No. _____

In The

Supreme Court of the United States

CITY OF OKLAHOMA CITY,
an Oklahoma municipal corporation and
OKLAHOMA CITY WATER UTILITIES TRUST,

Petitioners,

v.

DEER CREEK WATER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a private corporation may waive State sovereignty without the permission of the State.

2. Whether Oklahoma has authorized private corporations to accept federal obligations under the Act that waive its sovereignty.

3. Whether Respondent's failure to comply with the express requirements of Oklahoma law under 82 O.S. §1324.35 precluded its entitlement to serve the disputed area and thus §1926(b) protection.

STATEMENT OF RELATED CASES

- *Deer Creek Water Corp. v. City of Oklahoma City, et al.*, CIV-2019-1116-SLP, United States District Court for the Western District of Oklahoma. Judgment entered October 27, 2021.

- *Deer Creek Water Corp. v. City of Oklahoma City, et al.*, 21-6155 and 21-6164, United States Court of Appeals for the Tenth Circuit. Judgment entered September 18, 2023.

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PETITION FOR WRIT OF CERTIORARI

The City of Oklahoma City petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 82 F.4th 972. [App. 1a-46a]. The opinion and order of the U.S. District Court for the Western District of Oklahoma is unreported. [App. 50a-65a].

STATEMENT OF JURISDICTION

The Tenth Circuit's decision and opinion were entered on September 18, 2023. [App. 1a-46a]. Petitioners and the Bolings, separately petitioned for Rehearing, both of which were denied on November 1, 2023. [App. 91a-92a]. Pursuant to Supreme Court Rule 13, the time to file this petition is 90 days from the issuance of the Court of Appeals denial of rehearing to January 30, 2024. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tenth Amendment to the United States Constitution provides, "[t]he powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Spending Clause, U.S. Const. art. I, §8, cl. 1 provides that, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;. . . ."

7 U.S.C §1926(a)(1) provides that "[t]he Secretary is . . . authorized to make or insure loans to associations, including corporations not operated for profit . . . 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 for 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(b) "Curtailment or Limitation of service Prohibited," provides that "[t]he 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."

82 O.S. §1324.35 "Continuation of Service in District upon Organization as Rural Water District" states "In the event a corporation provides service within the boundaries of an incorporated city or town on the date of organization as a rural water district, the district may continue to serve in that area as permitted by law."

82 O.S. §1324.10(A)(4) provides "A. Every district incorporated hereunder shall have perpetual existence, subject to dissolution as provided by the Rural Water, Sewer, Gas and Solid Waste Management District Act, and shall have power to: 4. Borrow money and otherwise contract indebtedness for the purposes set forth in this act, and without limitation of the generality of the foregoing, to borrow money and accept grants from the Unites States of America, or from any corporation or agency created or designated by the United States of America, and in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to issue its notes or obligations therefore, and to secure the payment thereof by mortgage, pledge or deed of trust on all or any property, assets, franchise,

rights, privileges, licenses, rights-of-way, easements, revenues, or income of the said district.

STATEMENT OF THE CASE

The Respondent brought this action originally requesting declaratory judgment to enforce the prohibitions in the Consolidated Farm and Rural Development Act (the "Act") against Petitioners. Petitioners filed a counter-claim requesting declaratory judgment as to the legitimacy and application of the Act as related to the disputed property and of the property in and around city limits. Petitioners raised issues as to the entitlement of the Respondent to §1926(b) protection without the authority or permission of the State.

INTRODUCTION

The Tenth Amendment established the paradigm between the sovereignties of the Federal and State governments. The Congress has broad powers under the Spending Clause to spend funds for the general welfare. Where Congressional legislation under the Spending Clause infringes on State sovereignty, this Court, in *Pennhurst*, held that Congressional legislation acts much like a contract, where the legislation is the offer, and the waiver of State sovereignty thereunder is legitimized only by the voluntary and knowing acceptance by the State. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Congress enacted the Act, which authorizes the Secretary of the USDA to make loans and grants available to water associations, and which protects those loans by precluding municipalities from serving areas to which the water association provided or made service available, as accompanying obligations. 7 U.S.C. §1926, *et seq*. Municipalities are subdivisions of the State. The State Constitution and statutes authorize municipalities to provide water service within and outside city limits. Oklahoma Constitution Article XVII, §§3, 6 and 7; and 11 O.S. §22-104. By precluding municipalities from providing water service within their own city limits and by establishing a federally created monopoly to undefined service areas, the Act infringes on Oklahoma sovereignty to control land development within its sovereignty.

In this case, the Tenth Circuit held private corporations may accept the benefits of Congressional legislation and the accompanying obligations, including infringements on State sovereignty, without the permission of the State. In doing so, the Tenth Circuit has deprived Oklahoma of control of its sovereignty and established a backdoor around *Pennhurst* that changes and erodes State sovereignty under the Tenth Amendment.

Specifically, the Tenth Circuit held "We . . . reject the [Petitioners'] Tenth Amendment argument because a nonprofit **corporation** like [Respondent] is not a quasi-[governmental] and thus **does not need Oklahoma's permission before incurring federal**

debt and any accompanying obligations." [App. 35a (emphasis added)].

However, by reading and applying *Pennhurst* and Oklahoma statutes as written and intended, the holding in this case would command a different result. *Pennhurst*, 451 U.S. 1 (1981).

In *Pennhurst*, this Court protected State sovereignty under the Tenth Amendment from infringement under the Spending Clause. In *Pennhurst*, this Court required Congressional legislation that includes accompanying obligations that infringe on State sovereignty be legitimized by the voluntary and knowing acceptance of the State. The Tenth Circuit holding grants corporations the power to accept the benefits and accompanying obligations that waive State sovereignty without Oklahoma's permission or authorization.

In Oklahoma, the legislature specifically authorized water districts to borrow money from the United States for rural water service and the Tenth Circuit so held in *Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988). However, Oklahoma did not and has not authorized private corporations to act on behalf of and to bind the State of Oklahoma to Congressional legislation that waives State sovereignty.

In 1989, Oklahoma exercised its control over its sovereignty by enacting 82 O.S. §1324.35, which specifically requires corporations to create a water district to serve within city limits. In previous cases, the Tenth

Circuit held that legal entitlement to provide water service under State law is a requirement to make water service available and to protection under §1926(b) of the Act. Section 1926(b) is the Congressional legislation that expresses the accompanying obligations that infringe on State sovereignty by precluding State regulation of land use and development.

The Tenth Circuit supported its holding by interpreting §1926(a) to grant corporations quasi-governmental authority to accept loans that infringe on State sovereignty. However, §1926(a) only authorizes the Secretary of the USDA to make grants and loans available to water associations. Section 1926(a) does not and cannot grant the Secretary of the USDA or corporations the authority to waive State sovereignty. Section 1926(a) does not act to supersede *Pennhurst* or waive State control of its sovereignty.

By applying *Pennhurst* and Oklahoma statutes, State sovereignty under the Tenth Amendment is protected from the Tenth Circuit holding that private corporations may waive State sovereignty without the express permission of the State.

REASONS FOR GRANTING THE WRIT

I. Whether a private corporation may waive State sovereignty without the permission of the State.

Only the State may waive State sovereignty, not private corporations, as the Tenth Circuit held in this

case. Under *Pennhurst*, this Court held only the State may legitimize Congressional legislation, enacted pursuant to the Spending Clause, which infringes upon its sovereignty. As such, each State must have ultimate control of the waiver of its sovereignty.

A. The Tenth Amendment and this Court's holding in *Pennhurst* protect State sovereignty by requiring voluntary and knowing acceptance by the State of accompanying obligations that waive its sovereignty.

The Tenth Amendment to the United States Constitution preserves the sovereignty of the States and establishes the paradigm between the federal and the state governments. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

This Court held the Tenth Amendment "is essentially a tautology": It "confirms that the power of the [f]ederal [g]overnment is subject to limits that may, in a given instance, reserve power to the [s]tates." *New York v. United States*, 505 U.S. 144, 156-157 (1992).

This Court has determined the legitimacy of the exercise of Congress's authority under the Spending Clause is analogous to a contract.

> "**[L]egislation enacted pursuant to the spending power is much in the nature of a contract**: in return for federal

> funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the Spending Clause thus rests on **whether the State voluntarily and knowingly accepts the terms of the 'contract.'"** *See Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598 (1937); *Harris v. McRae*, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Cf. Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

In *Pennhurst*, this Court has held that acceptance must be by the voluntary and knowing act of the State with full understanding of the consequences of the accompanying obligations ("Spending Clause requirements"). Congressional legislation is the offer and requires acceptance by the State.

As such, the legitimacy of the Act to authorize Oklahoma entities to apply for loans that bind the State of Oklahoma to accompanying obligations that include the waiver of its sovereignty are dependent on the acceptance by the State of Oklahoma.

B. The Tenth Circuit acknowledged that the Consolidated Farm and Rural Development Act was enacted pursuant to the Spending Clause and thus this Court's holding in *Pennhurst*.

The Tenth Circuit has held that the Consolidated Farm and Rural Development Act, 7 U.S.C. §§1921 – 2009cc-18 (the "Act") was enacted by Congress pursuant to the Spending Clause.

The Tenth Circuit recited that Congress enacted §1926(b) pursuant to its power under the Constitution's Spending Clause, which provides that "Congress shall have the [p]ower [t]o . . . provide for the . . . general [w]elfare of the United States." U.S. Const. art. I, §8, cl.1. [App. 31a].

In *Glenpool*, the Tenth Circuit, in analyzing the Tenth Amendment to the United States Constitution and the United States Constitution Art. I, §8, acknowledged that federal authority under the Spending Clause was much in the nature of a contract.

The Tenth Circuit further stated in *Glenpool*, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of "[t]he 'contract'." *Glenpool*, 861 F.2d at 1215 (citing others).

In analyzing the Act, the Tenth Circuit previously held for legislation passed under the Spending Clause, a state's acceptance of federal funds "entails acceptance of the conditions that accompany them." *Id*.

The Tenth Circuit explained, "(i)n examining whether a congressional action under the broad powers of the Spending Clause is constitutional, we must ascertain **if the state has accepted the federal funds**, for acceptance of the funds entails acceptance of the conditions that accompany them." *Id.* (emphasis added).

The Oklahoma Supreme Court has held that "[l]ike other federal-state cooperative programs, participation in the USDA program is **voluntary** and the **States are given the choice** of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. In so borrowing, '**Oklahoma – through its authorization . . .** [**districts**] – bound itself and all its subdivisions . . . to the [terms and] conditions . . . ' of the federally funded program." *Rural Water Sewer & Solid Waste Mgmt. District No. 1 v. City of Guthrie*, 2010 OK 51, ¶ 19, 253 P.3d 38, 47 (citing *Glenpool*, 861 F.2d at 1216) (emphasis added.)

In accordance with *Pennhurst* and *Glenpool*, the Oklahoma Supreme Court acknowledges, that Oklahoma through its authorization binds itself to the terms and conditions of federal legislation under the Spending Clause. As such, Oklahoma maintains ultimate authority over acceptance of Congressional legislation that infringes on its sovereignty.

C. The federal accompanying obligations in the Consolidated Farm and Rural Development Act infringe on Oklahoma sovereignty over zoning, development, annexation and therefore requires acceptance of such waiver by the State.

The Act infringes on State sovereignty in that 7 U.S.C. §1926(b) precludes the State and municipalities, which are political subdivisions of the State, from exercising Oklahoma's authority under its state constitution and statutes.

The Oklahoma Constitution Art. XVII, §§3, 6 and 7 authorize municipalities to provide water service. Oklahoma statutes authorize municipalities to provide water service within and outside city limits, 11 O.S. §22-104. Public trusts are also authorized to provide water service. 60 O.S. §176, *et seq*.

The Act precludes municipalities from providing water service within its municipal boundaries. Section 1926(b) provides:

> Curtailment or limitation of service prohibited. 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 Tenth Circuit acknowledged that the Act may frustrate State sovereignty over zoning, development, and annexation plans. The Tenth Circuit stated in *Rural Water Dist. No. 4 v. City of Eudora (Eudora II)*, 720 F.3d at 1275, "we require states to authorize their rural water districts to seek §1926(b) protection (with whatever conditions the state may impose) so that the state itself maintains ultimate control over the circumstances in which a water district may call down federal protection and potentially frustrate future zoning, development, or annexation plans. *See Eudora I*, 659 F.3d at 976." *Rural Water Dist. No. 4 v. City of Eudora (Eudora II)*, 720 F.3d 1269, 1275 (10th Cir. 2013).

In *Eudora II*, the Tenth Circuit acknowledged the relationship between the federal protection under §1926(b) and frustration of State sovereignty over zoning, development and annexation plans. Further in *Eudora II*, the Tenth Circuit acknowledged that States must have ultimate control over circumstances in which federal protection is called down and infringes on Oklahoma sovereignty.

D. The State of Oklahoma authorized water districts to accept loans from the United States government.

The Act, as originally enacted by Congress, authorized the Secretary to make federal loans available to "water associations," which term was defined as **water districts**. Water districts in Oklahoma are specifically authorized to **borrow money and accept grants from the United States of America.** 82 O.S. §1324.10(A)(4) (emphasis added).

Subsequently in 1961, Congress amended the Act to authorize the Secretary to make federal loans available to "water associations," which amendment expanded the definition to include **private corporations**. Agriculture Act of 1961, 87 P.L. 128, 75 Stat. 294 (emphasis added).

The Tenth Circuit acknowledged that "[i]n 1961, Congress amended 7 U.S.C. §1926(a) to authorize the United States Farmer's Home Administration (FMHA) to make loans to nonprofit water service associations. . . ." *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester (Pittsburg II)*, 358 F.3d 694, 701 (10th Cir. 2004). *See also Rural Water Sewer & Solid Waste Mgmt. v. City of Guthrie*, 654 F.3d 1058 (10th Cir. 2011). [App. 13a-14a, 36a (dissent)].

"**In 1963, Oklahoma lawmakers responded to Congress's 1961 amendment of 7 U.S.C. §1926 by enacting a statute that 'authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which**

they are established." *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester (Pittsburg I)*, 346 F.3d 1260 at 1266-1267 (10th Cir. 2003) (citing *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 (10th Cir. 1999) (citing 82 O.S. §1324.10(A)(4) (emphasis added)). "**The Oklahoma Legislature formed the water districts so that the state, through the water districts, could avail itself of the loans made available through §1926,** *i.e.* '**to borrow money from the federal government** to accomplish the purpose for which they are established.'" *Pittsburg I*, 346 F.3d at 1283 (citing *Sequoyah County*, 191 F.3d at 1194) (emphasis added).

The Tenth Circuit held that Oklahoma, in 1963, specifically responded to this Congressional amendment, broadening the definition of water association to include corporations, by authorizing water districts to accept this Congressional offer under the Spending Clause. In *Pittsburg I*, the Tenth Circuit did not hold that Oklahoma authorized corporations to accept loans from the federal government.

In this case, the Tenth Circuit did not hold that Oklahoma authorized corporations to accept loans from the federal government; but rather, that corporations could accept loans and bind the State of Oklahoma to the accompanying obligations without the permission of Oklahoma.

E. The Tenth Circuit held corporations need no permission to bind the State to obligations that waive its sovereignty thereby contravening this Court's holding in *Pennhurst*, nullifying the Spending Clause requirement of State acceptance, and eroding Oklahoma sovereignty and the Tenth Amendment.

Specifically, the Tenth Circuit held "We . . . reject the [Petitioners'] Tenth Amendment argument because a nonprofit **corporation** like Respondent is not a quasi-[governmental] and thus **does not need Oklahoma's permission before incurring federal debt and any accompanying obligations.**" [App. 35a (emphasis added)].

The Tenth Circuit had never opined that the Oklahoma Legislature has ever authorized corporations to act on behalf of and to bind Oklahoma by accepting the benefits and accompanying obligation of the Act. The Tenth Circuit's holding does not meet the Spending Clause requirements of the State acceptance established by this Court in *Pennhurst.* [App. 38a-39a (dissent)].

Petitioners filed a cross appeal at the Tenth Circuit specifically requesting a determination whether corporations were authorized by Oklahoma to act on its behalf and to bind Oklahoma to a waiver of State sovereignty as an accompanying obligation in §1926(b). The Tenth Circuit held corporations need no permission from the State of Oklahoma under *Pennhurst* to waive State sovereignty.

As such, the Tenth Circuit has not held that the State of Oklahoma by its voluntary and knowing act has authorized corporations to accept loans under the Act in accordance with the holdings of this Court under *Pennhurst*. The Tenth Circuit has held, under the Act, private corporations may accept Congressional offers of loans and also the accompanying obligations, including the infringements on Oklahoma sovereignty, without the permission of the State of Oklahoma.

The Tenth Circuit published the holding in this case, thereby establishing the authority for corporations to waive State sovereignty.

In granting private corporations the power to effectuate infringements on State sovereignty, the Tenth Circuit has elevated corporations to sovereign status.

The Tenth Circuit holding is contrary to this Court's holding in *Pennhurst*; obfuscates the Spending Clause requirements; deprives the States of control of infringements on its sovereignty; and erodes the Tenth Amendment.

Noted Constitutional writer, Laurence Tribe, described this type of Congressional legislative infringement as one that "may not be exercised so as to destroy the essence of a state's semi-autonomous character as a polity in its own right." And cautioned that "[o]f course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is

left but a gutted shell." *Laurence Tribe & Ralph Tyler*, 381 (1988) (ebook) (https://archive.org/details/americanconstitu00trib/page/n1897/mode/2up).

II. Whether Oklahoma has authorized private corporations to accept federal obligations under the Act that waive its sovereignty.

The Tenth Circuit has never opined that the State of Oklahoma has granted private corporations the statutory authority to act on Oklahoma's behalf by accepting loans that have accompanying obligations that waive State sovereignty.

Rather than opining that the Oklahoma Legislature has authorized corporations to act on its behalf and bind Oklahoma, the Tenth Circuit held that corporations do not need the permission of the State to accept loans that waive State sovereignty.

A. Oklahoma's acceptance of waivers of sovereignty must be by specific enactments that clearly express the intentions of its Legislature.

Oklahoma exercises and delegates its authority by constitutional and statutory enactments.

In Oklahoma, corporations are created pursuant to statute and only have such powers as granted by statute. *See generally* General Corporations Act, 18 O.S. §1001, *et seq*. Corporations do not have statutory authority to act on behalf of the State without

permission of the State. *Vette v. Childers*, 1924 Okla. 140, 145, 228 P. 145, 149.

This Court has similarly held that "[n]ow it is the well-settled doctrine that a corporation created by statute is a mere creature of law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence." *Perrine v. Chesapeake & Delaware Canal Co*., 50 U.S. 172, 184 (1850). *See Berea College v. Kentucky*, 211 U.S. 45 (1908) and *Runyan v. Lessee of Coster*, 39 U.S. 122 (1840).

To meet the Spending Clause requirements that this Court established in *Pennhurst* requires specific legislation that clearly evidences the Oklahoma legislature's voluntary and knowing intent to authorize acceptance of Congressional legislation and accompanying obligations.

Under Oklahoma law, legislative intent is determined from the express language in the statute. *Cox v. Dawson*, 1996 OK 11, ¶ 6, 911 P.2d 272.

Consequently, the intent of Oklahoma to voluntarily and knowingly accept accompanying obligations that infringe on its sovereignty or to authorize an entity to act on its behalf and to bind the State of Oklahoma must be clearly expressed in the legislation.

B. The Oklahoma Legislature did not, by specific authorization, express its intent that corporations may act on behalf of and bind Oklahoma to a waiver of its sovereignty.

Respondent alleged that generic language in the General Corporations Act granted corporations broad powers to contract for loans, including, by inference or implication, the authorization to legitimize Congressional legislation that waives State sovereignty under §1926(b) of the Act.

Petitioners argued legislation delegating authority to waive Oklahoma sovereignty requires specific Oklahoma legislation that clearly expresses that legislative intent and meets the Spending Clause requirements in *Pennhurst*. **Public water districts are specifically authorized to borrow money and accept grants from the United States of America** in 82 O.S. §1324.10(A)(4). Okla. Stat. tit. 82, §1324.10(4) (Supp. 1988); *id.*, §1309(4) (1970) (repealed 1972) (predecessor of §**1324.10**) (emphasis added). *See Glenpool*, 861 F.2d at 1216. This very explicit grant of an enumerated and particular authorization by the Oklahoma Legislature clearly meets the *Pennhurst* Spending Clause requirements of voluntary and knowing acceptance.

The Water District Act was that legislation, which the Tenth Circuit itself previously expressly determined in *Glenpool* was Oklahoma's authorization for water districts to act on its behalf to accept loans and

the accompanying obligations under the Act. *Id.* at 1216.

In contrast, the General Corporation Acts is neither similar in language nor a clear expression of the Oklahoma Legislature's voluntary and knowing intent to authorize corporations to waive its sovereignty under the Act.

The Tenth Circuit relied upon the Non-Profit Corporations Act, 18 O.S. §863, which only recognizes nonprofit corporations as tax-exempt and grants a right to eminent domain. Section 863 is irrelevant in determining if the Oklahoma Legislature by express language granted private corporations the authority to borrow money and accept grants from the United States of America. Section 863 does not express the intent of the Oklahoma Legislature to authorize corporations to knowingly and voluntarily acknowledge and accept federal obligations that intrude on State sovereignty under *Pennhurst*.

The Tenth Circuit also relied on the General Corporations Act, section 1016, which only generically grants every corporation the power to make contracts and to borrow money **as are necessary for the business of the corporation**. 18 O.S. §1016(13) (emphasis added).

There is no reference in either statute relied upon by the Tenth Circuit authorizing corporations to borrow money and accepting grants from the United States of America, as specifically enumerated in the Water District Act. There is no expression in either

statute expressing an intent of the Oklahoma Legislature to authorize corporations to bind the State, only to borrow for the business of the corporation and to bind the corporation.

The specific language of the Water District Act clearly expresses Oklahoma's intent **to authorize water districts to borrow money and accept grants from the United States of America**. Whereas, neither the Non-Profit Corporations Act nor the General Corporations Act provide any such authorization of acceptance of federal grants and accompanying obligations that waive State sovereignty.

The two statutes relied upon by the Tenth Circuit in this case are clearly distinguishable from the Water District Act, which the Tenth Circuit expressly held in *Glenpool*, 861 F.2d at 1215-1216 authorized water districts under the Act. Nor do the statutes relied upon by the Tenth Circuit meet the *Pennhurst* Spending Clause requirements as evidencing the Oklahoma intent to voluntarily and knowingly authorize corporations to bind Oklahoma to loans from the United States that infringe on its sovereignty.

The Tenth Circuit also noted the Congress's authorization to the Secretary of USDA in §1926(a) of the Act as authorization for corporations to accept on behalf of and bind the State. In doing so, the Tenth Circuit holding overlooks the *Pennhurst* Spending Clause requirements of acceptance by the State.

Section 1926(a) is only Congressional legislative authorization for the Secretary to make loans and

grants available. Section 1926(a) is not an authorization for corporation to act on behalf of and to bind Oklahoma. If it were, then Congress could both enact accompanying obligations that infringe on State sovereignty and authorize corporations to unilaterally waive sovereignty without any voluntary and knowing acceptance of the State. This is in essence what the Tenth Circuit held when it opined that corporations are authorized to accept loans that waive sovereignty without permission of the State. The Tenth Circuit's reliance on §1926(a) is both inaccurate from a literal reading of §1926(a) and directly conflicts with the *Pennhurst* Spending Clause requirements.

The Tenth Circuit held that corporations may accept benefits and involuntarily bind Oklahoma to accompanying obligations, which unravels the State of Oklahoma's ultimate control of its sovereignty and empowers congress to dictate what entity may waive state sovereignty.

C. The Tenth Circuit holding that corporations need no permission or statutory authorization to accept obligations that waive Oklahoma sovereignty limits the application of this Court's holding in *Pennhurst* and obfuscates Oklahoma's control over its sovereignty.

Waiver of State sovereignty must be by a specific voluntary and knowing act of the State Legislature clearly expressing its intent to accept the

accompanying obligations. The Tenth Circuit's holding relegates infringements on State sovereignty to a unilateral decision of a private corporation by implication without the voluntary and knowing permission of the State of Oklahoma.

The Tenth Circuit has in effect limited the application of this Court's holding in *Pennhurst*, to water districts and empowers corporations to accept loans and bind the State without permission of the State. But this Court made no such distinction based upon potential grant recipients. Any entity binding the State must have been specifically authorized to accept loans and grants and accompanying obligations that waive State sovereignty to be by voluntary and knowing acts of the State.

If sovereignty can be unilaterally waived by corporations without the permission of the State, then the Tenth Amendment and State sovereignty will quickly erode. States must have ultimate control of waiving its State sovereignty.

III. Whether Respondent's failure to comply with the express requirements of Oklahoma law precluded its entitlement to serve the disputed area and thus §1926(b) protection.

The Tenth Circuit did not find Respondent's lack of statutory authority to act on behalf of and bind Oklahoma to be persuasive. The Tenth Circuit suggested

needing a specific statutory prohibition or requirement.

The Tenth Circuit held that "To the extent that the [Petitioners disagree] with this outcome and desires to prohibit rural water associations from receiving federal funds under §1926(a), its remedy lies with its state legislature. *Cf. Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 2010 OK 51, 235 P.3d 38, at 50 (noting that state legislature may at any time 'amend the Oklahoma [s]tatutes to further limit rights and duties of rural water districts')." [App. 35a].

The Tenth Circuit has previously held that without the legal authority to provide service under state law a water association is not entitled to §1926(b) protection. ***Le Ax Water Dist. v. City of Athens*, 174 F. Supp. 2d 696, 706 (S.D. Ohio 2001) (citing *Sequoyah County* at 1202, n. 8)**. As such an Oklahoma corporation that is not entitled to provide service under Oklahoma law cannot make water service available and is not entitled to §1926(b) protection.

In 1989, the Oklahoma Legislature enacted a statute that expressly requires corporations to create a water district to be legally entitled to continue serving within city limits. *See* 82 O.S. §1324.35. Under Oklahoma law, a corporation cannot continue to serve or provide service within city limits until that corporation creates a water district. In this case, Respondent is a corporation serving within the city limits that has not established a water district as required by Oklahoma law.

A. The Tenth Circuit has previously held that a water association must have the legal right under state law to serve water to the disputed area as a prerequisite to §1926(b) protection.

To bring an action under §1926(b), a water association must be qualified to provide service under Oklahoma law. "**Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection under 1926(b)** in the first instance because the association would not legally have 'provided or made available' any service." *Sequoyah County*, 191 F.3d at 1201, n. 8 (emphasis added).

The Tenth Circuit has opined that "[w]ithout a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection under §1926(b) in the first instance because the association would not legally have 'provided or made available' any service." *Id.* This requirement is applicable to all water associations, corporations and water districts.

Section 1926(a)(1) of the Act defines water associations as "[t]he Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit. . . ." [App. 37a]. Water association, as defined under the Act, includes both water districts and non-profit corporations, such as Respondent. 7 U.S.C. §1926(a)(1*)*.

The water association has the burden of proof that it is entitled to provide water service under Oklahoma law. *See Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262, 1264-65 (10th Cir. 2002). Respondent has not and cannot meet this burden of proof; thus, it is not entitled to §1926(b) protection under the Act.

B. In 1989, the Oklahoma Legislature specifically amended the Water District Act, 82 O.S. §1324.1, *et seq.*, by enactment of §1324.35, which requires corporations to create a water district as a requirement of providing and continuing to provide water service within those city limits.

In 1989, the Oklahoma Legislature enacted §1324.35 of the Water District Act, which explicitly provides: "[i]n the event a corporation provides service within the boundaries of an incorporated city or town on the date of organization as a rural water district, the district may continue to serve in that area as permitted by law." 82 O.S. §1324.35. The Oklahoma Legislature underscored the importance of this requirement by its adoption with emergency.

As such, commencing in 1989, by express requirement under Oklahoma law, a corporation serving or to continuing serving within city limits must create a water district to serve that area.

Respondent is a "corporation" as defined in the Water District Act. 82 O.S. §1324.30(1). [App. 98a]. The disputed area is within city limits. [App. 5a]. Respondent has not created a district. [App. 40a (dissent)].

The Oklahoma Legislature expressly requires corporations, like Respondent, to create a rural water district as a condition of providing water service within city limits. So, effective in 1989, Respondent could only continue to serve those areas within the city limits if it organized a rural water district.

Respondent claims the exclusive right to serve an area within city limits. Beginning more than 30 years ago and prior to any of Respondent's existing loans, Oklahoma law required that Respondent establish a water district to be legally entitled to serve within city limits, including the disputed area.

Respondent has not created a water district to serve within city limits as required by 82 O.S. §1324.35. [App. 40a (dissent)]. Thus, Respondent cannot legally make water service available to the disputed area under Oklahoma law.

As Respondent cannot legally make water service available to the disputed area, Respondent cannot satisfy these requirements and is not entitled to §1926(b) protection. As Respondent is not entitled to §1926(b) protection, Petitioners have not violated §1926(b) and the Tenth Circuit must be reversed.

C. The Tenth Circuit did not interpret and apply the Water District Act as a whole, but rather only applied one select section, §1324.31, thereby making the Oklahoma legislation enacting the §1324.35 requirement to create a water district a nullity.

1. Oklahoma Law is interpreted and applied by giving effect to the entire act, as a whole, not just one select section as the Tenth Circuit held.

The Tenth Circuit in its analysis of the requirements of the Water District Act, in particular §1324.35, did not analyze the Water District Act as a whole to give meaning to each section.

The Tenth Circuit cited 82 O.S. §1324.31, wherein corporations are authorized, but not required, to create a water district. Section 1324.31 provides "[p]ursuant to the provisions of this act, any corporation which was formed prior to December 1, 1988, may organize and constitute a district. . . ." [App. 33a, n. 14]. Therefore, the Tenth Circuit held creation of a water district is not required. However, the Oklahoma Legislature enacted §1324.35, an exception to the §1324.31 general authorization. The Oklahoma Legislature expressly amended the Water District Act, in 1989, by specifically enacting §1324.35, requiring creation of a water district, whenever a corporation desires to service within the boundaries of a municipality. Section 1324.35 provides, "[i]n the event a corporation provides service within the boundaries of an incorporated city or town on the date

of organization as a rural water district, the district may continue to serve in that area as permitted by law."

When interpreting Oklahoma law, statutes are interpreted by taking into consideration the entire act and not just a single provision. *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶ 5, 687 P.2d 132, 134. In not reading the Water District Act as a whole, the Tenth Circuit made the §1324.35 statutory requirement a nullity.

Under Oklahoma law, a statute may not be read to be useless or absurd. In *Gray v. State ex rel. State Election Bd.*, at ¶¶ 8 and 11, the Oklahoma Supreme Court stated: "[t]he legislative intent behind a statute is to be ascertained from the whole act in light of general purpose and object." . . . "This Court will not assume that the Legislature has done a vain and useless act." 1998 OK 85, 962 P.2d 1. "Every provision of . . . [a] statute . . . is presumed to have been intended for some useful purpose and should be given effect." *Darnell*, 1984 OK at ¶ 5, 687 P.2d at 134. "It is a well-settled principle of statutory construction that, where possible, courts will not allow statutes to have absurd or discriminatory consequences. A construction that would lead to an absurdity or to discriminatory treatment will be avoided if it can be done without violating legislative intent." *Cox v. Dawson*, 1996 OK at ¶ 20, 911 P.2d at 281. "We must interpret statutes in a manner which renders every word and sentence operative, does not render a specific provision nugatory, and gives meaning to every provision." *Boyd v. Tietze*, 2007 OK CIV APP 119, ¶15, 172 P.3d 639, 643.

The Tenth Circuit held that the first provision, §1324.31, permitted corporations to create a water district, and failed to apply the legal requirement in §1324.35, which made creation of a water district mandatory, whenever a corporation is serving in a city's limits. In doing so, the Tenth Circuit holding made §1324.35 a nullity.

In its holding, the Tenth Circuit directed Petitioners to the Oklahoma Legislature to address the authority of corporations to accept federal funds and the accompanying obligations of §1926(b) protection. However, the Oklahoma Legislature has already spoken and established that requirement through the enactment of §1324.35, but this statutory requirement was not applied by the Tenth Circuit.

In enacting §1324.35, the Oklahoma Legislature exercised its ultimate control of its sovereignty and its choice under *Pennhurst* to authorize or condition authorization of acceptance of terms of the federal offer under the Act. In so exercising, Oklahoma required Oklahoma corporations to create a water district as a condition precedent to legal authority to serve within a city's limit.

As the Tenth Circuit has previously held that a water association, including Respondent – a non-profit corporation – must be entitled to provide service under state law as a prerequisite to §1926(b) protection. Respondent chose not to comply with Oklahoma law and failed to create a water district and therefore denied itself the legal authority to serve within city limits.

Consequently, Respondent is not able to make service available and therefore is not entitled to federal protection under §1926(b).

2. Respondent has failed to comply with Oklahoma law requiring creation of a water district to serve within the city limits, and thus cannot legally serve within the city limits and deprived itself of §1926(b) protection.

Although Respondent has had ample opportunity, Respondent has not created a water district; thus, Respondent cannot make the requested water service available to the disputed area, and therefore the disputed area is not a protected service area under §1926(b).

This 1989 statutory legal requirement, §1324.35, is for a corporation to create a water district as a condition to legal entitlement to provide water service within city limits under Oklahoma law and **precedes all of Respondent's current and continuing indebtedness.** [App. 15a].

This statutory requirement is reasonable and achievable, if Respondent wanted or wants to expand service to the disputed area that lies within city limits. Respondent chose not to comply and continues to not comply with this Oklahoma statutory requirement. Consequently, Respondent is not legally able to make service available to the disputed area and is not

entitled to §1926(b) protection. As such, Respondent has failed to meet its burden to prove it is entitled to make service available under Oklahoma law to the disputed area under §1324.35. *See Sequoya*, 191 F.3d at 1197 (citing *Glenpool*, 861 F.2d at 1214).

As Respondent cannot make water service available to the disputed area under Oklahoma law, a requirement for §1926(b) protection, it has no §1926(b) protection. *See Glenpool*, 861 F.2d at 1214; *Sequoyah County*, 191 F.3d at 1197.

D. Oklahoma must have ultimate control over its sovereignty and whether Oklahoma entities have the legal right to provide service in Oklahoma under Oklahoma law.

In accordance with this Court's holding in *Pennhurst*, where Congress enacts legislation pursuant to the Spending Clause which includes accompanying obligations that infringe on State sovereignty, acceptance of the benefits and burdens requires the voluntary and knowing acceptance of the State. As such, each State has ultimate control of the waiver of its sovereignty. The State of Oklahoma must have ultimate control to limit, repeal or condition the ability of Oklahoma entities, including corporations and water districts to provide service. *See Eudora II*, 720 F.3d 1269 (10th Cir. 2013).

The Tenth Circuit has similarly held that any such authorization must be particularly granted

enumerated powers under state law, and any reasonable doubt about the existence of such power is resolved against its existence. *Eudora I*, 659 F.3d at 976. The Tenth Circuit has opined that States may, at any time, repeal or limit the federal entitlement to protection under the Act. *Id*.

Additionally, the Tenth Circuit has held the State of Oklahoma, by limiting a rural water district's powers, is "'ultimately free to reject both the conditions and the funding [of federal loans], no matter how hard that choice may be.'" *Pittsburg II*, 358 F.3d at 718.

As to water districts, the Tenth Circuit has opined in *Eudora II*, 720 F.3d at 1275, "we require states to authorize their rural water districts to seek §1926(b) protection (with whatever conditions the state may impose) so that the state itself maintains ultimate control over the circumstances in which a water district may call down federal protection and potentially frustrate future zoning, development, or annexation plans. *See Eudora I*, 659 F.3d at 976." *Eudora II*, 720 F.3d at 1275 (emphasis added).

The water associations in *Eudora* and *Pittsburg* were water districts. The Tenth Circuit in this case distinguished the application of *Pennhurst* between water associations that are water districts and water associations that are corporations. Nothwithstanding the failure to apply Oklahoma law requiring corporations create water districts, the Tenth Circuit determined that corporations need no permission from the State to accept the benefits of Congressional legislation under

the Spending Clause. In doing so, the Tenth Circuit has determined that this Court's holding in *Pennhurst* does not apply to corporations and therefore acceptance by the State or authorization to accept on behalf of and binding the State to waivers of sovereignty is not required. The Tenth Circuit distinction deprives the State of control of its sovereignty. Under *Pennhurst*, States must have ultimate control over circumstances in which federal obligations infringe State sovereignty such as zoning, development and annexation plans. The Tenth Circuit holding empowers corporations to unilaterally affect and unbalance the paradigm of federal and State sovereignty.

The State must have ultimate control of the waiver of its sovereignty. States must have ultimate control of delegation of authority to accept Congressional legislation that infringes upon or waives its State sovereignty.

This principle of State control of the waiver of its State sovereignty under *Pennhurst* conflicts with the Tenth Circuit holding that corporations may unilaterally accept loans and grants that bind the State and waive sovereignty without the permission of the State of Oklahoma. The conflicts between *Pennhurst* and the Tenth Circuit holding in this case are irreconcilable.

CONCLUSION

The petition for a writ of certiorari should be granted as the published holding of the Tenth Circuit

will erode the paradigm between Federal and State sovereignty, create a backdoor for Congress to obfuscate the Tenth Amendment, and effectively nullify this Court's holding in *Pennhurst*.

Respectfully submitted,

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