory language expressly stating that § 1926(b) protects only services supported by a federal loan, the court relied on its understanding of the statute's purposes. It observed that a utility entirely "protected from municipal encroachment" will be able to achieve "greater economies of scale" and will be "less vulnerable to financial disruptions." App. 8a. It did not address the implications of its expansive

interpretation for the balance of federal and state control over an area of traditional state regulation, or the real-world consequences of conferring monopoly power upon a rural association with no practical ability to provide wastewater service to suburban customers.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTIONS PRESENTED

A. The Fifth And Eighth Circuits Have Reached Opposite Conclusions On The Meaning Of "The Service" Protected By § 1926(b)

In this case, the Fifth Circuit created an acknowledged split of authority with the Eighth Circuit on a question of critical importance to the balance of state and federal control over local infrastructure planning. The Fifth Circuit expressly rejected the Eighth Circuit's interpretation of 7 U.S.C. § 1926(b) in *Public Water Supply District No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010). App. 4a-5a & nn.5, 8.

In *Public Water Supply*, the Eighth Circuit considered whether "[t]he service" protected by § 1926(b) means "the [USDA-]financed service" or "all services," and it reached the opposite conclusion as the Fifth Circuit here. 605 F.3d at 520-21. There, Public Water Supply District No. 3 received a $2 million loan for its wastewater system in 2007. *Id.* at 514. The District sought an injunction to prevent the City of Lebanon from providing water service within the District's territory, arguing that, because the District had received a wastewater loan, its water service also qualified for protection under § 1926(b). *Id.* at 519.

In affirming the grant of summary judgment in the City's favor, the Eighth Circuit held that § 1926(b) protected only the District's federally supported sewer service, and not its water service. *Id.* at 520-21. The court reasoned that the singular term "'the service provided or made available' is best interpreted to include only the type of service financed by the qualifying federal loan." *Id.* at 520. The Eighth Circuit took note of Congress's purposes of "encourag[ing] rural water development and . . . provid[ing] greater security for [USDA] loans." *Id.* at 520-21 (last alteration in original). It concluded that its interpretation satisfied those objectives by protecting the federally financed service, without preventing other entities from providing non-financed services if they are better positioned to do so. *Id.* at 520. The court explained that "divorcing the type of service underlying a rural district's qualifying federal loan from the type of service that § 1926(b) protects would stretch the statute too far." *Id.* at 521.

In this case, the Fifth Circuit expressly acknowledged that the City's arguments "track the Eighth Circuit's reasoning in *Public Water Supply*." App. 5a n.8. The Fifth Circuit explicitly "disagree[d]" with those arguments in holding that § 1926(b) protects "any service made available by a federally indebted utility." App. 4a-5a & n.8.

B. A Deep And Acknowledged Circuit Conflict Exists Over What It Means For A Utility To Have "Provided Or Made Available" A Service Under § 1926(b)

The Fifth Circuit's decision also deepened an acknowledged division of authority regarding what it means for an association to have "provided or made available" the service for which it claims § 1926(b)

protection. *See Chesapeake Ranch Water Co. v. Board of Comm'rs of Calvert Cty.*, 401 F.3d 274, 279 (4th Cir. 2005) (recognizing that the test for whether an association has "provided or made available" service "varies among the courts of appeals," and rejecting the Fifth Circuit's test); *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 706 (6th Cir. 2003) (recognizing that "the circuits are in conflict as to what they require" and that the Fifth Circuit has "adopted a far looser approach" than the Fourth, Eighth, and Tenth Circuits); *Sequoyah Cty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1201 (10th Cir. 1999) (noting that the courts of appeals "are in disagreement" as to the test and that "[o]ne court" — the Fifth Circuit — had held that an association may "simply . . . show[] that it has a legal obligation" to provide service).

1. Four circuits apply a "pipes in the ground" or "physical ability" approach to assess whether a service has been "provided or made available" under § 1926(b).

Fourth Circuit. To determine whether a service has been "provided or made available," the Fourth Circuit requires a utility to demonstrate that "(1) it is physically capable of serving the area in dispute, (2) it has the legal right under state law to do so, and (3) the disputed area is within the geographic boundaries of the association's existing franchise area." *Chesapeake Ranch Water*, 401 F.3d at 280-81. In *Bell Arthur Water Corp. v. Greenville Utilities Commission*, 173 F.3d 517 (4th Cir. 1999), a rural association whose water service was supported by a federal loan sought to enjoin a municipal utility from providing water service to a new housing development. The Fourth Circuit affirmed the district

court's grant of summary judgment to the municipal utility on the ground that the association had not "provided or made available" service to the disputed area. It reached that conclusion because the association "did not have the capacity to serve that area, nor did it have the capacity to provide such service within a reasonable time after the request for service was made." *Id.* at 525.

Sixth Circuit. The Sixth Circuit's approach is similar to the Fourth Circuit's. The Sixth Circuit "first consider[s] whether the association has 'pipes in the ground,'" meaning that the association has "water pipes either within or adjacent to the disputed area before the allegedly encroaching [utility] begins" providing the disputed service and that it is "capable of providing service to the disputed area within a reasonable time after a request for service occurs." *Ross Cty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 399 (6th Cir. 2011). "Once the association satisfies the 'pipes in the ground test,'" the court "then determine[s] whether the rural water association has the legal right under state law to provide water to the disputed area." *Id.* In *Lexington-South Elkhorn Water District v. City of Wilmore*, 93 F.3d 230 (6th Cir. 1996), the Sixth Circuit applied the pipes-in-the-ground test to affirm a grant of summary judgment against a rural association that lacked "facilities on, or in the proximity of, the location to be served." *Id.* at 237.

Eighth Circuit. As in the Sixth Circuit, the Eighth Circuit holds that "[m]aking service available has two components: (1) the physical ability to serve an area; and (2) the legal right to serve an area." *Public Water Supply*, 605 F.3d at 521. In *Public Water Supply*, the Eighth Circuit reversed a grant of

summary judgment to an encroaching city because the district court had incorrectly focused on the preferences of the private firm that was developing the land in question. *See id.* at 522 ("[A] rural district has discretion to determine the method of providing service, even if it conflicts with a potential recipient's stated preferences."). The court emphasized, however, that, on remand, the rural district would have to satisfy "the 'pipes in the ground' test" by showing "adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made." *Id.* at 523. The court also observed that it had "not found any cases where a rural district has satisfied the 'physical ability to serve' requirement in the absence of any facilities whatsoever." *Id.*

Tenth Circuit. Like the Sixth and Eighth Circuits, the Tenth Circuit requires a showing that the rural utility "has the legal right to provide water service" and "has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 654 F.3d 1058, 1064 (10th Cir. 2011). The Tenth Circuit has expressly rejected the Fifth Circuit's holding that a rural association need only show "that it has a legal obligation to provide water service to the customer" because "to hold that a legal duty is sufficient to meet the requirement would be contrary to the language of the statute." *Sequoyah Cty.*, 191 F.3d at 1201, 1203 (citing *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 917 (5th Cir. 1996) (per curiam)). Instead, the test is "whether the water association has *in fact* 'made service available,'" that is, "whether the association

has proximate and adequate 'pipes in the ground.'" *Id.* at 1203.

2. In contrast to those four circuits, the Fifth Circuit has held that a legal duty under state law to serve an area is independently sufficient to show that a utility has made service available under § 1926(b). In *North Alamo Water Supply*, the court stated explicitly: "We hold that the Utility's state law duty to provide service is the legal equivalent to the Utility's 'making service available' under § 1926(b)." 90 F.3d at 916; *see also id.* (relying "[i]n the alternative" on the district court's finding that the utility had adequate facilities to provide service).[7] Thus, as the Sixth Circuit has expressly recognized, "[t]he Fifth Circuit has adopted a far looser approach" than the other circuits, "apparently holding that service is made available through *either* a state-law duty to serve *or* a physical ability to serve." *Le-Ax Water Dist.*, 346 F.3d at 706 (citing *North Alamo Water Supply*, 90 F.3d at 916).

In reversing the district court's dismissal of Green Valley's complaint in this case, the Fifth Circuit applied *North Alamo Water Supply* to conclude that Green Valley had made service available solely on the basis that "a CCN imposes a duty on [Green Valley] to provide [sewer] service" in the disputed area. App. 3a-4a. In reaching that conclusion, the court did not acknowledge the publicly available materials appended to the City's brief showing that Green Valley was not providing wastewater service to the

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[7] The unsuccessful petition for a writ of certiorari in *North Alamo Water Supply* did not present the question how to determine when a service has been "provided or made available." *See* Pet. for a Writ of Certiorari, No. 96-668 (U.S. filed Sept. 3, 1996).

disputed area and that it lacked the permits and infrastructure to do so. *See* Cibolo 5th Cir. Add., Attachs. C & D at 25-26, 33-34. Nor did the Fifth Circuit consider that Green Valley's complaint alleged no facts indicating a physical ability to provide sewer service. *See* Pl.'s First Am. Compl. ¶¶ 5, 9, 16, 20, No. 1:16-cv-00627-SS, Dkt. 12 (W.D. Tex. filed Aug. 19, 2016). In no other circuit would the mere existence of "a CCN impos[ing] a duty on a utility to provide a service" have been sufficient to establish that the utility had "provided or made available" that service under § 1926(b).[8]

II. THE FIFTH CIRCUIT'S INTERPRETATION OF § 1926(b) IS INCORRECT

A. Section 1926(b) Protects Only "The Service" Funded By The Federal Loan

The text of § 1926(b), read in its entirety and in light of the statute's purposes, *see Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006), protects only those services funded by USDA loans, not any service provided by an indebted association.

1. The plain language of the statute protects "*[t]he* service provided or made available." 7 U.S.C.

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[8] The Texas intermediate appellate court with jurisdiction over appeals from the state administrative proceeding that Green Valley sought to enjoin has also rejected the Fifth Circuit's holding in *North Alamo Water Supply*. *See Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 522 (Tex. App. 2010) (adopting the "pipes in the ground" test and holding that "bare possession of a legal . . . duty to serve an area without regard to whether the utility has in fact served or is capable of serving the area" is insufficient). Accordingly, if this matter is permitted to proceed through the state administrative and judicial systems, Green Valley's apparent lack of pipes in the ground likely will be fatal to its reliance on § 1926(b).

§ 1926(b) (emphasis added). Congress did not use a term with an expansive meaning such as "any service" or "all services." *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (the statutory term "any" has an "expansive meaning"). Rather, it used the definite article, which this Court has interpreted to particularize an otherwise general term to the scope contemplated by the statute.

For example, after this Court held that honest-services fraud was not covered by existing mail- and wire-fraud statutes, as lower courts had held it to be, Congress passed a new statute that expressly criminalized deprivations of "the intangible right of honest services." *Skilling v. United States*, 561 U.S. 358, 404 (2010) (interpreting 18 U.S.C. § 1346). In *Skilling*, the Court held that the use of the definite article meant the term referred to "'*that* "intangible right of honest services," which had been protected before . . . , not *all* intangible rights of honest services whatever they might be thought to be.'" *Id.* at 404-05 (quoting *United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003) (en banc)); *see also Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) (use of "the appraisement" rather than "an appraisement" means the term refers to a specific appraisal authorized by a related statute); *cf. Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("'*[T]he* Courts of Law'" in the Appointments Clause "[c]ertainly . . . does not mean *any* 'Cour[t] of Law' (the Supreme Court of Rhode Island would not do). The definite article 'the' obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution.") (last alteration in original).

Similarly, in § 1926(b), Congress's reference to "[t]he service" refers to the service supported by the federal loan authorized under § 1926(a). It does not refer to any and all services that a utility might offer.

Congress's use of the singular term "service" in § 1926(b), rather than the plural "services" used elsewhere in § 1926, provides additional support for that interpretation. The use of the singular conveys specificity. *See Public Water Supply*, 605 F.3d at 520; *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-24 (1978) (use of the plural appears to contemplate generic, rather than particular, meaning). In the context of § 1926(b), that specificity differentiates the service supported by the federal loan from any other services provided by the rural association. Congress's use of the singular underscores that § 1926(b) protections extend to a specific class of service — the service funded by a § 1926 loan.

2. The Fifth Circuit declined to draw meaning from Congress's use of the definite article combined with the use of the singular form of the noun "service." App. 5a-7a. It reasoned that "[t]he service" could be read to mean "an integrated water-and-sewer service," such as Green Valley claims to provide. App. 6a. But, even if a utility provides both water and wastewater services, drinking water and wastewater flow through separate facilities.[9] And those separate facilities can, and generally do, receive single-service USDA loans. *See* RUS Progress

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[9] *See* Neil S. Grigg, *Water, Wastewater, and Stormwater Infrastructure Management* 234 (CRC Press 2d ed. 2012) ("[W]ater distribution pipes[] [and] wastewater sewers . . . use different materials and design procedures. . . . A wastewater treatment plant uses different processes than a water treatment plant.").

Report at 7 (95 percent of RUS funding supports water-only or wastewater-only projects, and 5 percent "made improvements to both water and sewer systems"). Water and sewage services also are regulated by different laws. *See* Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.*; 30 Tex. Admin. Code ch. 290; Texas Health & Safety Code §§ 341.031-341.050 (water); Clean Water Act, 33 U.S.C. § 1251 *et seq.*; 30 Tex. Admin. Code ch. 217 (wastewater). Indeed, although Green Valley claims to operate an "integrated" service, App. 5a, its federal loan undisputedly funds only its water service, as the Fifth Circuit acknowledged, App. 2a. The Fifth Circuit offered no reason to think that Congress intended the scope of § 1926(b)'s monopoly to turn on whether a utility describes a service not supported by a federal loan as "integrated" with a service that does receive federal support.

The Fifth Circuit erroneously opined that, if the singular term "[t]he service" is read to refer only to the service supported by a federal loan, then an association that "received federal loans for both its water and sewer service" would "be able to receive § 1926(b)'s protection" for "only one of" those services. App. 6a. In fact, Congress's use of a singular noun preceded by the definite article demonstrates its intent to refer to "[t]he service" that is the subject of the statute's solicitude — namely, a service supported by a loan authorized under § 1926(a). If a utility has more than one service supported by a federal loan, each can be the service to which § 1926(b) refers.

3. Ultimately, the Fifth Circuit grounded its holding in the court's understanding of the statute's purposes. The court did not claim that "[t]he service"

unambiguously encompasses services that are not supported by a federal loan, or even that such a conclusion was the best reading of the text. Instead, the court relied on a perceived lack of express language "limit[ing] the statute's protection to services that have received federal financing." App. 8a. In the absence of such language, the court reasoned that Green Valley's interpretation supported the statute's purposes of "encourag[ing] rural water development" and "safeguard[ing] the viability" of rural associations. *Id.*

The Fifth Circuit's approach to interpreting § 1926(b) is erroneous because "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Adopting Green Valley's "broad view of the scope of protection would undoubtedly benefit [Green Valley] and other rural districts." *Public Water Supply*, 605 F.3d at 520. But the mere fact that Congress did not expressly prohibit such an extension is not a sufficient reason for extending § 1926(b)'s monopoly protection to services unsupported by a federal loan. As this Court explained in *Rodriguez*, it is not the case that "*whatever* furthers the statute's primary objective must be the law." 480 U.S. at 525-26.

Moreover, the Fifth Circuit's purpose arguments are incorrect even on their own terms. As the Eighth Circuit recognized, interpreting § 1926(b) as the Fifth Circuit did here does "not promote rural water development because other services a rural district might happen to provide are irrelevant to maintaining the necessary economies of scale to allow rural utility associations to remain viable and to keep[] the per-user cost low *for the service financed by the loan*." *Public Water Supply*, 605 F.3d at 520 (emphasis add-

ed). Even if state rate regulations permit a utility to divert revenues from a service not funded by a federal loan to support another service for which federal funding has been received, that is a cross-subsidy, not "economies of scale." App. 8a.[10]

In addition, as the Eighth Circuit also recognized, the Fifth Circuit's approach is in fact "incompatible with the purpose of encouraging rural water development because expanding § 1926(b) to protect services unrelated to the qualifying federal loan would prohibit cities from providing other services to customers within a district's boundaries even when" state and local officials determine that the city is "better situated to do so." *Public Water Supply*, 605 F.3d at 520.

4. The Fifth Circuit's expansive interpretation of § 1926(b) is particularly unjustified because the statute contains no clear indication of congressional intent to maximize the degree of federal intrusion into an area of traditional state responsibility. *See Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (a "clear indication" is required to interpret a statute to "intrude[] on the police power of the States"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the States" are not superseded by federal law "unless that was the clear and manifest purpose of Congress"). This Court has recognized "land and water use" as "areas of traditional state responsibility." *Bond*, 134 S. Ct. at 2089.

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[10] Although a utility that provides more than one service might spread certain management and overhead costs between multiple services, small rural associations generally have "few staff" and often rely on project-based consultants. GAO Report at 7.

Where § 1926(b) applies, the statute shifts from States to the federal government the power to make infrastructure decisions with significant land-use implications. *See* Scott Hounsel, *Water Associations and Federal Protection under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 Tex. L. Rev. 155, 177-85 (2001) (describing land-use and economic-development impacts of maintaining rural-water-association control over infrastructure in urbanizing areas). It also functions to preempt state laws that otherwise would allow a municipality to serve an area claimed by an association. *See*, *e.g.*, *Sioux Rural Water Sys., Inc. v. City of Watertown*, CIV 15-1023-CBK, 2017 WL 1372602 (D.S.D. Apr. 12, 2017) (§ 1926(b) preempts state law that otherwise would allow a municipality a right of first refusal to serve customers that a rural water association seeks to serve within three miles of the municipality's boundaries); *see also* Compl. ¶ 19 (asserting that § 1926(b) preempts the provision under the Texas Water Code under which the City sought authority to provide service).

The term "[t]he service" should not be interpreted to maximize federal intrusion absent a clearer indication of congressional intent to do so. Here, the Fifth Circuit pointed to no such clear signals of congressional intent.

That absence is particularly consequential because reading "[t]he service" as "any service" significantly broadens § 1926(b). Although the Fifth Circuit appears to have assumed that an association may provide only water or sewer service, *see* App. 4a-5a (noting that "service" could refer to "a specific service — either a water service or a sewer service — made available" by the association), that is incorrect. In

fact, an association protected by § 1926(b) may offer services other than water and wastewater, all of which would be protected under the Fifth Circuit's interpretation. *See*, *e.g.*, Okla. Stat. Ann. tit. 82, §§ 1324.2(1), 1324.3, 1324.4 (authorizing the creation of districts that provide "all or any combination of" water, wastewater, gas distribution, and solid waste management systems); *see generally Guthrie*, 654 F.3d at 1061 (considering § 1926(b) protections for a "Water, Sewer and Solid Waste Management District"). Nothing suggests Congress intended such a sweeping result. *See* S. Rep. No. 87-566, at 67, 1961 U.S.C.C.A.N. 2309 (§ 1926(b) loans would help provide "a safe and adequate supply of running household water").

B. The Existence Of A Legal Duty To Serve, Without More, Is Insufficient To Establish That A Service Has Been "Provided Or Made Available"

Section 1926(b)'s protections apply only when a service has been "provided or made available" by an association. The Fifth Circuit has held that a "state law duty to provide service is the legal equivalent to the Utility's 'making service available' under § 1926(b)," *North Alamo Water Supply*, 90 F.3d at 915-16, such that, "[w]here a CCN imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service," App. 3a-4a. That interpretation is incorrect: the ordinary meanings of the terms "provided or made available" do not encompass a service that exists only on paper.

"To 'provide' ordinarily means 'to make available,' to 'furnish,' to 'supply,' or to 'equip.'" *Chesapeake Ranch Water*, 401 F.3d at 280 (quoting *Webster's Encyclopedic Unabridged Dictionary of the English*

Language 1556 (2001)). Likewise, "available" means "capable of use for the accomplishment of a purpose," "suitable or ready for use," or "present or ready for immediate use." *Ross v. Blake*, 136 S. Ct. 1850, 1858-59 (2016) (surveying dictionary definitions). Those terms "denote actual provision of service or physical capacity and readiness to provide service, not merely a legal right or duty to do so." *Creedmoor-Maha Water Supply*, 307 S.W.3d at 522. "Inherent in the concept of providing service or making service available is the *capability* of providing service or, at a minimum, of providing service within a reasonable time." *Bell Arthur Water*, 173 F.3d at 526. That interpretation comports with this Court's decision in *Ross*, which held that an administrative remedy is not "available" if, "although officially on the books," it "is not capable of use to obtain relief." 136 S. Ct. at 1859.

The "pipes in the ground" test adopted by the Fourth, Sixth, Eighth, and Tenth Circuits gives meaning to the statutory language by requiring that an association have "adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." *Sequoyah Cty.*, 191 F.3d at 1203. The Fifth Circuit's approach — holding "that a legal duty is sufficient" — is "contrary to the language of the statute, which provides protection only against curtailments of 'service provided or made available' by water associations." *Id.* When an association holds a CCN authorizing it to provide a particular service, but it lacks facilities capable of providing that service, the association has neither "provided" nor "made available" the service.

Interpreting § 1926(b) according to its plain terms achieves the objective identified in the Senate Report — namely, "to assist in protecting the territory *served* by [an indebted] association," S. Rep. No. 87-566, at 67, 1961 U.S.C.C.A.N. 2309 (emphasis added), not merely territory that has been assigned under state law but that is not, in the ordinary sense, being "served." As the Tenth Circuit has observed in rejecting the "legal duty" rule, such a rule "undermine[s]" the goal of providing service to rural residents anywhere that "a water association has a legal duty to provide service but has no proximate or adequate facilities or cannot provide them within a reasonable time." *Sequoyah Cty.*, 191 F.3d at 1203. When a rural association lacks the ability to serve customers in an area and § 1926(b) is interpreted to foreclose nearby municipalities from providing service, "it is the customer who suffers." *Id.* Nothing in the statute supports the Fifth Circuit's counterintuitive construction.

III. THIS CASE PRESENTS QUESTIONS OF RECURRING IMPORTANCE WARRANTING THIS COURT'S REVIEW

This case concerns the extent to which § 1926(b) prevents state regulators from applying state law to decide whether an association or some other entity should provide water and wastewater services in rural areas. That is a question of great importance in view of the nation's unmet water and wastewater infrastructure needs, and the traditional role of state and local regulators in deciding how best to meet those needs. *See Bond*, 134 S. Ct. at 2089.

Disputes like the one between Green Valley and the City of Cibolo will continue to recur with

frequency.[11] Communities nationwide will require significant infrastructure investments in coming years to meet the public's need for safe drinking water and wastewater facilities. The Environmental Protection Agency ("EPA") has estimated the infrastructure necessary to provide safe drinking water to the public will cost $384.2 billion in coming decades, and estimated wastewater infrastructure needs total $271 billion.[12] Rural systems will require almost $190 billion. *See* GAO Report at 1.

Small systems often face particularly serious challenges in meeting those needs, including "difficulty obtaining financial assistance, . . . management limitations, lack of long-term planning activities, . . . aging infrastructure," and inability "to attract qualified and certified operators."[13] These problems

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[11] *See* John Wood, *"Domestic Terrorists" vs. "Blackmailers": Unresolved Conflict Between Municipalities and Rural Water Districts*, 22 Okla. Pol. 73, 75 (Nov. 2012) (identifying "more than 100 trials" between municipalities and rural associations disputing the interpretation of § 1926(b) between 1969 and 2011), *available at* http://ojs.library.okstate.edu/osu/index.php/OKPolitics/article/view/1605/1433.

[12] *See* EPA, *Drinking Water Infrastructure Needs Survey and Assessment: Fifth Report to Congress* at 1 (Apr. 2013), https://www.epa.gov/sites/production/files/2015-07/documents/epa816r13006.pdf; EPA, *Clean Watersheds Needs Survey 2012: Report to Congress* at 1 (Jan. 2016), https://www.epa.gov/sites/production/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf.

[13] Memorandum of Agreement Between the United States Environmental Protection Agency and the United States Department of Agriculture – Rural Development Rural Utilities Service: Promoting Sustainable Rural Water and Wastewater Systems at 1 (2011), https://www.epa.gov/sites/production/files/2015-04/documents/epausdamoaruraldevelopmentruralutilitiesservicejune2011.pdf.

are exacerbated on the suburban fringe, where rural associations may be incapable of adequately serving new growth. For example, an association's pipes may be too small to support dense residential subdivisions, *see*, *e.g.*, *Bell Arthur Water*, 173 F.3d at 525-26, or high-capacity fire hydrants, *see* Hounsel, 80 Tex. L. Rev. at 178-80. To correct system inadequacies, an association may seek to charge the developer for expensive upgrades that would be unnecessary if the developer were to tap into a nearby municipal system that already enjoys adequate capacity. *See*, *e.g.*, *Creedmoor-Maha Water Supply*, 307 S.W.3d at 511-12, 523. The result is often decreased investment and growth. *See* Hounsel, 80 Tex. L. Rev. at 171-72, 177-85 (describing negative effects of § 1926(b)'s monopoly protections on land use and economic development).

The USDA loan program offers no guarantee that a rural association — even one that has received funds in the past — can adequately maintain its facilities or serve new growth. Small systems often rely heavily on state and federal funding. *See* GAO Report at 2, 6. At current funding levels, the USDA's loan program can provide for only a small portion of the unmet need. *See* RUS Progress Report at 28-29 (FY 2016 loans totaled $1.2 billion to 622 systems). When rural associations are unable to satisfy the needs of growing populations, municipalities such as the City of Cibolo increasingly will seek to fill the gaps, generating additional disputes over the scope of § 1926(b).

When both a rural association and a municipality seek to serve the same area, the dispute should be resolved to the greatest extent possible by state and local officials under state law. Those officials are closest and most accountable to the affected residents,

and they are best positioned to determine which entity can provide the highest quality service. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 458, 461 (1991). The close relationship between infrastructure and development, *see* Hounsel, 80 Tex. L. Rev. at 171-72, 177-85, makes local control over these decisions especially important.

This Court should review and decide the questions that have divided the courts of appeals regarding the scope of § 1926(b). Disputes implicating that provision are likely to become even more frequent in the future, and this Court's review is warranted to ensure that state and local authority is displaced by that provision only to the extent Congress clearly expressed in the statute.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ACKNOWLEDGED CIRCUIT CONFLICTS

This case is an ideal vehicle to answer the question whether § 1926(b) extends monopoly protection to all services provided by an indebted utility or only to those services funded by a federal loan. Two circuits have considered the identical question and reached opposite results on a pure issue of statutory construction, with the Fifth Circuit expressly acknowledging its rejection of the Eighth Circuit's reasoning and result. The lower courts are therefore unlikely to resolve the conflict without this Court's guidance. There are no threshold or preliminary issues that would pose an obstacle to considering that question in this case, and the key fact — that Green Valley's sewer service is not supported by its federal loan — has never been in dispute.

This case also provides an appropriate vehicle to consider the Fifth Circuit's outlier holding that an

association has "provided or made available" service merely by possessing a state-law certificate obligating it to do so. Five courts of appeals have carefully considered the meaning of the phrase "provided or made available" in § 1926(b) in a series of cases stretching back nearly three decades. Only the Fifth Circuit has held that a legal duty to serve, without more, establishes that an association has "provided or made available" service. The Fifth Circuit passed upon the issue when it declined to consider facts showing that Green Valley does not, in fact, provide wastewater service, and instead followed circuit precedent in *North Alamo Water Supply* in holding that Green Valley need not do so to qualify for § 1926(b) protections. App. 3a-4a & n.3. Given the Fifth Circuit's reaffirmation of that holding in this case, there is no reasonable prospect that the conflict will disappear with further "percolation."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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