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

REPLY BRIEF FOR PETITIONER

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May 1, 2018

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An acknowledged circuit split exists regarding both questions presented, which have significant implications for rural and urban development nationwide. The Fifth Circuit expressly rejected the Eighth Circuit's reasoning when it held that a federal statute that protects "the service" provided by a rural utility that receives a federal loan refers to any service provided by that utility, including services *not* supported by the loan. Pet. 13. On the second question, multiple courts of appeals have acknowledged that the Fifth Circuit stands alone in allowing a utility to demonstrate that it has "provided or made available" a service that qualifies for § 1926(b) protection by showing nothing more than the utility's state-law duty to provide the service. Pet. 15. All four of the other courts of appeals to have considered that question require a utility to show a physical capability to provide service before concluding that federal law precludes a different provider from stepping in. Pet. 15-18.

Respondent fails to identify a basis to deny review of the questions presented in this case, which are well-defined, implicate the federal-state balance, and have important real-world implications for growing communities.

I. THIS CASE IS A GOOD VEHICLE TO RESOLVE ACKNOWLEDGED CIRCUIT SPLITS ON IMPORTANT ISSUES

The federal courts of appeals are deeply divided on two important questions pertaining to the scope of federal preemption of state infrastructure regulation. Both questions merit this Court's review, and Green Valley offers no convincing reason why the Court should delay any longer in resolving the acknowledged divisions of authority.

A. The First Question Warrants Review

The first question involves the Fifth Circuit's decision to create an acknowledged split with the Eighth Circuit over the breadth of the federal monopoly granted to rural utilities receiving federal loans under 7 U.S.C. § 1926. Section 1926(b) provides that "[t]he service provided or made available through" an indebted utility is protected from competition. The Eighth Circuit correctly held in *Public Water Supply District No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010), that the phrase "'the service provided or made available' is best interpreted to include only the type of service financed by the qualifying federal loan." *Id.* at 520. In this case, the Fifth Circuit expressly "disagree[d]" with "the Eighth Circuit's reasoning in *Public Water Supply*." App. 5a & n.8. It held instead that § 1926(b) creates a monopoly for any service made available by a federally indebted utility, including services that are *not* supported by a federal loan. Green Valley makes no effort to distinguish this case from *Public Water Supply* or otherwise to dispute the acknowledged division of authority between the Fifth and Eighth Circuits on the first question presented.

Green Valley argues (at 1, 6) that the circuit split should be allowed to persist, reasoning that the issue rarely arises because only two courts of appeals have addressed it. That ignores the day-to-day negotiations that take place between rural utilities and local governments against the backdrop of § 1926(b). *See* Scott Hounsel, Note, *Water Associations and Federal Protection under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 Tex. L. Rev. 155, 170-81 (2001) (collecting evidence demonstrating that judicial interpretations of § 1926(b) dictate outcomes in negotiations among competing service providers). Clashes

between rural utility associations and expanding municipal governments occur frequently today and will only increase in the coming years. Pet. 28-29; *see* Hounsel, 80 Tex. L. Rev. at 191. With more than 15,000 loans under § 1926 outstanding, and 95 percent of those loans supporting only one type of service (either water or sewer), Pet. 8, many of those disputes can be expected to involve circumstances like those here, where a utility asserts monopoly protection for a service not supported by the federal loan.

Those confrontations will be resolved in the rural utility's favor in the Fifth Circuit and against the utility in the Eighth Circuit, likely without judicial involvement in either case. This Court's review is warranted to prevent the proliferation of divergent outcomes depending solely on geography and "to provide clarity to . . . local governments around the country." Texas Municipal League et al. *Amicus* Br. 13.

The Fifth Circuit's interpretation also maximizes interference with state and local decision-making. Because many rural utilities are "incapable of meeting the water demands" of new customers in urbanizing areas, § 1926 picks economic development "winners and losers" when "inadequate water infrastructure drives investment elsewhere." Hounsel, 80 Tex. L. Rev. at 157, 177-78; *see also* Order at 8, *Crystal Clear Special Util. Dist. v. Marquez*, No. 1:17-CV-254-LY, ECF #66 (W.D. Tex. Mar. 29, 2018) ("*Crystal Clear*") (granting summary judgment to utility under § 1926(b) even though its cost of service would be "alarmingly high" compared to municipal service). Unduly expansive interpretations of § 1926(b) also hamper efforts to address rural water-quality issues, which are a growing public-health challenge. *See* Maura Allaire et al., *National Trends in Drinking*

Water Quality Violations 4-5 (Feb. 27, 2018) (Texas is a "hot spot[]" of rural water-safety violations), *available at* https://www.ncbi.nlm.nih.gov/pubmed/29440421. Although some intrusion into state infrastructure planning is inherent in § 1926's design, Congress struck a careful balance that the Fifth Circuit abrogated by radically extending the federal monopoly.

The Fifth Circuit's rejection of the Eighth Circuit's sound reasoning on the first question presents a well-defined, important, and purely legal conflict that merits this Court's attention now.

B. The Second Question Warrants Review

The second question presented implicates an acknowledged 4-1 split over what it means for service to be "provided or made available" by a rural utility under § 1926(b). In this case, the Fifth Circuit reaffirmed its prior holding in *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996) (per curiam), that, "[w]here a [state certification] imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926(b)." App. 3a-4a. By contrast, the Fourth, Sixth, Eighth, and Tenth Circuits have held that a rural utility seeking § 1926(b) protection must show not only that it has a legal duty to provide service under state law, but also that the service is actually being or can promptly be furnished.[1] Multiple courts of appeals have recognized the conflict:

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[1] *See Chesapeake Ranch Water Co. v. Board of Comm'rs of Calvert Cty.*, 401 F.3d 274, 280-81 (4th Cir. 2005); *Ross Cty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 399 (6th Cir. 2011); *Public Water Supply*, 605 F.3d at 521; *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 654 F.3d 1058, 1064 (10th Cir. 2011).

"the circuits are in conflict," *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 706 (6th Cir. 2003); "[t]he test . . . varies among the courts of appeals," *Chesapeake Ranch*, 401 F.3d at 279; "[c]ourts are in disagreement," *Sequoyah Cty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1201 (10th Cir. 1999). The issue is of particular importance to property owners, who have no means to obtain adequate service when § 1926(b) preempts efforts to obtain service from a competing provider. *See* Guadalupe Valley Dev. Corp. et al. *Amicus* Br.

Green Valley does not dispute the existence of that deep, acknowledged conflict. Instead, it characterizes the second question as improperly preserved and insufficiently ripe. Opp. 12. Both contentions fail.

1. The Fifth Circuit Passed on the Second Question

The second question is properly presented because the Fifth Circuit passed on it in the course of reversing the district court's judgment dismissing Green Valley's § 1926(b) claim. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[o]ur practice permits review of an issue not pressed so long as it has been passed upon") (alteration omitted). Although the City had no obligation to "demand overruling of" the Fifth Circuit's *North Alamo* decision, *United States v. Williams*, 504 U.S. 36, 44 (1992), the City demonstrated in its Fifth Circuit brief that Green Valley "has no actual wastewater utility, only a paper utility," Pet. C.A. Br. 27. In the face of that showing, the Fifth Circuit concluded that Green Valley had made service available solely on the basis that a state certification "imposes a duty on [Green Valley] to provide [wastewater] service." App. 3a. The Fifth Circuit thus passed on the question, which suffices for certiorari review. *See Lebron*, 513 U.S. at 379; *Williams*,

504 U.S. at 41; *see also Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (granting certiorari on question whether a certain duty existed under securities laws, where defendant did not argue below that duty did not exist, but rather argued that plaintiff had pleaded insufficient facts to show a violation of the duty).

District courts in the Fifth Circuit have recognized that the decision in this case passed on the second question presented. In denying a motion to dismiss an analogous § 1926 complaint that alleged only a legal duty to serve, a district court explained that the Fifth Circuit's decision in this case "reaffirmed" the *North Alamo* rule. *Green Valley Special Util. Dist. v. Walker*, No. AU-17-CA-00819-SS, 2018 WL 814245, at *9 (W.D. Tex. Feb. 9, 2018); *see Crystal Clear* at 8 (granting summary judgment to utility under Fifth Circuit's "recent[] h[o]ld[ing]" on the second question).

2. The Second Question Is Ripe for Review

Green Valley asserts (at 2, 14) that "unresolved factual disputes" exist that, if decided in its favor on remand, would show that it is making sewer service available "under *either* party's interpretation of Section 1926(b)." But Green Valley offers no reason why the district court would entertain such factual development in light of the Fifth Circuit's binding mandate holding that Green Valley has made sewer service available for purposes of § 1926(b). The Fifth Circuit held that respondent provides a wastewater service that qualifies for § 1926(b) protection because respondent holds a state certification for that service. App. 3a-4a. The district court is bound by the Fifth Circuit's holding. It will not "adjudicate[]" whether Green Valley could satisfy a different circuit's test. Opp. 2.

Moreover, the Fifth Circuit's decision in this case already has been interpreted to foreclose the kind of factual development that Green Valley claims would occur on remand. In *Crystal Clear*, the district court denied a landowner's motion to postpone ruling on the utility's motion for summary judgment until after discovery into whether the utility was actually providing service. *See* Order, *Crystal Clear Special Util. Dist. v. Marquez*, No. 1:17-CV-254-LY, ECF #41 (W.D. Tex. Feb. 13, 2018). The court then granted summary judgment to the utility on the applicability of § 1926, reasoning that, under the Fifth Circuit's holding in this case, the utility had "provided or made available" service "by virtue of its . . . [state certification]." *Crystal Clear* at 22.

In this case, the Fifth Circuit further entrenched a split that has developed over nearly three decades and spans five courts of appeals, several of which have repeatedly addressed the question. Pet. 15-18. The issue has been thoroughly considered by the lower courts, and the time is ripe for this Court to resolve it.

II. THE FIFTH CIRCUIT INCORRECTLY EXPANDED § 1926(b)'S SCOPE

Green Valley spends most of its opposition unsuccessfully attempting to defend the Fifth Circuit's rulings on the merits. Opp. 6-11. Those arguments are incorrect and provide no reason to deny review in any event.

A. Section 1926(b) Confers A Federal Monopoly Only For Services Supported By A Federal Loan

Congress wrote that § 1926(b) protects "the service" provided by a utility and did not use a term with an expansive meaning like "any." The correct interpretation, particularly when read in context and in light

of § 1926(b)'s history and purpose, is that § 1926(b) protects only a service supported by federal funds. Pet. 19-26; *Public Water Supply*, 605 F.3d at 520-21.

Green Valley identifies no textual basis for the Fifth Circuit's expansive interpretation. The phrase "provided or made available" does not confer monopoly protection on "any service" or "whatever service," as Green Valley suggests (at 7). Nor does the phrase "such association" support the Fifth Circuit's rule. *Cf.* Opp. 6. That phrase refers to the associations eligible for funding under § 1926(a). *See* 7 U.S.C. §§ 1926(a)(1) (authorizing Secretary to fund certain "associations" identified in that provision), 1926(a)(2)(A)(i) (defining purposes for which Secretary may make loans to "such associations"). Thus, "such association" refers to an association as defined in § 1926(a), and "the service" means the service for which such eligible association has received funds.

Congress's direction to interpret singular terms as encompassing multiples "unless the context indicates otherwise," 1 U.S.C. § 1, also does not support Green Valley's interpretation. *Cf.* Opp. 7. The "context" of § 1926, which creates a federal loan program, only reinforces the conclusion that the federal monopoly created by § 1926(b) protects only the service supported by the § 1926 loan. *See Public Water Supply*, 605 F.3d at 520-21.

Green Valley's claim that Congress created a regime in which a utility's territory is "sacrosanct" as to any and all services, Opp. 9, 11, cannot be squared with the statute Congress passed. Section 1926 provides *temporary* protection *only* to those associations that receive loans and *only* during the terms of the loans. Although § 1926 undoubtedly protects rural associations in some circumstances, "it is quite mistaken to

assume . . . that whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alteration omitted). Section 1926(b) protects the rural utility where and when a federal loan is outstanding, and otherwise lets state and local officials determine whether a rural utility or a municipality should serve high-density new growth. Opp. 9. Interpreting "the service" to refer to the service for which a federal loan is outstanding comports with the balance that Congress struck.[2]

Moreover, the assertion that § 1926 should be "liberally interpreted" to favor rural associations, Opp. 7, is not "a substitute for a conclusion grounded in the statute's text and structure," particularly when such a reading would "restrict the States' sovereign capacity to regulate in areas of traditional state concern." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). Liberally construing § 1926 out of a perceived congressional preference for non-municipal service, Opp. 9, is particularly inappropriate given Congress's express preference for municipal service where available. *See* 7 U.S.C. § 1926(a)(8) (when considering competing applications to fund service to the same rural residents, Secretary must choose a city or other "general local government . . . in the absence of substantial reasons to the contrary").

Congress's concern with economies of scale also points to reading "the service" to refer to the service

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[2] Green Valley's reliance on Spending Clause doctrine (at 10-11) only undermines its position, because Green Valley points to nothing in § 1926(b) that "unambiguously" extends the federal monopoly to services not supported by a federal loan, as would be required to comply with the Spending Clause. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

funded by the federal loan. Pet. 6, 23-24; *cf.* Opp. 8-10. Economies of scale are achieved when the cost of one service is spread over more users. *See* S. Rep. No. 87-566, at 67 (1961) (whereas prior loan programs were limited to farmers, associations funded under § 1926 could also provide "service to other rural residents" so that "the cost per user is reduced and the loans are more secure"). Using one service to prop up a different service is a cross-subsidy. *See National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 828-29 & n.24 (1983) (in setting postal service rates, Congress intended "to avoid the inequity of users of one class subsidizing users of another class," or "cross-subsidies"). Green Valley points to nothing suggesting that Congress sought to encourage cross-subsidization in § 1926(b).

B. A State Certification Does Not Establish That Service Has Been Provided Or Made Available

Green Valley argues that holding a state certification is equivalent to having "provided or made available" a service for purposes of § 1926(b) because Texas law requires certification holders to provide "'continuous and adequate'" service. Opp. 13 (quoting Tex. Water Code § 13.250(a)). But, as four courts of appeals have recognized, having a state-law duty to provide service is not the same as actually "provid[ing]" a service or "ma[king]" it "available" to customers. Pet. 26-27. That approach comports with the principle that, "[a]bsent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law." *Taylor v. United States*, 495 U.S. 575, 591 (1990). Section 1926(b) contains no indication that Congress intended the "provided or made available" determination to turn on the existence of a state certification.

Moreover, Green Valley and others have argued successfully in other cases that, under the Fifth Circuit's decisions in *North Alamo* and in this case, § 1926(b) preempts state proceedings to revoke a utility's certification for failure to provide service. *See Walker*, 2018 WL 814245, at *9; *Crystal Clear* at 8, 22.[3] Thus, under Green Valley's approach, the existence of a state-law certification establishes that a service is being "provided or made available," but federal law preempts state commissions from reviewing whether the certification holder actually is providing the service or making it available. Nothing suggests that Congress intended such a perverse and circular regime.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] *See also* Green Valley et al. *Amicus* Br. at 22-23, *Mountain Peak Special Util. Dist. v. Public Util. Comm'n*, No. 03-16-00796-CV (Tex. App. filed Oct. 9, 2017) (arguing that § 1926(b) prohibits revoking certification because "the whole point of decertification is to ultimately receive the utility service from a *different* provider"). The Texas appeals court rejected Green Valley's argument in that *amicus* brief under precedent interpreting "provided or made available" in § 1926(b) to mean "presently . . . serving" or having "the physical means to do so." *Mountain Peak Special Util. Dist. v. Public Util. Comm'n*, No. 03-16-00796-CV, 2017 WL 5078034, at *8 (Tex. App. Nov. 2, 2017). The fact that this case would have come out differently in Texas's intermediate appellate court is another reason for this Court to grant certiorari.

Respectfully submitted,

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