No. 17-938

# In the Supreme Court of the United States

CITY OF CIBOLO, TEXAS, PETITIONER

*v.*

GREEN VALLEY SPECIAL UTILITY DISTRICT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
JOSEPH H. HUNT
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
FREDERICK LIU
*Assistant to the Solicitor General*
CHARLES W. SCARBOROUGH
THAIS-LYN TRAYER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

The Department of Agriculture makes loans to fund water services and sewer services in rural areas. Under 7 U.S.C. 1926(b), a rural utility association that receives such a loan enjoys territorial protection for "[t]he service provided or made available through" the association during the term of the loan. The questions presented are:

1. Whether "[t]he service" protected by Section 1926(b) is limited to the service funded by the federal loan.

2. Whether a state-law duty to provide a service is sufficient to establish that an association has "provided or made available" that service under Section 1926(b).

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## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. Congress enacted the Water Facilities Act of 1937, ch. 870, 50 Stat. 869, to address the "inadequate utilization of water resources on farm, grazing, and forest lands in the arid and semiarid areas of the United States," *ibid.* To "assist in providing facilities for water storage and utilization" in those areas, *ibid.*, the Act authorized the Secretary of Agriculture "to furnish financial or other aid to[] any agency, governmental or otherwise, or any person, subject to such conditions as he may deem necessary for the purposes of th[e] Act." § 2(3), 50 Stat. 869. The Secretary's authority under the

Act was understood to be limited to assisting water facilities that served farmers. See S. Rep. No. 566, 87th Cong., 1st Sess. 67 (1961) (1961 Senate Report) ("[T]he Water Facilities Act requires the benefits of such loans to be on farms.").

Two decades later, Congress enacted the Consolidated Farmers Home Administration Act of 1961 (CFHAA), Pub. L. No. 87-128, Tit. III, 75 Stat. 307, which broadened the Secretary's authority to assist water facilities, see 1961 Senate Report 63, 67. As originally enacted, Section 306 of the CFHAA provided:

> (a) The Secretary * * * is authorized to make or insure loans to associations, including corporations not operated for profit and public and quasi-public agencies, to provide for the application or establishment of soil conservation practices, the conservation, development, use, and control of water and the installation or improvement of drainage facilities, all primarily for serving farmers, ranchers, farm tenants, farm laborers, and rural residents, and to furnish financial assistance or other aid in planning projects for such purposes. * * *
>
> (b) 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.

§ 306, 75 Stat. 308.

In Subsection (a), Congress thus authorized the Secretary to make "water facilities loans" not just to associations serving farmers, but also to "associations serving nonfarm rural residents." 1961 Senate Report 63. And by enacting Subsection (b), Congress "added" a "new provision," *id.* at 67, "[p]rohibit[ing] curtailment of a water association borrower's service as a result of inclusion of its service area within the boundaries of any public body or as the result of the granting of any private franchise for similar service in such area," *id.* at 63. Subsection (b) thus "protect[s] the territory served by such an association facility against competitive facilities," *id.* at 67, making it more likely that the association will be financially viable and therefore able to repay the money that the Secretary has loaned to it.

Since 1961, Congress has amended Subsection (a) by moving the first sentence of that Subsection, quoted above, into a new paragraph (1). Act of Oct. 7, 1965, Pub. L. No. 89-240, 79 Stat. 931. Congress has also added to the purposes for which the Secretary may make loans under Subsection (a). In 1965, for example, Congress expanded the Secretary's loan-making authority to encompass loans for the installation or improvement of "waste disposal" facilities. *Ibid.*; see also Food and Agriculture Act of 1962, Pub. L. No. 87-703, Tit. IV, § 401(2), 76 Stat. 632 (adding authority to make loans for the establishment of "shifts in land use including the development of recreational facilities"); Rural Development Act of 1972, Pub. L. No. 92-419, Tit. I, § 104, 86 Stat. 658 (adding authority to make loans for "essential community facilities including necessary related equipment").

In its current form, codified at 7 U.S.C. 1926(a) (2012 & Supp. V 2017), Subsection (a) provides in pertinent part:

> (1) The Secretary is * * * authorized to make or insure 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 to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.

7 U.S.C. 1926(a)(1).

Congress has never amended the text of Subsection (b). The text of that Subsection, now codified at 7 U.S.C. 1926(b), is the same today as when it was enacted in 1961.

2. Respondent Green Valley Special Utility District is a special utility district created under Texas state law. First Am. Compl. ¶ 1; see Tex. Water Code Ann. § 65.011 (West 2004). It holds two certificates of convenience and necessity (CCNs) issued by the Texas Public Utility Commission (Commission). First Am. Compl. ¶ 5. One CCN gives respondent the exclusive right under state law to provide water service within a particular service area; the other gives respondent the exclusive right under state law to provide wastewater

(*i.e.*, sewer) service within a particular service area. *Id.* ¶¶ 5, 11. Respondent's service area under each CCN covers portions of Guadalupe, Comal, and Bexar Counties in Texas. *Id.* ¶ 5.

In 2003, the U.S. Department of Agriculture (Department) loaned respondent $584,000 under Section 1926 to fund respondent's water service. First Am. Compl. ¶¶ 6, 9; Pet. App. 2a. The loan, which remains outstanding, is secured by revenues from that service. First Am. Compl. ¶¶ 6, 9.

In 2016, petitioner City of Cibolo—a municipality located in Guadalupe and Bexar Counties, First Am. Compl. ¶ 2—applied to the Commission for a CCN to provide sewer service to a part of the City within respondent's sewer-service area. See *id.* ¶ 7; see Tex. Water Code Ann. § 13.255 (West Supp. 2016). The application requested that that part of the City be removed from the scope of respondent's sewer-service CCN, depriving respondent of the right to provide sewer service there. First Am. Compl. ¶ 7.

3. Two months after petitioner filed its application with the Commission, respondent sued petitioner in federal district court under 42 U.S.C. 1983. Compl. ¶¶ 3, 9, 20. Respondent alleged that petitioner had violated, and was continuing to violate, respondent's rights under Section 1926(b) by pursuing an application with the Commission to curtail or limit respondent's sewer service. *Id.* ¶¶ 9, 12. Respondent sought a declaratory judgment that petitioner "is not entitled to commence providing—or seek or apply to the [Commission] to commence providing—any [sewer] service within [respondent's] boundaries or certificated area under [its sewer-service CCN], as long as any debt remains outstanding on a loan subject to 7 U.S.C. section 1926."

Compl. 6. Respondent also sought an injunction requiring petitioner to dismiss its application with the Commission and "commanding [petitioner] not to seek any relief from any governmental entity that has the effect of altering the physical area or exclusive nature" of respondent's CCNs. Compl. 5-6.

Petitioner moved to dismiss the complaint. D. Ct. Doc. 4, at 1-5 (June 22, 2016). Petitioner argued that Section 1926(b) does not protect the area covered by respondent's sewer-service CCN because respondent's federal loan is "not secured by the facilities or revenues from" respondent's sewer service. *Id.* at 1-2. Petitioner contended that only respondent's water service qualifies for protection under Section 1926(b) because "only its water system serves as collateral for its [federal] loan." *Id.* at 2; see *id.* at 4. Petitioner also identified a "defense" that it intended to "later assert[] in a motion for summary judgment"—namely, that Section 1926(b) does not prevent petitioner from providing sewer service "within the disputed area" because, "in spite of its [sewer-service] CCN," respondent has no actual sewer facilities within that area. *Id.* at 2.

The district court dismissed the complaint without prejudice. Pet. App. 21a-32a. The court rejected petitioner's view that Section 1926(b) protects the service the "revenues" from which "provide the collateral for" a Section 1926(a) loan—in this case, respondent's water service, Compl. ¶ 6. Pet. App. 25a. The court instead interpreted Section 1926(b) to "protect[] only the service for which the loan was made—the funded service—regardless of what secures the loan." *Id.* at 25a-26a. The court, however, determined that respondent had "failed to plead which service is funded by [its federal]

loan." *Id.* at 22a. The court therefore granted respondent leave to amend its complaint to plead that "pertinent fact." *Id.* at 31a.

Respondent amended its complaint to state that "the proceeds from the Federal Loan were used * * * in connection with its water system." First Am. Compl. ¶ 9. Having done so, respondent urged the district court to "reconsider its construction of section 1926(b)." D. Ct. Doc. 15, at 1 (Sept. 14, 2016). Respondent argued that "Section 1926(b)'s protections" should be construed to "apply to *any* service sought to be curtailed in the association's service area if the association is the recipient of a federal loan under section 1926(a)." *Ibid.*

The district court granted petitioner's motion to dismiss the amended complaint with prejudice. Pet. App. 10a-20a. The court reaffirmed its interpretation that Section 1926(b) "safeguard[s] only the type of service funded by federal loan, not ancillary services an association may also provide." *Id.* at 15a. It then determined that, "because [respondent] has not received federal funds for its sewer service," respondent "cannot establish a cause of action under § 1926(b) and [its] Amended Complaint should be dismissed." *Id.* at 20a.

4. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-9a.

The court of appeals observed that "Section 1926(b) prohibits the curtailment or limitation of '[t]he service provided or made available through any such association.'" Pet. App. 3a (quoting 7 U.S.C. 1926(b)) (brackets in original). The court also stated that, "[w]here a CCN imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926(b)." *Id.* at 3a-4a (citing *North Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 915-916

(5th Cir.) (per curiam), cert. denied, 519 U.S. 1029 (1996)).

The court of appeals then framed "[t]he dispute" between the parties as a dispute "over the meaning of 'service.'" Pet. App. 4a. The court explained that, whereas respondent "claims that § 1926(b)'s protection extends to any service made available by a federally indebted utility," the district court had decided "that § 1926(b) applies only to services that are funded by federal loans." *Ibid.* The court of appeals also observed that the Eighth Circuit—"[t]he only circuit that has considered this issue"—"found that § 1926(b) applies only to 'the type of service financed by the qualifying federal loan.'" *Ibid.* (quoting *Public Water Supply Dist. No. 3* v. *City of Lebanon*, 605 F.3d 511, 520 (2010)).

Rejecting the district court's and the Eighth Circuit's views, the court of appeals concluded that "§ 1926(b)'s plain language does not limit the statute's protection to services that have received federal financing." Pet. App. 8a. The court also found the purposes of Section 1926(b) to be "consistent" with respondent's interpretation, on the view that giving utilities like respondent greater protection from "municipal encroachment" would make them "less vulnerable to financial disruptions." *Ibid.* The court therefore reversed the dismissal of respondent's complaint and remanded for further proceedings. *Id.* at 9a.

The court of appeals denied rehearing en banc. C.A. Order 1 (Sept. 1, 2017).

**DISCUSSION**

Petitioner seeks review of two questions regarding the interpretation of 7 U.S.C. 1926(b). Although both questions implicate conflicts among the circuits, this case is not a suitable vehicle for resolving them. That is

because the first question may soon be rendered moot, and because the second question is not squarely presented in the current posture of this case. Accordingly, the petition for a writ of certiorari should be denied.

### A. The Court Should Decline To Review The First Question Presented

Petitioner first seeks review of the question whether "[t]he service" protected by Section 1926(b) is limited to the service funded by a Section 1926(a) loan. Pet. i (brackets in original). The court of appeals answered no. That decision is incorrect and contrary to the decision of another court of appeals. The Department has informed this Office, however, that respondent has a pending Section 1926(a) loan application, which, if granted, would render the issue moot. Given the substantial possibility of that occurring in the coming months, this case is not a suitable vehicle for this Court's review.

1. The court of appeals erred in construing "[t]he service" in Section 1926(b) as referring to *any* service provided or made available through an association, regardless of whether that service is funded by a Section 1926(a) loan.

The interpretation of a statute begins with its text. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). Section 1926(b) provides:

> 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.

7 U.S.C. 1926(b). The text of Section 1926(b) refers to "[t]he service." *Ibid.* Unlike "a," "an," or "any," the definite article "the" suggests that Congress had a specific "service" in mind. See *Skilling* v. *United States*, 561 U.S. 358, 404-405 (2010) ("The definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute.") (quoting *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004)). The question is *which* service.

The first sentence of Section 1926(a)(1) provides the answer. See *Jones* v. *United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'") (citation omitted). That sentence states:

> The Secretary is * * * authorized to make or insure 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 to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural busi-

> nesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.

7 U.S.C. 1926(a)(1). Section 1926(a)(1) thus authorizes the Secretary to make loans to "associations" to "provide for" a particular service, such as "water" or "waste disposal" (*i.e.*, sewer) service. *Ibid.* When Section 1926(b) is read together with Section 1926(a)(1), the meaning of "[t]he service" becomes clear: "The service" refers to the service "provide[d] for" (*i.e.*, funded) by a loan under Section 1926(a)(1).

Other statutory indicators support that reading. Section 1926(b) refers to "[t]he service provided or made available through any *such association*." 7 U.S.C. 1926(b) (emphasis added). The word "such" means "of the sort or degree previously indicated." *Webster's Third New International Dictionary of the English Language* 2283 (1981). The phrase "such association" in Section 1926(b) thus refers naturally to one of the "associations" previously described in the first sentence of Section 1926(a)(1). It follows that "[t]he service" in Section 1926(b) should be read in light of that sentence as well.

The relevant statutory history reinforces that conclusion. The provisions that are now codified as Section 1926(a)(1) and (b) were enacted in 1961 as Section 306(a) and (b) of the CFHAA. See § 306, 75 Stat. 308; p. 2, *supra*. As originally enacted, the provision authorizing loans for particular services and the provision protecting "[t]he service provided or made available" were separated by only a single sentence. § 306, 75 Stat. 308. A reader would thus have naturally read the two provisions together, understanding "[t]he service" to refer to the service that was the subject of a loan. Although

Congress has since added dozens of paragraphs to Section 1926(a), see 7 U.S.C. 1926(a)(1)-(26) (2012 & Supp. V 2017), Congress has not modified Section 1926(b) or its relationship to the first sentence of Section 1926(a)(1). "The service" in Section 1926(b) thus retains the same meaning it had in 1961: the service funded by a Section 1926(a) loan.

In reaching a contrary conclusion, the court of appeals relied on the statute's purposes, reasoning that construing "[t]he service" to mean *any* service that respondent provides would give respondent greater protection from "municipal encroachment." Pet. App. 8a. But "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And extending Section 1926(b)'s territorial protection to services not funded by a federal loan may well discourage the very development in rural areas that Congress sought to foster, by "prohibit[ing] cities from providing [such] services to customers within a district's boundaries even when the city is perhaps better situated to do so." *Public Water Supply Dist. No. 3* v. *City of Lebanon*, 605 F.3d 511, 520 (8th Cir. 2010). In any event, the court's reliance on the statute's purposes was misplaced, where, as here, the statute's text and history make clear that "[t]he service" refers to the service funded by a Section 1926(a) loan.

2. The court of appeals' decision conflicts with the Eighth Circuit's decision in *Lebanon*. See Pet. App. 4a (acknowledging that the Eighth Circuit in *Lebanon* "found that § 1926(b) applies only to the 'type of service financed by the qualifying federal loan'") (quoting *Lebanon*, 605 F.3d at 520). *Lebanon* involved a public water supply district that provided water and sewer services

within its boundaries. 605 F.3d at 514. In 2007, the district obtained a Section 1926(a) loan to fund its sewer service; the loan was also secured by revenues from that service. *Ibid.* After obtaining the federal loan, the water supply district sued the City of Lebanon, arguing that the City was violating Section 1926(b) by providing "water services to certain customers within the District's boundaries." *Ibid.*

The Eighth Circuit rejected that argument. *Lebanon*, 605 F.3d at 519-521. After considering the text and purposes of Section 1926(b), the court concluded 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. The court held that Section 1926(b)'s reference to "'the service'" is "best interpreted to include only the type of service financed by the qualifying federal loan." *Id.* at 520. Although the Eighth Circuit found it unnecessary to decide whether the "financed" service is the "service which provides the collateral for the loan" or the "service for which the loan was made," *id.* at 520 n.9, it squarely rejected the interpretation of Section 1926(b) adopted by the court of appeals in this case—namely, that "'[t]he service'" refers to "*all* services that a rural district provides," *id.* at 519 (emphasis added; brackets in original).

3. Although the decision below is incorrect and contrary to the decision of another court of appeals, this case is not a suitable vehicle for this Court's review. The Department has informed this Office that respondent has a pending application with the Department for a Section 1926(a) loan to provide funds for respondent's sewer service. Because respondent does not have its

own wastewater treatment plant, it must purchase capacity from outside plants to treat the waste from residential subdivisions within its service area. The Department has informed this Office that respondent's pending loan application seeks funds for purchasing such outside capacity. The loan would be secured by revenues from respondent's water and sewer services.

On September 27, 2018, the Department obligated (*i.e.*, set aside) $3,096,000 in funds for respondent's requested loan. Although the loan has not yet closed, the Department believes that the loan may close as soon as January or February 2019. There is thus a substantial possibility that respondent will obtain a Section 1926(a) loan for its sewer service before a decision could be rendered in this case.

Given that possibility, this case is not a suitable vehicle for this Court's review. If respondent obtains a Section 1926(a) loan for its sewer service, the first question presented will have no continuing significance to the parties in this case, because respondent's sewer service would be protected under Section 1926(b) even if "[t]he service" refers only to the service funded by a Section 1926(a) loan. Although the parties may continue to dispute other issues—such as the scope of the protection afforded respondent's sewer service under Section 1926(b) and whether that protection extends to the contested area in this case—the closing of respondent's sewer-service loan would render the first question presented moot. Therefore, in the view of the United States, the Court should decline to review that question at this time.

### B. The Court Should Decline To Review The Second Question Presented

Petitioner also seeks review of the question whether a state-law duty to provide a service is sufficient to establish that an association has "provided or made available" that service under Section 1926(b). Pet. i. Petitioner, however, did not raise that question below, and the court of appeals merely restated the holding of prior precedent on the issue. Thus, even though that precedent is incorrect and contrary to the decisions of four other circuits, this case, in its current posture, does not squarely present the question petitioner now raises. The Court should therefore decline to review that question at this juncture.

1. Relying on circuit precedent, the court of appeals in this case stated that "[w]here a CCN imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926(b)." Pet. App. 3a-4a (citing *North Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 915-916 (5th Cir.) (per curiam), cert. denied, 519 U.S. 1029 (1996)). That interpretation of the phrase "provided or made available" is incorrect.

As petitioner explains (Pet. 26-27), "[t]o 'provide' ordinarily means 'to make available,' to 'furnish,' to 'supply,' or to 'equip.'" *Chesapeake Ranch Water Co.* v. *Board of Comm'rs*, 401 F.3d 274, 280 (4th Cir. 2005) (citation omitted). And "the ordinary meaning of the word 'available' is '"capable of use for the accomplishment of a purpose," and that which "is accessible or may be obtained."'" *Ross* v. *Blake*, 136 S. Ct. 1850, 1858 (2016) (citations omitted); see *id.* at 1858-1859 (quoting dictionaries defining "available" as "'suitable or ready for

use'" and "'present or ready for immediate use'") (citations omitted). For purposes of Section 1926(b), then, an association may establish that it has "provided or made available" a service by showing "actual provision" of the service or the "physical capacity and readiness to provide" it. *Creedmoor-Maha Water Supply Corp.* v. *Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 522 (Tex. App. 2010).

Under Fifth Circuit precedent, an association need not show either; rather, an association need only show that it possesses a CCN, which imposes a "state law duty to provide service." *North Alamo*, 90 F.3d at 916; see Tex. Water Code Ann. § 13.250(a) (West Supp. 2016) (providing that a utility that possesses a CCN "shall serve every consumer within its certified area and shall render continuous and adequate service within the area"). But the fact that an association has a legal duty to provide service does not mean that it is actually providing service or that it is physically capable or ready to do so. Fifth Circuit precedent is therefore contrary to the ordinary meaning of the phrase "provided or made available."

2. Fifth Circuit precedent is also contrary to the decisions of four other courts of appeals. See *Chesapeake Ranch*, 401 F.3d at 279 (acknowledging the circuit conflict); *Sequoyah Cnty. Rural Water Dist. No. 7* v. *Town of Muldrow*, 191 F.3d 1192, 1201-1202 (10th Cir. 1999) (same), cert. denied, 529 U.S. 1037, and 529 U.S. 1049 (2000). Consistent with the ordinary meaning of the phrase "provided or made available," each of those other courts of appeals has adopted a so-called "pipes in the ground" test, which requires the association to show that it has the physical capability to provide the service within a reasonable time following a request for service.

*Le-Ax Water Dist.* v. *City of Athens*, 346 F.3d 701, 706 (6th Cir. 2003); see *Chesapeake Ranch*, 401 F.3d at 279; *Lebanon*, 605 F.3d at 521, 523; *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1* v. *City of Guthrie*, 654 F.3d 1058, 1064-1065 (10th Cir. 2011).

3. In its current posture, however, this case is not a suitable vehicle for resolving the circuit conflict. Petitioner below did not raise the issue of whether respondent had "provided" sewer service, or "made [it] available," within the meaning of Section 1926(b). In its motions to dismiss, petitioner argued only that "[t]he service" protected by Section 1926(b) was limited to respondent's water service. See D. Ct. Doc. 4, at 1-2; D. Ct. Doc. 13, at 2 (Sept. 1, 2016). Indeed, in its motion to dismiss respondent's original complaint, petitioner specifically advised the district court that respondent's ability to provide sewer service was an issue petitioner would raise "later" in a "motion for summary judgment." D. Ct. Doc. 4, at 2. And in its motion to dismiss respondent's amended complaint, petitioner did not mention that issue at all. See D. Ct. Doc. 13, at 1-7.

Before the court of appeals, petitioner likewise focused only on the first question presented. See Pet. C.A. Br. 1. In its brief, petitioner recited, but did not take issue with, the Fifth Circuit's prior holding in *North Alamo* that "a utility's state law duty to provide service is the legal equivalent to the utility's 'making service available' under section 1926(b)." *Id.* at 13 (quoting *North Alamo*, 90 F.3d at 916). The court of appeals similarly restated *North Alamo*'s holding, but framed the dispute before it as limited to "the meaning of 'service.'" Pet. App. 3a-4a (citing *North Alamo*, 90 F.3d at 915-916); see *Illinois* v. *Gates*, 462 U.S. 213, 222-223 (1983) (explaining that, in the absence of "'any

real contest'" between the parties, "the routine restatement and application of settled law by an appellate court d[oes] not satisfy the 'not pressed or passed upon below' rule") (citation omitted).

Nor did petitioner take issue with *North Alamo* in its petition for rehearing en banc, which challenged only the panel's determination that the "protections in § 1926(b)" extend to "all services provided by or made available by an association." Pet. C.A. Reh'g Pet. 10. The court of appeals thus had no occasion to consider whether to revisit *North Alamo* in light of the weight of authority from other circuits.

For these reasons, this case, in its current posture, does not squarely present the second question in the petition for a writ of certiorari. Thus, despite the fact that Fifth Circuit precedent is incorrect and contrary to the decisions of other circuits, this Court should decline to review that question at this juncture.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*
JOSEPH H. HUNT
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
FREDERICK LIU
*Assistant to the Solicitor General*
CHARLES W. SCARBOROUGH
THAIS-LYN TRAYER
*Attorneys*

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