

No. 17-938

In the Supreme Court of the United States

CITY OF CIBOLO, TEXAS,
Petitioner,

v.

GREEN VALLEY SPECIAL UTILITY DISTRICT,
Respondent.

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

**BRIEF OF AMICI CURIAE TEXAS MUNICIPAL
LEAGUE, TEXAS CITY ATTORNEYS
ASSOCIATION, NATIONAL LEAGUE OF
CITIES, AND INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION IN SUPPORT OF
PETITIONER**

HEATHER M. LOCKHART
Counsel of Record
ASSISTANT GENERAL COUNSEL
TEXAS MUNICIPAL LEAGUE
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Telephone: (512) 231-7400
heather@tml.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

The Texas Municipal League (“TML”) is a non-profit association of over 1,150 Texas municipalities. Over 13,000 mayors, council members, city managers, city attorneys, police chiefs, and other department heads are member officials of TML by virtue of their cities’ participation. TML established a legal defense program to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The Texas City Attorneys Association (“TCAA”), an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas cities and city officials in the performance of their duties.

The National League of Cities (“NLC”) is dedicated to helping city leaders build better communities. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages and towns it represents.

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae’s* intention to file this brief. The parties have consented to the filing of this brief. The author of this brief is a salaried employee of TML. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The International Municipal Lawyers Association (“IMLA”) is a non-profit, professional organization that is an advocate and resource for local government attorneys.

TML, TCAA, NLC, and IMLA (*Amici*) advocate for the interests common to local governments. TML and NLC member cities provide vital services to both city residents and non-residents, while TCAA and IMLA members represent local governments in these endeavors. *Amici* have an interest in ensuring that local governments maintain their authority to provide efficient services to customers. Believing that the issue before this Court is of great significance to all local governments, *Amici* respectfully submit this brief in support of the City of Cibolo’s Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Amici urge the Court to grant the Petitioner’s Petition for Writ of Certiorari to resolve the split between the Fifth and Eighth circuits in interpreting 7 U.S.C. § 1926(b), the federal statute protecting water and wastewater development in rural areas. The Fifth Circuit Court of Appeals concluded that section 1926(b) protection of a rural association is not limited to the service for which the association is indebted to the federal government. The court extended the protection to any other service provided or that could be provided, even if that service is not financed through loans by the Department of Agriculture.

In contrast, the Eighth Circuit Court of Appeals concluded that only the service funded by a

federal loan is protected under 1926(b). *Amici* agree with the Eighth Circuit's analysis of section 1926(b) protection, which relies on the purpose behind that section: to encourage rural development and to provide greater security for federal loans. More importantly, *Amici* seek clarity from this Court on this important issue, which impacts local governments' ability to provide services intending to expand development in rural areas. The history of section 1926 federal loans for water infrastructure reveals the purpose of this funding is to promote rural development. The Fifth Circuit's broad interpretation of section 1926(b), particularly if developed elsewhere, would hinder rural development, deprive citizens of necessary and basic low-cost services, and place cities at a competitive disadvantage. Local governments outside the Fifth and Eighth Circuits, in particular, need this Court's guidance on this important question of federal law.

ARGUMENT

A. The History of Section 1926 infrastructure loans underscores the importance of the issues presented in the Petition for Certiorari.

Because the circuit split creates a situation where many cities will forego providing water and wastewater services to their citizens out of fear of being sued by a rural association with a federal loan for a *different* service, the history of Section 1926 provides insight and context into the importance of the issues presented in the Petition. For most of the nation's history, the United States has been a predominately rural place. The first census taken in 1790 revealed that 95 percent of the nation's population lived in rural areas. *Historical Statistics of the United States Colonial Times to 1970: Volume 1* available at https://www.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970.html (last visited: Jan. 23, 2018). This began to shift over time.

As urban areas and the criteria used to define them have evolved, the share of the total population living in rural areas has decreased. The 1910 census showed that more than half of the total population (54.4 percent) lived in rural areas. In contrast, the 2010 Census revealed that only 1 in 5 of the total population (19.3 percent) lived in rural areas. United State Census Bureau, *Measuring America*, Dec. 8, 2016:

<https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/acs-rural-urban.pdf> (last visited: Jan. 23, 2018).

Urbanization is problematic to an entity providing water and sewer service in a rural area. A decreasing rural population results in a decrease in rural water users. This decrease in water users necessarily results in a decrease in revenue for a water provider. When fewer water users exist, but are spread over large distances, the cost of constructing the necessary infrastructure to provide water service increases.

At the same time the nation's rural population was decreasing, rural farming regions were experiencing devastation from the Dust Bowl and drought conditions of the 1930s. Timothy M. Brady, *The Farmers Home Administration Community Facility Program: A Mandate for Rural Development*, 23 S.D. L. REV. 585, 586 (1978). To address these conditions, Congress passed the Water Facility Act of 1937. *Id.* This Act authorized the Secretary of Agriculture to make low-interest loans to help construct water facilities. The Act of August 28, 1937, Pub. L. No. 75-399, 50 Stat. 869 (repealed by Act of August 8, 1961, Pub. L. No. 87-128, 75 Stat. 294, 318). To qualify for a loan, though, the proposed facilities had to specifically benefit farm families. *Id.*

Economic conditions for farmers remained dismal, even after the Dust Bowl era ended. As President Kennedy put it: "The present state of our economy is disturbing. We take office in the wake of seven months of recession, three and one-half years of slack, seven years of diminished economic growth, and nine years of falling farm income." President John F. Kennedy, State of the Union (Jan. 30, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8045>. Under this backdrop, Congress passed the

Consolidated Farmers Home Administration Act of 1961 to address the economic issues that continued to plague farmers. Pub. L. No. 87-128, 75 Stat. 307 (codified in 7 U.S.C.). Sections 304 and 306 of the 1961 Act replaced the Water Facility Act of 1937. Section 306 expanded the Department of Agriculture's ("USDA") authority to make water facility loans. More specifically, the USDA would now be able to provide loans to associations serving non-farming rural residents. The legislative history indicates that Congress expected the expanded loan program to result in a reduction in the cost per-user in addition to the community benefits of a safe and adequate supply of household running water. Brady, *supra* at 588 *quoting* S. Rep. No. 566, 87th Cong., 1st Sess. 1.

Section 306 also included the provision at issue in this case, which is now known as 7 U.S.C. 1926(b):

(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.

7 U.S.C. § 1926 (1976).

This curtailment provision was intended to protect the territory served by a USDA loan from encroachment by competitive facilities that might be developed with the expansion of municipal boundaries and to protect rural development. These policy considerations are important issues that will be undermined by the circuit split that has developed on this important issue. Without this Court's intervention, local governments who might be willing to provide rural communities with water or sewer service may decide not to, out of fear of being sued by an association, even if that association does not currently provide the desired services.

B. The purpose of the curtailment provision, to expand rural development, is undermined by the circuit split.

As the preceding discussion demonstrates, the overriding purpose permeating through the passage of both the Water Facilities Act of 1937 and the Consolidated Farmers Act of 1961 was to stimulate the economy in rural areas by expanding development while still protecting the U.S. Treasury's investment in rural associations. *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir. 1987).

It is undisputed that the U.S. Treasury's investment in this case was in Green Valley's *water* infrastructure. ("In 2003, Green Valley obtained a

\$584,000 loan from the United States to fund its water service.” *Green Valley Special Util. Dist. v. City of Cibolo, Texas*, 866 F.3d 339, 340 (5th Cir. 2017)). *Amici* agree that section 1926(b) protects the territory of Green Valley’s federally financed water service. However, this protection does not and should not extend to non-federally financed services. In this case, the non-federally financed service is wastewater service, which the City of Cibolo seeks to provide.

In deciding this case, the Fifth Circuit states that section 1926(b) refers to “[t]he service,” and section 1926 does not include statutory language that defines or limits “service” to a service funded by a USDA loan. *Id.* at 342. Though the court acknowledges it is possible that Congress “intended to limit § 1926(b)'s protection to services directly financed by a federal loan,” the court nevertheless concludes that 1926(b)’s plain language does not limit the statute’s protection to “services that have received federal financing.” *Id.* at 343–44.

The Eighth Circuit by contrast, considered the purpose and context of the statute in deciding the identical question in *Public Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 520 (8th Cir. 2010). *City of Lebanon* involved an association’s challenge to the City of Lebanon’s provision of water service to customers within a district’s boundaries. The district’s USDA loan was for its sewer system; however, the District argued that the USDA sewer loan triggered section 1926(b) protection with respect to its water service. The court reiterated its prior holding that the purpose of section 1926 is “to encourage rural development and to provide greater

security for [USDA] loans.” *Id.* quoting *Rural Water Sys. No. 1 v. City of Sioux Center*, 202 F.3d 1035, 1038 (8th Cir. 2000). Interpreting that “[t]he service” referred to in 1926(b) is limited to the financed service, the court cautioned:

adopting the District’s broad view of the scope of protection would undoubtedly benefit the District and other rural districts, it **would not promote rural water development** because other services a rural district might happen to provide are irrelevant to maintaining the necessary economies of scale to allow rural utility associations to remain viable and to keeping the per-user cost low for the service financed by the loan.

Id. (emphasis added).

If the Fifth Circuit’s interpretation of section 1926(b)’s protection stands, it would hinder rural development by providing seemingly limitless protection for an association. Moreover, the circuit split creates uncertainty for local governments outside of the Fifth and Eighth Circuits. Rural development in those areas, the vast majority of the country, will also be stymied due to the lack of clarity on this issue. For example, would an exclusive franchise to provide solid waste service in the territory covered by a USDA water loan be protected? A certificate of convenience and necessity to provide electricity service? Natural gas service? Under the Fifth Circuit’s broad interpretation, an

association will hide behind the protections of section 1926(b) for *any* service the association chooses to provide simply because they offer *a* service that is financed through a USDA loan. Associations outside the Eighth Circuit will certainly make these arguments as well, providing a disincentive for local governments to provide competitively priced services to rural citizens. Accepting this broad interpretation would discourage rural water development by allowing an association unlimited monopolies on services simply because they have received a loan for water service from the USDA.

The intent since section 1926's predecessor's passage in 1937 is to reduce costs of service in order to expand rural development. Section 1926(b) was enacted as a shield to ensure that an association has the means to repay its debt to the federal government. It is not intended to monopolize services unrelated to that federal debt. This Court should grant the Petition to prevent further economic harm to rural communities.

C. The Fifth Circuit's interpretation of 1926(b), and the ensuing circuit split, places cities at a competitive disadvantage.

As the trend towards urbanization continues, the need for city services continues to expand. The latest U.S. census shows that rural areas cover 97 percent of the land area of the United States, yet only contain 19.3 percent of the population (about 60 million people). Press Release, *U.S. Census Bureau, New Census Data Show Differences Between Urban and Rural Populations* (Dec. 8, 2016),

<https://www.census.gov/newsroom/press-releases/2016/cb16-210.html>. The Fifth Circuit Court of Appeals' expansive interpretation of section 1926(b) in this case, coupled with the confusion created by the circuit split, places cities at a competitive disadvantage to associations, like Green Valley, in meeting the needs of rural users.

To help illustrate the problem created by the lower court's decision, take another example from the Fifth Circuit. In *Madison v. Bear Creek*, the Fifth Circuit Court of Appeals looked at the City of Madison's efforts to condemn Bear Creek's water system facilities located within its expanded city limits. *City of Madison*, 816 F.2d at 1058. The Bear Creek water system was financed by five USDA loans. Concluding that section 1926(b) prohibits a city from condemning an association's facilities during the term of its loan, the court explained the purposes behind the USDA's section 1926 loan program: "This history indicates two congressional purposes behind § 1926: 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *Id.* at 1060.

The Fifth Circuit was especially critical of the City of Madison "skim[ming] the cream by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost)." *Id.* The court concluded that this would undermine Congress's purpose of facilitating inexpensive water supplies for farmers

and other rural residents and protecting those associations' ability to repay USDA loans. *Id.*

Amici understand the court's rationale in the *Madison* decision: a city cannot swoop in and seize the most profitable portion of an association's infrastructure and source of revenue for federally-backed loans. Doing so would increase the cost per-user for those served by the rural association in contravention of the purposes of 1926(b).

Both the facts of the case and the intention of the City of Cibolo are distinguishable from *Madison* and lumping them together puts local governments all around the country at an economic disadvantage. Here, Green Valley provides no wastewater service. The City of Cibolo does not intend to acquire customers or facilities from Green Valley: there are neither customers nor facilities to acquire. Instead, the city seeks to provide actual wastewater service to individuals who are currently without this service. There can be no increase in the cost per-user if the City of Cibolo begins providing wastewater service because the users are not currently being served.

The City of Cibolo² and the surrounding area continue to urbanize. This urbanization has created a need for wastewater service that Green Valley has been either unable or unwilling to fill. Thus, the City has attempted to offer wastewater services to fill the void, which complies with its vision statement "to be

² The 2010 census determined the population of Cibolo was 15,349. The 2016 estimated population is 27,855. *Quick Facts, Cibolo City*, <https://www.census.gov/quickfacts/fact/table/cibolocitytexas/PS T045216> (last visited Jan. 24, 2018). Cibolo is located 21 miles from downtown San Antonio, Texas.

cognizant of its businesses and citizens first and foremost.” *City of Cibola*, Mission & Vision, <http://www.cibolotx.gov/index.aspx?NID=209> (last visited Jan. 24, 2018). This is not an uncommon scenario.

The availability of reliable wastewater is an important factor in a new business’s location decision. Cities fiercely compete in the economic-development arena to attract jobs for its citizens. *See generally* Amazon HQ2, <https://www.amazon.com/b?node=17044620011> (last visited Jan. 24, 2018). Allowing an association, like Green Valley, to use section 1926(b) as a protection to fail to offer, or to offer inadequate, service places cities that are willing and able to offer such service at a severe disadvantage in their ability to attract and retain businesses and create a desirable place to live for their citizens.

The Fifth Circuit’s liberal interpretation cripples cities’ efforts to provide services to citizens. More importantly, the circuit split exacerbates this problem for thousands of local governments outside the Fifth and Eighth Circuit as they will be reluctant to provide essential services to citizens out of fear of being sued by an association providing a *different* service backed by a federal loan. This Court should grant certiorari to provide clarity to these local governments around the country. An increase in development and the number of users will serve to drive down the cost per-user, thereby achieving the purpose of section 1926: to encourage development while still protecting the U.S. Treasury’s financial interests.

CONCLUSION

The USDA loan program was created to promote rural development of infrastructure. To further this objective, the curtailment protection of section 1926(b) should be limited to the specific service financed through USDA loans.

The split between the Fifth Circuit and Eight Circuit's interpretation of the meaning of "[t]he service" in section 1926(b) has created uncertainty for local governments. *Amici curiae* seek clarity for local governments seeking to provide services to and urge the Court to grant the City of Cibolo's Petition for Writ of Certiorari.

Respectfully submitted,

HEATHER M. LOCKHART
Counsel of Record
ASSISTANT GENERAL COUNSEL
TEXAS MUNICIPAL LEAGUE
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Telephone: (512) 231-7400
heather@tml.org

Counsel for Amici Curiae