No. 17-938

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent is an integrated water and wastewater utility that holds water and wastewater Certificates of Convenience and Necessity ("CCN"). Under Texas law, a CCN holder has a mandatory duty to "serve every consumer within its certified area." Respondent is an "indebted association" under a federal loan that funded its water system. Under 7 U.S.C. § 1926(b), "The service provided or made available through any such indebted association shall not be curtailed or limited" by an encroaching municipality. Petitioner is a Texas municipality seeking to acquire Respondent's wastewater CCN service area.

1. Was the Fifth Circuit correct in holding that Section 1926(b)'s plain language protects an indebted association from loss of its CCN service area to an encroaching municipality because Section 1926(b) does not limit protection to the service funded by the federal loan?

2. Can the Petitioner challenge the Fifth Circuit's holding from a 1996 opinion in a different case, when the Petitioner did not challenge the holding in its motion to dismiss, the Petitioner acknowledged the holding before the Fifth Circuit without raising any complaint, and a challenge to the holding in this case would involve the resolution of factual disputes that have yet to be litigated?

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INTRODUCTION

Neither question presented by Petitioner warrants review by this Court. When a rural utility obtains a federal loan, the service provided or made available by the utility is statutorily protected against any municipal attempt to replace the utility as water or wastewater service provider. *See* 7 U.S.C. § 1926(b). The parties do not dispute this statutory protection exists. The narrow dispute here involves how the protection applies in a very small subset of cases—those few cases where the federal loan funded a utility's water services and the encroaching municipality seeks to take a portion of the utility's wastewater service area.

The Fifth Circuit answered this narrow question and held that Section 1926(b) protects a federally-funded utility's entire service area including both water and wastewater. This is the correct construction of Section 1926(b) based on both its express language and its stated purpose. However, even if this construction of the statute is wrong, the issue does not warrant this Court's review. In the 57 years since Section 1926(b)'s enactment, this narrow issue has only arisen twice—in the Eighth Circuit in 2010 and in the Fifth Circuit in 2017. This represents a difference of view between two circuits in the only two cases that have presented this plainly rare issue in the last fifty years.

The application of Section 1926(b) in the particular circumstances presented by this case is simply not an issue of national importance. It affects a narrow range of potential disputes, which due to their unusual facts, are rare. Indeed, this issue may not arise again for several

decades and may or may not see a deeper split among the courts of appeals. At this point, the issue does not merit this Court's limited resources.

Petitioner also asks this Court to review the question of what constitutes "providing or making service available" under Section 1926(b). This issue is not properly before the Court, however. Petitioner did not raise this issue in either the district court or the Fifth Circuit. This Court should, consistent with its established practice, decline to review an issue that was neither raised nor passed on below.

Indeed, this Court's consideration of Petitioner's second issue would be premature even if it had been raised below. There are material unresolved factual disputes concerning Respondent's provision of wastewater service that would likely obviate the need for this Court's review. These factual issues have not yet been adjudicated because this case has not proceeded beyond a motion to dismiss. It is entirely possible, and even likely, that a resolution of these factual issues will establish that Respondent is providing and making wastewater service available under *either* party's interpretation of Section 1926(b). In the event that adjudication of the factual issues does not moot the statutory construction issue, Petitioner will have the opportunity to appeal the issue on a complete record after final disposition of the case. Petitioner's second issue is not ripe for this Court's review in this posture.

The petition should be denied.

STATEMENT OF THE CASE

Respondent Green Valley Special Utility District is a utility provider created under the authority of Texas Water Code chapter 65. It has a certificated service area covering portions of Guadalupe, Comal, and Bexar Counties, Texas. *See* Pl.'s First Am. Pet., No. 1:16-cv-00627-SS, Dkt. 12 (W.D. Tex. Sept. 1, 2016).

Respondent provides and makes available both water and wastewater (sewer) service within its service area. *Id.* Water service is provided pursuant to Respondent's Certificate of Convenience and Necessity ("CCN") No. 10646. Sewer service is provided pursuant to Respondent's CCN No. 20973. Both CCNs are regulated by the Public Utility Commission of Texas ("PUC"). The CCNs require Respondent, among other things, to "serve every consumer within its certified area" and "render continuous and adequate service within its certified area." Tex. Water Code § 13.250(a).

In 2003, Respondent obtained a $584,000 loan from the United States Department of Agriculture, Rural Development ("USDA") pursuant to 7 U.S.C. §§ 1921 *et seq.* *See* Pl.'s First Am. Pet., No. 1:16-cv-00627-SS, Dkt. 12 (W.D. Tex. Sept. 1, 2016). It is undisputed that this loan remains outstanding and entitles Respondent to certain protections under federal law:

> 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. . . .

7 U.S.C. § 1926(b). Indeed, Petitioner acknowledges that: "Section 1926(b) preempts state infra-structure regulation—and shields rural utilities from competition—to the extent that state action would 'curtail' or 'limit' 'the service provided or made available by a utility' with an outstanding USDA loan." Petition ("Pet.") 7 (alterations omitted).

Petitioner is a home rule municipality located in Guadalupe and Bexar Counties, Texas with a population close to 30,000. *See* Pl.'s First Am. Pet., No. 1:16-cv-00627-SS, Dkt. 12 (W.D. Tex. Sept. 1, 2016). Petitioner does not operate a wastewater treatment plant. Instead, along with other nearby small cities, it delivers its sewage effluent to a regional wastewater service provider who is not a party to this case.

On March 8, 2016, Petitioner filed an application with the PUC for single certification of an area within Guadalupe County that is both within the Petitioner's corporate limits and Respondent's wastewater CCN. *Id.* By its application, the Petitioner sought authority from the PUC to replace Respondent as the wastewater service provider within such area.

In response, Respondent filed this action seeking injunctive and declaratory relief to enforce Section 1926(b)'s protections and prevent Petitioner from curtailing or limiting Respondent's wastewater service. Petitioner filed a motion to dismiss arguing that while

Respondent operates an integrated water and wastewater utility system, the federal loan only funded portions of Respondent's water system—not its wastewater system. *See* Def.'s Mot. to Dismiss, No. 1:16-cv-00627-SS, Dkt. 13 (W.D. Tex. Sept. 1, 2016). According to Petitioner, Section 1926(b) protects only the services of a federally indebted utility that the proceeds of the loan were actually used to fund. The district court agreed and dismissed the Complaint. App. 10a-20a.

The Fifth Circuit reversed. App. 1a-11a. It held that the district court's order (1) was contrary to the plain language of Section 1926(b) and (2) directly conflicted with the two purposes of the statute—expanding the number of potential users of the federally-indebted utility's systems (thereby decreasing user cost) and safeguarding the viability and financial security of the federally-indebted utility. App. 1a-11a.

REASONS FOR DENYING THE PETITION

This case is unsuited for review by this Court. Petitioner's first question, which the Fifth Circuit correctly decided, has only come before federal courts twice in over 50 years and involves circumstances that rarely arise. The second issue was neither raised nor passed on below and, thus, is not properly before this Court. In addition, Petitioner's second issue involves factual issues that have not been adjudicated and that are necessary to a determination of that issue in this case. Review should be denied.

I. Whether the court of appeals correctly construed Section 1926(b) on the narrow issue in this case does not warrant the Court's review.

Petitioner asks this Court to decide whether Section 1926(b)'s protections are confined to the specific services actually funded by a utility's federal loan. Pet. 19-26. In the 57 years since the statute's enactment, however, this question has only reached federal court twice—this case and *Public Water Supply Dist. No. 3 of Laclede County v. City of Lebanon*, 605 F.3d 511, 520 (8th Cir. 2010). In the unlikely event that this issue takes on a broader significance in the future, the Court can take up the question at that point after more lower courts have weighed in. An issue arising this infrequently—only two courts of appeal have written on it in the history of the statute—does not warrant review at this juncture.

Moreover, the Fifth Circuit correctly decided the issue. Section 1926(b), by its plain language, protects any service provided or made available through the utility. The statute does not limit its protections based in any way on the use of the federal loan proceeds. Section 1926(b) provides that when a utility is a borrower under a federal loan, the "service provided or made available"—through any federally indebted association and in any area served by that association—"shall not be curtailed or limited." 7 U.S.C. § 1926(b). The plain language of the statute, therefore, does not limit its protection to the particular service provided *and funded by a federal loan*. Instead, the statute refers broadly to the "service provided or made available *through any such [federally indebted] association*." *Id.* (emphasis added). As the Fifth Circuit observed: "The plain language of § 1926(b) is dispositive." App. 4a.

In arguing otherwise, Petitioner points to the statute's use of the word "the" before "service." Pet. 19-21. But, Petitioner ignores the rest of the statutory phrase. The question here is *what* service is protected under § 1926(b)? The statute plainly states that it is "*[t]he* service *provided or made available*" by the utility. 7 U.S.C. § 1926(b) (emphasis added). There is no statutory limitation based on what service is funded by the federal loan. The word "the" is a direct reference to whatever service is "provided or made available." There is no statutory language to tie it to the service that is funded by the federal loan.

Petitioner also suggests the statute's use of the term "service" instead of "services" is significant. Pet. 21-22. "In determining the meaning of any Act of Congress," however, "unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things; [and] words importing the plural include the singular." 1 U.S.C. § 1. The singular term "service," therefore, must include the plural "services." 7 U.S.C. § 1926(b). Otherwise, a utility providing water and wastewater services and whose loan funded *both* services would only be able to receive Section 1926(b) protection for one of them. App. 6a. The statute plainly does not apply this way.

The Fifth Circuit's approach also comports with the existing body of federal case law that has addressed how Section 1926(b) should be construed as a general matter. The courts of appeals are in broad agreement that Section 1926(b) should be liberally interpreted to protect federally-indebted rural utilities. *See, e.g.*, *Ross County Water Co. v. City of Chillicothe*, 666 F.3d 391, 397 (6th Cir. 2011); *Pittsburg County Rural Water Dist.*

No. 7 v. City of McAlester, 358 F.3d 694, 714-15 (10th Cir. 2004); *Jennings Water, Inc. v. City of N. Vernon*, 895 F.2d 311, 315 (7th Cir. 1989). "Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FMHA-indebted rural water associations from municipal encroachment." *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996). Although these courts did not confront the specific issue presented here, this uniform understanding of Congress's statutory intent to provide additional protections for rural utilities strongly supports the Fifth Circuit's decision in this case.

Petitioner's interpretation also conflicts with Section 1926(b)'s purposes. Congress passed Section 1926(b): "1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FMHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987) (citing S. Rep. No. 87-566 (1961), reprinted in 1961 U.S.C.C.A.N. 2243, 2309). Petitioner's proposed interpretation would allow certain piecemeal service area curtailment by municipalities in direct conflict with these purposes. The Fifth Circuit's reading promotes both of these purposes.

First, retaining all of the properties within the utility's service area maintains lower per-user costs and encourages rural development. A "utility that is protected from municipal encroachment will be able to achieve greater economies of scale, thereby decreasing its per-user costs." App. 8a. Economies of scale are a benefit to

the association serving a rural area (and its customers) regardless of the type of service involved. Curtailing a utility's service area—for any service—will negatively impact its economies of scale. Petitioner's unsupported claim—that allowing it to seize the part of Respondent's service area closest to the municipality's urban boundaries would encourage distant rural development—is inherently contradictory and inconsistent with the purpose of Section 1926(b).

The very point of Section 1926(b) is to provide "funds for water and waste projects serving the most financially needy communities." 7 C.F.R. § 1780.2. Allowing Petitioner to cherry pick the *least* financially needy communities in Respondent's service area would damage Respondent's ability to serve the neediest communities (which are farther from the City). Interpreting Section 1926(b) in a way that permits cities like Petitioner to "skim the cream" from a rural utility's service area would be flatly inconsistent with the purpose of the statute. *Bear Creek*, 816 F.2d at 1059-60. Section 1926(b) reflects a congressional policy choice to protect rural users who are not close to a municipality and who will never receive services from a city. Preserving a rural utility's service area protects the utility's investment in its *entire* service area for the benefit of all of its users.

Second, Section 1926(b) is intended to safeguard the financial viability of federally indebted associations. Respondent's financial viability would be impaired by allowing Petitioner to cherry pick the populated areas that generate the most revenues. A reduction in revenues, regardless of the source of those revenues, impairs the financial health of a rural utility. These real-

world consequences should be dispositive in rejecting Petitioner's attempt to have this Court rewrite Section 1926(b) and make a policy choice different from that of Congress.

Petitioner argues that construing Section 1926(b) liberally to protect the financial viability of federally-indebted utilities results in an improper "federal intrusion" into state utility regulation. Pet. 24-26. This is not correct. First, the constitutionality of Section 1926(b) is not at issue here. Its constitutionality is presumed for the purposes of this case. *See City of McAlester*, 358 F.3d at 716-17. By enacting Section 1926(b), Congress necessarily decided that federal interests prevail over state interests with respect to the protection of a federally-indebted utility's service area. Second, Section 1926(b) clearly authorizes the USDA to make low-interest loans to nonprofit water service associations (which benefits the states) in exchange for compliance with Section 1926(b)'s terms and conditions. *See id.*

As of 2016, the federal portfolio of low-interest loans for the construction of water and waste facilities in rural communities across the country totaled over $12 billion.[1] In fact, the State of Texas was the largest recipient of federal USDA dollars in 2016. This was made possible by Texas's decision to enact laws allowing in-state utilities to benefit from federal low-income loans under Section 1926(b). Tex. Water Code §§ 49.152, 49.153(e)(1)(B), 67.010(b). In exchange for this massive funding,

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

Texas accepted Section 1926(b)'s conditions. *See City of McAlester*, 358 F.3d at 717. There is no federal intrusion here—Texas chose the benefits of federal funding and the restrictions of Section 1926(b).

This does not mean state regulators (such as the PUC) are powerless to regulate their state's utilities holding a federal loan. States have authority to set the requirements for who can hold exclusive service rights such as a CCN. They also have the authority to regulate the utilities holding such rights to determine, for instance, whether a utility is complying with its state law duty to provide "continuous and adequate service" within its CCN area. Tex. Water Code §§ 13.250(a) and 13.254(a). However, if a utility holds a valid CCN and also holds a federal loan, Section 1926(b) protects the federal government's interest in getting its loan repaid. To do so, it protects the utility's service area for the duration of the loan. This is why Respondent's service area is, as the Fifth Circuit has noted, "sacrosanct." *N. Alamo*, 90 F.3d at 915.

II. Whether Respondent has made its wastewater service available is not before the Court and does not warrant review.

Petitioner also asks the Court to decide whether a utility's possession of a valid CCN establishes, for purposes of Section 1926(b), it is making service available. Petitioner argues that the Court should impose the different standard of a "pipes in the ground" test. Pet. 26-28. However, this question is not properly before the Court.

This issue was not raised before the district court. Petitioner sought dismissal solely on the ground that Respondent's federal loan funded water services—not wastewater services (*i.e.*, the first question presented). *See* Def.'s Mot. to Dismiss, No. 1:16-cv-00627-SS, Dkt. 13 (W.D. Tex. Sept. 1, 2016). The district court did not address the issue of the standard for making service available and granted the motion to dismiss solely on the basis presented by Petitioner. *See* Order, No. 1:16-cv-00627-SS, Dkt. 19 (W.D. Tex. Oct. 3, 2016). Consistently with its position in the district court, Petitioner did not raise the issue of what constitutes "making service available" in the Fifth Circuit. The Fifth Circuit did not address the issue and reversed based on Petitioner's first issue alone. App. 1a-9a.

Petitioner's attempt to raise the issue for the first time at this stage should be denied. This Court's "traditional rule . . . precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation and quotations omitted). This "is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (citation and quotations omitted). This case should be no exception. Like all litigants, Petitioner must litigate its issues first in the courts below. Neither the district court nor the Fifth Circuit has had an opportunity to address or pass on Petitioner's second issue. Thus, it is not ripe for this Court.

Even if this Court believes Petitioner's second issue is properly before the Court, review is not warranted for at least two reasons. First, the Fifth Circuit's longstanding rule that a utility's "state law duty to provide service is the legal equivalent to the Utility's 'making service

available' under § 1926(b)" is correct. *N. Alamo*, 90 F.3d at 916. Petitioner argues that the Fifth Circuit's rule ignores whether the utility is, in fact, capable of providing the service that its CCN obligates it to provide. Pet. 28. However, this is not correct. Texas law requires a utility to provide "continuous and adequate" service to all customers within its entire CCN service area. Tex. Water Code § 13.250(a). In addition, the PUC may revoke a CCN if the utility fails to provide or make service available. *See id.* § 13.254(a). This is the process by which the PUC can evaluate the federally-indebted utility's compliance with state law obligations.

The Fifth Circuit's standard for when service is made available respects the state agency's right to review the utility's service and ability to provide service in the first instance. Federal courts should not be examining potentially complex factual disputes over how sufficiently and how immediately a utility may be able to provide service to individual properties unless and until the state agency that supervises such issues first makes its own determination that the utility is not complying with its service obligations under state law.

In contrast, the "pipes in the ground" test promoted by Petitioner would interfere with a state's supervisory authority over its utilities in an area where factual circumstances and regulatory expertise are critical. Indeed, it overlooks the physical reality that in the context of wastewater, "pipes in the ground" is often a misleading—and inaccurate—description. Utilities in rural and developing areas can—and often do—provide wastewater service by collection in storage tanks that are then pumped and hauled by utility trucks for treatment

and disposal. Respondent, in fact, provides wastewater service to residential subdivisions in its wastewater CCN area in precisely this way.

The Fifth Circuit's test appropriately accounts for these physical realities and the need for regulatory oversight. Unless and until the PUC determines that a utility is not providing or making service available, and concludes a utility's CCN should be decertified, in whole or in part, *as a result* of such determination, federal district courts should not be weighing in on this fact-intensive question.

Even if this Court should be of the view that the "pipes in the ground" test is the correct test under Section 1926(b) as a general matter, the issue is not properly developed in this case at this stage of the case. This case was adjudicated by the district court on a motion to dismiss based on the pleadings. There has been no factual development, no record development on any contested factual issue, and no litigation of any contested material facts. It may well be—and Respondent contends that it is—that the facts will show that Respondent is, in fact, providing and making service available under the "pipes in the ground" test that Petitioner advocates. Specifically, the record will ultimately reflect that Respondent provides actual wastewater service to multiple residential subdivisions within its wastewater CCN area and has wastewater treatment contracts with the San Antonio River Authority and The City of Marion. Thus, once the factual record is properly developed, this case will not be an appropriate vehicle for the litigation of the question of whether Section 1926(b) requires a "pipes in the ground" test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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