

No. 17-938

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**In the Supreme Court of the United States**

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CITY OF CIBOLO, TEXAS,

*Petitioner,*

v.

GREEN VALLEY SPECIAL UTILITY DISTRICT,

*Respondent.*

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

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**MOTION FOR LEAVE TO FILE *AMICI* BRIEF AND  
BRIEF OF *AMICI CURIAE* GUADALUPE VALLEY  
DEVELOPMENT CORPORATION AND GUADALUPE  
VALLEY ELECTRIC COOPERATIVE  
IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

This matter presents this Court with the opportunity to resolve a circuit split between the Fourth, Fifth, Sixth, Eighth and Tenth Circuits regarding what it means for an association to provide or make available sewer service, and thus be entitled to protection under 7 U.S.C. § 1926(b). *Amici* hold interests in Respondent's service area: Guadalupe Valley Development Corporation owns rural land within the certificated sewer service area of Respondent, and Guadalupe Valley Electric Cooperative is a rural electric utility with a service area that overlaps Respondent's certificated sewer service area. Respondent's failure to provide or make available sewer service to its certificated service area has had a direct negative impact on *Amici* and the development of Respondent's service area.

Guadalupe Valley Development Corporation and Guadalupe Valley Electric Cooperative timely notified the parties of their intention to submit their *amici* brief. Petitioner provided its consent to the filing of this brief, and Respondent did not. Pursuant to Supreme Court Rule 37.2(b), Guadalupe Valley Development Corporation and Guadalupe Valley Electric Cooperative therefore respectfully move the Court for leave to file the attached *amici* brief in support of Petitioner. *Amici* are familiar with the detrimental impact of an association's failure to provide or make available sewer service for rural development, and they are well-suited to provide this Court with insight regarding the purpose and effect of section 1926(b). Guadalupe Valley Development Corporation and Guadalupe Valley Electric Cooperative respectfully

request leave to file the attached *amici* brief urging this Court to grant the petition.

Respectfully submitted,

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

Guadalupe Valley Development Corporation (GVDC) owns 159 acres of rural land within the certificated sewer service area of Respondent. For the last 12 years, Respondent has held a state-issued permit—a Certificate of Convenience and Necessity (CCN)—which gives it the exclusive right to provide sewer service to GVDC’s land. GVDC wants to develop its property into an industrial park but cannot do so because Respondent has failed to provide sewer service for the last 12 years. Respondent continues to sit on the CCN without using it. Under the Fifth Circuit’s interpretation of 7 U.S.C. § 1926(b), Respondent’s CCN cannot be revoked by the state authority that issued it, so long as Respondent is repaying a loan to the USDA. As a result, Petitioner is blocked from providing sewer service to GVDC’s land, and GVDC is precluded from developing its land.

Guadalupe Valley Electric Cooperative (GVEC) is a rural electric utility with a service area that overlaps the sewer service area covered by Respondent’s CCN. GVEC’s purpose is to provide electricity to rural areas, such as GVDC’s land. Development is stymied because Respondent has not provided sewer service to the land. This impedes GVEC’s public purpose of bringing electric service to rural areas and adding new

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<sup>1</sup> Pursuant to Rule 37.2, counsel for all parties received timely notice of the intent to file this brief. Petitioner has consented to its filing. Respondent has withheld consent. No counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

customers to its electric system to reduce the cost per user to all customers.

*Amici* respectfully submit this brief in support of the City of Cibolo's Petition for Writ of Certiorari.

### **BACKGROUND**

Guadalupe Valley Development Corporation (GVDC) acquired 159 acres of land in the unincorporated area of Guadalupe County, Texas. The property is located within Respondent's certificated sewer service area. GVDC acquired the property to develop it into an industrial park.

Guadalupe Valley Electric Cooperative (GVEC) is a rural provider of electricity, operating under Chapter 161 of the Texas Utilities Code. GVEC created GVDC to stimulate development and demand for electricity in rural areas located within GVEC's electric service area. This strategy furthers GVEC's public purpose of rural electrification, stimulates economic activity, and reduces the cost per user for GVEC's electric utility services.

Respondent obtained a sewer CCN on October 5, 2005, covering a 3-county area consisting of about 71,175 acres of land, including GVDC's land. Under Texas law, "any retail public utility that possesses . . . a [CCN] shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas." TEX. WATER CODE § 13.250(a). The holder of a CCN has a monopoly to provide the service within the certificated service area, such that no utility may encroach on that area to provide the same service without the CCN holder's consent.

GVDC sought sewer service from Respondent, but Respondent failed to provide it. Respondent does not have a wastewater treatment plant or the permits and financing needed to construct and operate such a plant. Respondent has no pipes in the ground to collect wastewater generated on GVDC's property.

GVDC petitioned the Texas Public Utility Commission (PUC) to remove its land from Respondent's sewer service area pursuant to Texas Water Code section 13.254(a-5), so that the property could receive sewer service from an alternative provider such as Petitioner. This subsection of the Texas Water Code provides that the PUC shall release the property from a CCN if the petitioner shows, among other things, that the tract of land is at least 25 acres in size and is "not receiving" sewer service. Respondent intervened in the PUC proceeding, contested GVDC's petition, and lost. The PUC found that GVDC's property is not receiving sewer service, and it granted GVDC's petition to remove its property from Respondent's CCN. Respondent then filed a lawsuit in state court to challenge the PUC's findings, and to assert that its CCN is protected by section 1926(b). That lawsuit remains pending.<sup>2</sup> Respondent also filed a lawsuit in federal court to enjoin the PUC and GVDC from taking further steps to enforce the PUC's order, arguing among other things that its sewer CCN is protected by section 1926(b). The federal

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<sup>2</sup> Under Texas law, Respondent must establish that the service is being provided or at least can promptly be provided to GVDC's property for Respondent to be protected by section 1926(b). *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505 (Tex. App.—Austin 2010, no pet.).

district court denied the defendants' motions to dismiss, citing *Green Valley* for the premise that Respondent need only plead facts showing that Respondent holds a CCN to plead that it has "provided or made available" service for purposes of section 1926(b). That lawsuit remains pending.

### **SUMMARY OF ARGUMENT**

The Fifth Circuit's interpretation of section 1926(b) leads to the absurd result that the holder of a sewer service CCN can refuse to provide or make available such service, preclude any other entity from providing such service, stymie rural development, and thwart the purposes of section 1926(b), all while claiming section 1926(b) protection. The Fifth Circuit's interpretation is contrary to the text and policies of the statute.

### **ARGUMENT**

#### **THE FIFTH CIRCUIT'S INTERPRETATION OF SECTION 1926(b) CREATES ABSURD AND UNFAIR RESULTS.**

In *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996), the court concluded that "a state law duty to provide service is the legal equivalent to the Utility's 'making service available' under 1926(b)" such that "[w]here a CCN imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service." In other words, merely holding a CCN, and doing nothing to make service available to consumers in the area, is considered 'making service available' for purposes of satisfying federal law. The Fifth Circuit reaffirmed this legal fiction in *Green Valley Special Util. Dist. v. City of Cibolo*, 866 F.3d 339 (5th Cir. 2017).

The Fifth Circuit’s holding in *North Alamo* made sense under the facts presented in that case, where the court upheld the district court’s “alternative” findings that North Alamo had “made service available” as a factual matter. But to the extent that its rule also applies to utilities that are not providing or making service available to customers in the area—as the Fifth Circuit confirmed in *Green Valley* that it does—it is at odds with the text and policies of the statute.

Despite holding a CCN over GVDC’s land for more than 12 years, and despite the state law duty imposed by the CCN to “serve every consumer within its certified area and shall render continuous and adequate service within the area or areas,” Respondent has done nothing to provide sewer service to GVDC’s land. The Fifth Circuit’s interpretation of section 1926(b) leaves GVDC powerless to obtain sewer service for its land. Thus, the land remains rural, idle, and undeveloped while Respondent continues to flout the very duty to serve that it claims protects its monopoly.

If the Fifth Circuit’s interpretation stands, the result will be that GVDC cannot remove its land from Respondent’s CCN and cannot obtain sewer service from alternative providers, such as Petitioner. This outcome not only directly impedes a landowner’s ability to develop his property, but it also allows Respondent to hide behind the protection of section 1926(b) while not complying with its state-law duty to render continuous and adequate service within the certificated area. It allows Respondent to impede development in rural areas to the detriment of landowners, the economy, and the rural utilities that are attempting to expand their utility services in those areas.

Furthermore, the Fifth Circuit's holding in *North Alamo* and *Green Valley* does not serve the policy of the statute. The purpose of section 1926(b) is to stimulate the economy in rural areas by expanding development while 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). The Fifth Circuit's holding does the opposite by protecting a utility that is withholding services.

### CONCLUSION

The Fifth Circuit's interpretation of section 1926(b) in *North Alamo* and *Green Valley* is contrary to the plain language of the statute, sanctions a legal fiction, leads to absurd and unfair results, and does not serve the policy of the statute. *Amici* ask this Court to adopt the view of the Fourth, Sixth, Eighth and Tenth Circuits, which would require the Respondent to establish that service is being provided or at least can promptly be provided to the GVDC property, before the Respondent receives protection under section 1926(b).

Respectfully submitted,

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