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

SUPPLEMENTAL BRIEF FOR PETITIONER

LOWELL F. DENTON
DENTON NAVARRO ROCHA BERNAL & ZECH, P.C.
2517 North Main Avenue
San Antonio, Texas 78212
(210) 227-3243

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
RACHEL PROCTOR MAY
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

December 19, 2018

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The Solicitor General ("SG") agrees that acknowledged circuit conflicts exist on both questions presented and that the Fifth Circuit erroneously decided those issues. Review of both questions therefore is warranted under this Court's traditional criteria, particularly in light of the SG's recognition that the Fifth Circuit's interpretation of 7 U.S.C. § 1926(b) undermines Congress's purpose of bringing water and wastewater infrastructure to rural areas, U.S. Br. 12, which have significant unmet infrastructure needs, Pet. 28-31.

The SG's concerns about this case as a vehicle are unfounded and do not support denying review. On the first question, the prospect of an Agriculture Department loan is speculative and, even if awarded, it would not cover the City of Cibolo residents who are being denied City-provided sewer services. Regardless of the Department's disposition of the loan application, the Fifth Circuit's erroneous holding still would preclude the City from providing sewer service to the affected residents. The SG's position creates unnecessary uncertainty as to when those residents will receive appropriate sewer service.

On the second question, the SG overlooks that more elaborate briefing in the Fifth Circuit would have made no difference in how the issue is presented in this Court, both because the court of appeals followed its precedent in passing on that question and because the issue is a pure question of statutory interpretation. Declining review needlessly would force other public entities to expend scarce resources litigating another "test" case on the off-chance that the en banc Fifth Circuit might reconsider its erroneous decision. This Court ordinarily is more sensitive to the resource constraints of public entities like the City, and

granting certiorari now is the most efficient way to resolve both circuit splits.

ARGUMENT

I. THE FIRST QUESTION WARRANTS REVIEW

A. There Is An Acknowledged Circuit Conflict

The Fifth Circuit's decision created an acknowledged split with the Eighth Circuit's decision in *Public Water Supply District No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010), by holding that "the service" protected by § 1926(b) is any service provided by a rural utility, and not, as the Eighth Circuit held, only the service funded by a federal loan. Pet. 13-14. The SG agrees that the Fifth Circuit's interpretation "conflicts with the Eighth Circuit's decision in *Lebanon*." U.S. Br. 12; *see id.* at 9. As the SG explains, the Eighth Circuit "squarely rejected the interpretation of Section 1926(b) adopted by the court of appeals in this case — namely, that 'the service' refers to '*all* services that a rural district provides.'" *Id.* at 13 (quoting *Lebanon*, 605 F.3d at 519) (brackets omitted).

The SG identifies nothing about the conflict on the first question presented that makes review unwarranted. In particular, the SG does not endorse Green Valley's mistaken assertion that this Court should wait for additional decisions on the issue. As explained in the City's reply brief, that assertion ignores the effect the Fifth Circuit's rule has on negotiations between municipalities and rural utilities, the ongoing interference with state and local decision-making resulting from that rule, and the accompanying adverse consequences for property owners who are deprived of safe, reliable, and affordable water and sewer service. Reply Br. 2-4.

B. The Fifth Circuit Erred

The Fifth Circuit's conclusion that § 1926(b)'s monopoly protection for "the service" provided by a rural utility extends to all services offered by that utility is "incorrect." U.S. Br. 9. As the SG explains, "the definite article 'the' suggests that Congress has a specific 'service' in mind," and within the context of § 1926(b) "the meaning . . . becomes clear": "the service that was the subject of [the] loan." *Id.* at 10-11; *see* Pet. 19-21.

The Fifth Circuit's contrary conclusion stemmed from its mistaken desire to fulfill Congress's purported "purpose[]" of "giv[ing] respondent greater protection from 'municipal encroachment.'" U.S. Br. 12 (quoting App. 8a). That approach errs in multiple ways. First, as the SG explains, it is not the case that "*whatever* furthers the statute's primary objective must be the law," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam), particularly when the result is at odds with the plain text, U.S. Br. 12; *see* Pet. 23. Second, as the SG also recognizes, preventing cities from offering services when they are "'better situated to do so'" can "discourage the very development in rural areas that Congress sought to foster" with § 1926(b). U.S. Br. 12 (quoting *Lebanon*, 605 F.3d at 520); *see* Pet. 24. That is precisely the case here, because the Fifth Circuit's erroneous interpretation of § 1926(b) prevents petitioner the City from providing wastewater service where respondent Green Valley does not. The Fifth Circuit's approach also erroneously expands the degree of federal intrusion into an area of traditional state responsibility without a "clear indication" that Congress intended that result. Pet. 24-25 (quoting *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014)).

C. The Solicitor General's Vehicle Reservations Are Incorrect

The only reason the SG offers for denying review is that the first question "may soon be rendered moot" because Green Valley has a "pending" application for wastewater funds from the Agriculture Department that, "if granted," will mean the first question is of "no continuing significance" to the parties. U.S. Br. 9, 14. That highly equivocal concern lacks merit for numerous reasons.

First, the Court should not assume that the loan will be granted promptly, if at all. The SG acknowledges (at 9) that the loan in question has not been "granted." The Agriculture Department's regulations require § 1926 loans to satisfy detailed regulatory criteria, including requirements that funded projects are "necessary for orderly community development and consistent with a current comprehensive water, waste disposal, or other current development plan for the rural area," 7 C.F.R. § 1780.7(c)(3), and "consistent with any current development plans of State, multi-jurisdictional areas, counties, or municipalities in which the proposed project is located," *id.* § 1780.1(h). The SG does not say that all relevant criteria have been satisfied on the "pending" application. U.S. Br. 13. Nor does he explain how funding a provider different from the one that otherwise would be authorized under state law to provide service to an area could be consistent with the State's development plans.

Even if the Agriculture Department approves the loan, any potential competing provider within Green Valley's wastewater service territory — an area encompassing parts of three counties, App. 1a-2a, including cities other than Cibolo — could challenge the loan under the Administrative Procedure Act. *See*,

e.g., *City of Coll. Station v. United States Dep't of Agric.*, 395 F. Supp. 2d 495, 517 (S.D. Tex. 2005). In *City of College Station*, the district court granted a city preliminary injunctive relief preventing the Department from consummating a water loan where the city demonstrated a likelihood of success that the loan violated the Department's regulations. *See id.* at 511-13. Because a similar action could significantly delay or bar the Department from closing on Green Valley's loan, it remains far from certain when, if ever, Green Valley will provide a federally funded wastewater service.

Second, even "if granted," U.S. Br. 9, the federal loan would not moot the first question presented. The loan to which the SG refers will be used to "purchase capacity from outside plants to treat the waste from" certain "residential subdivisions," *id.* at 14.[1] This "outside capacity," *id.*, cannot be used to provide wastewater service to customers in the City. Agriculture Department regulations prohibit loan funds from financing "[a]ny portion of the cost of a facility which does not serve a rural area." 7 C.F.R. § 1780.10(a)(4). A "rural" area is "any area not in a city or town with a population in excess of 10,000 inhabitants." *Id.* § 1780.3. Because the City is a municipality of more than 10,000 inhabitants and the disputed area is within the City's boundaries, App. 2a, the loan cannot fund wastewater service for customers in the City.

The SG erroneously suggests (at 14) that, so long as the federal loan supports wastewater service in some portion of Green Valley's three-county service

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[1] Green Valley provides wastewater service "by collection in storage tanks that are then pumped and hauled by utility trucks for treatment and disposal," Opp. 13-14, at these "outside plants" owned by other providers, U.S. Br. 13-14.

territory, the only remaining issues would be "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 SG does not assert that the facilities funded under the loan will serve the contested area. If certiorari is denied, then even if the City were to prevail in arguing on remand that the protection afforded by § 1926(b) as a result of a new federal wastewater loan does *not* "extend[] to the contested area in this case," U.S. Br. 14, Green Valley presumably would claim § 1926(b) protection based on its water loan. Under the Fifth Circuit's erroneous holding on the first question presented, Green Valley would argue that § 1926(b) protection extends to *all* of its services because of its *water* loan, even if the protection afforded by the wastewater loan does not extend to the disputed area. The first question presented therefore will remain a live issue, no matter how the Agriculture Department resolves Green Valley's pending loan application.

In light of the clear split of authority and the manifest error below, the Court should grant review despite the SG's unfounded vehicle concern. The Court regularly reviews appropriate cases where the SG has recommended a denial.[2] The case for doing so

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[2] *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 276-77 (2009) (Court granted petition in 17% of cases in sample where SG recommended denial); *see, e.g.*, U.S. Amicus Br. 6-7, *OBB Personenverkehr AG v. Sachs*, No. 13-1067 (U.S. Dec. 15, 2014) (recommending denial where the SG agreed that the lower court erred but factual issues rendered the case an inappropriate vehicle), 2014 WL 10463745; *OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (2015) (granting certiorari).

is particularly strong when, as here, the SG agrees (and the respondent does not dispute) that an acknowledged circuit conflict exists, and the SG has confirmed that the court of appeals erroneously interpreted the federal statute in question.

II. THE SECOND QUESTION WARRANTS REVIEW

A. There Is An Acknowledged Circuit Conflict

A deep, acknowledged circuit conflict exists over what it means for service to be "provided or made available" by a rural utility under § 1926(b). Pet. 14-19. The SG agrees (at 16) that "Fifth Circuit precedent" on the second question presented is "contrary to the decisions of four other courts of appeals." Four circuits have held that a rural utility seeking § 1926(b) protection must show not only that it has a legal right to provide service under state law, but also that the service is actually being or promptly can be furnished. U.S. Br. 16-17. In contrast, under the Fifth Circuit's approach, a state-law duty to provide service is independently sufficient to establish that the utility has "provided or made available" service under § 1926(b). U.S. Br. 15.

B. The Fifth Circuit's Interpretation Is Erroneous

As the SG also recognizes, the Fifth Circuit's conclusion that a service has been "provided or made available" anywhere a rural utility has a state-law duty to serve — regardless of whether the utility actually provides or promptly can provide real-world service — "is incorrect" and "contrary to the ordinary meaning of" the terms "provided" and "available." U.S. Br. 15-16 (citing Pet. 26-27). The unanimous approach of the other courts of appeals to have considered this question, by contrast, is "[c]onsistent with the

ordinary meaning" of the statutory language. *Id.* at 16-17.

C. This Case Is An Appropriate Vehicle

As with the first question presented, the SG agrees that the second question meets this Court's traditional criteria for certiorari review. The SG identifies no threshold jurisdictional or other type of issue that might prevent the Court from reaching the second question in this case. Nor does the SG support Green Valley's contention that "factual development" (Opp. 14) is necessary on this question. As the City has explained, if the Fifth Circuit's approach stands, there are no material facts to develop, because Green Valley's state-law duty qualifies it for § 1926(b) protection, regardless of whether it actually provides or makes available service. Reply Br. 6-7.

The SG asserts (at 17-18) only that this case "[i]n its current posture" is not a "suitable vehicle" for resolving the circuit conflict, because the City did not challenge in the lower courts the Fifth Circuit's precedent in *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996). But the second question is properly presented in this case because the Fifth Circuit "passed on" it. *See* Reply Br. 5-6; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("[i]t suffices for our purposes that the court below passed on the issue presented"); *see also United States v. Williams*, 504 U.S. 36, 44 (1992) (rejecting argument that a petitioner must "demand overruling of a squarely applicable, recent circuit precedent"); *Youakim v. Miller*, 425 U.S. 231, 235 (1976) (per curiam) (review appropriate where argument "would have been rejected" had it been raised).

The SG (at 17-18) erroneously cites *Illinois v. Gates*, 462 U.S. 213 (1983), to suggest that the Fifth Circuit

did not adequately "pass on" the second question when it reaffirmed *North Alamo*. *Gates* involved the limitations on this Court's jurisdiction to review cases coming from *state* courts, *see id.* at 217-18 — limitations that are inapplicable to this *federal* court case. In addition, in *Gates*, this Court declined to decide whether to modify the Fourth Amendment exclusionary rule because, although the state court had applied that rule, that court was not presented with, *and had not addressed*, any argument for modifying the rule. *See id.* at 222-23.

Here, by contrast, the City made the Fifth Circuit aware of a dispute on the second question, and the Fifth Circuit addressed it by reaffirming that a state-law duty to provide service suffices under § 1926(b). Specifically, the City asked the Fifth Circuit to take judicial notice of documents demonstrating that Green Valley did not provide wastewater service in the disputed area. Pet. 11; Reply Br. 5. Aware of that "real contest," *Gates*, 462 U.S. at 222-23, the Fifth Circuit did not state that the City had waived the question whether Green Valley "provided or made available" wastewater service. Nor did it say that the district court should consider that question in the first instance on a motion for summary judgment. Instead, it expressly reaffirmed that a state certificate, standing alone, confers § 1926(b) protections. App. 3a-4a; *compare id.* ("both sides agree that Green Valley qualifies as an 'association'" for purposes of § 1926(b)). District courts in the Fifth Circuit, including the judge presiding over this case, have understood the Fifth Circuit's decision as precedent that "conclusively precludes" the "pipes in the ground" standard followed in the other circuits and in the Texas state courts. *Green Valley Special Util. Dist. v. Walker*, No. AU-17-CA-

00819-SS, 2018 WL 814245, at *9 (W.D. Tex. Feb. 9, 2018) (Sparks, J.), *cited in* Reply Br. 6.

Denying review would serve none of the purposes of the "pressed or passed on" principle. The SG identifies no way in which additional briefing on the question in the lower courts would have enhanced this Court's consideration. The meaning of "provided or made available" is a pure question of statutory construction unaffected by the facts of the case. Five courts of appeals have debated the interpretation of that phrase in a series of decisions over several decades, developing a deep and acknowledged circuit conflict. Pet. 15-18. Given that the district court and the Fifth Circuit panel in this case understood themselves to be bound by *North Alamo*, more fully briefing the second question presented in the lower courts would have been a meaningless exercise.

Nor should the Court deny review in the hope that the en banc Fifth Circuit might someday correct that court's misinterpretation of § 1926(b). Delaying review until a similarly situated party can litigate the exact same issue through district court, appeal, and en banc review would fail to account for the financial constraints facing the rural water districts and municipalities that engage in § 1926(b) litigation. The City of Cibolo, for example, is a small and resource-constrained municipality of approximately 25,000 people, whose 2018 budget for legal services was $80,000.[3] When municipalities and rural water districts spend money on litigation, they have less

[3] City of Cibolo, Texas Fiscal Year 2018-2019 Proposed Budget at 33 (Aug. 8, 2018), https://www.cibolotx.gov/DocumentCenter/View/2752/FY-2018-2019-Proposed-Budget.

to spend on other critical services.[4] Litigants also may pass their costs onto their customers, including many rural and low-income customers. Because many providers choose to negotiate in the shadow of established interpretations of § 1926(b) rather than incur litigation costs, *see* Reply Br. 2-3, 7-8, this Court may not soon have another opportunity to correct the Fifth Circuit's erroneous interpretations of § 1926(b). In the meantime, lower courts and out-of-court negotiations in that Circuit will proceed under a rule that prevents willing and able municipalities from providing service even when a rural association does not do so, as the SG acknowledges (at 12).

In light of the evident errors below and the entrenched splits of authority, the Court should grant the City's petition. In the alternative, given the SG's unambiguous agreement that the Fifth Circuit incorrectly interpreted § 1926(b), the Court should grant the petition, vacate the Fifth Circuit's decision, and remand for the lower courts to reconsider the questions presented in light of the SG's views.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] *See* Caroline Guerra Wolf, Note, *Fire! When an Old Rule Creates a Hot Mess*, 52 Tulsa L. Rev. 343, 346-48 (2017) (describing rural water district embroiled in § 1926(b) litigation that spent one-third of its operating budget one year on legal and professional fees, while significant water-quality issues remained unaddressed).

Respectfully submitted,

LOWELL F. DENTON
DENTON NAVARRO ROCHA
BERNAL & ZECH, P.C.
2517 North Main Avenue
San Antonio, Texas 78212
(210) 227-3243

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
RACHEL PROCTOR MAY
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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