No. 17-938

In the Supreme Court of the United States

CITY OF CIBOLO, TEXAS,
Petitioner,

v.

GREEN VALLEY SPECIAL UTILITY DISTRICT,
Respondent.

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

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Paul M. Terrill, III
Counsel of Record
G. Alan Waldrop
Ryan D. V. Greene
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
pterrill@terrillwaldrop.com

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

Cited Authorities

INTRODUCTION

The Solicitor General correctly concluded that neither question presented by Petitioner warrants review by this Court. However, Petitioner has seized on the fact that the Solicitor General disagrees with the Fifth Circuit below to advocate for review in its Supplemental Brief. Nothing in Petitioner's Supplemental Brief warrants either a deviation from the Solicitor General's recommendation or review by this Court.

First, there is the extremely narrow dispute involving how 7 U.S.C. § 1926(b)'s protections apply in the small subset of cases in which a federal loan funds a utility's water services and an encroaching municipality seeks to take a portion of the utility's wastewater service area. As the Solicitor General observes, not only has this narrow issue only arisen twice in the 57 years since § 1926(b)'s enactment, but this very issue is about to disappear in this particular case. As the Solicitor General correctly notes, Respondent Green Valley Special Utility District's new water and wastewater loan application has been approved by the Department of Agriculture, and that loan will close and fund both water and wastewater service.

This first issue does not merit this Court's limited resources. Indeed, the issue may not ever arise again.

Second, there is the question of what constitutes "providing or making service available" under § 1926(b) when applied under differing state laws. As the Solicitor General observes, Petitioner did not

raise this issue in either the district court or the Fifth Circuit. Because the issue was not raised, Respondent had no opportunity to present its evidence that, today, Respondent is in fact providing active sewer service within its service area. Respondent owns pipes in the ground and is actively collecting sewage effluent from residential customers. Further, there is no real circuit split on this issue because of fundamental differences in the underlying state laws. Had this issue been properly raised below, the lower courts would have addressed the distinction between a "duty to serve" state like Texas versus a "right to serve" state. This distinction is critical to the issue but had no opportunity to be briefed or addressed at any stage of this litigation.

This second issue does not merit this Court's limited resources, and these factual and legal issues should not be explored for the first time before this Court. Indeed, the issue may have no impact on the parties to this case.

SUPPLEMENTAL ARGUMENT

I. Whether the court of appeals correctly construed § 1926(b) on the narrow issue in this case does not warrant the Court's review.

Petitioner asks this Court to decide whether § 1926(b)'s protections are confined to the specific services actually funded by a utility's federal loan. Pet. 19-26. In the 57 years since the statute's enactment, however, this question has only reached federal court twice—this case and *Public Water Supply District No. 3 of Laclede County v. City of*

Lebanon, 605 F.3d 511, 520 (8th Cir. 2010). In the unlikely event that this issue takes on a broader significance in the future, the Court can take up the question at that point, perhaps after more lower courts have weighed in. An issue arising this infrequently—only two courts of appeal have written on it in the history of the statute—does not warrant review at this juncture.

Certainly, Respondent disagrees with the Solicitor General that the Fifth Circuit's decision below "is incorrect." U.S. Br. 9. Section 1926(b), by its plain language, protects *any* of "the service provided or made available" through the federally-indebted utility. *See* 7 U.S.C. § 1926(b). The Solicitor General's review of the statute reads words into it that are not there—just as the Eighth Circuit had done. Under § 1926(b), as long as the utility provides or makes available both water and sewer service, then both are protected, with no limitation based on whether the federal loan funded only water service, only sewer service, or both water and sewer service. *See id.*

Indeed, sufficient proof that the Fifth Circuit's decision is correct is the opinion itself. The Fifth Circuit's opinion is well reasoned. It accurately discusses the plain language of the federal statute, as well as the undisputed policies underlying the federal statute. The Fifth Circuit's approach is the right one.

After all, the very purpose of § 1926(b) is to provide "funds for water and waste projects serving the most financially needy communities." 7 C.F.R. § 1780.2. Allowing Petitioner to cherry pick the *least*

financially needy communities in Respondent's utility service area, based on a hyper-technical determination that the federal loan's funds were not applied broadly enough, would damage Respondent's ability to serve the neediest communities (which are farther from the property the Petitioner want to take). Interpreting § 1926(b) in a way that permits cities like Petitioner to "skim the cream" from a rural utility's service area would be flatly inconsistent with the language and purpose of the statute. *See City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059-60 (5th Cir. 1987). Section 1926(b) reflects a congressional policy choice to protect rural users who are not close to a municipality and who will never receive service from a city. Preserving a rural utility's complete service area—water and sewer—protects the utility's investment in its *entire* service area for the benefit of *all* of its users.

However, this Court need not proceed any farther on this issue in this case. The Department was correct to inform the Solicitor General that Respondent's application for a § 1926(b) loan to provide funds for Respondent's sewer service has been approved by the Department. U.S. Br. 13. Respondent's § 1926(a) loan for its wastewater service will close in a matter of days, or weeks at most, and in any case prior to this Court rendering a decision in this case. This issue, as a result, will be moot for the parties in this case, and moreover, given the past 57 years, there is even a possibility it will lack any significance to any other person in this country. Therefore, this Court should decline to review this question at this time.

Moreover, Petitioner is simply incorrect in its Supplemental Brief that the closing of the § 1926(b) loan funding Respondent's sewer service "would not moot" the issue here. Pet. Supp. 5. No federal court has adopted Petitioner's novel position that § 1926(b)'s protection of a sewer service area would only extend to properties for which the utility could prove the loan funds "extend to the contested area." Pet. Supp. 6. On the contrary, § 1926(b)'s protections are not limited based on the specific geographical area benefiting from the loan. *See Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517 (4th Cir. 1999). No Circuit Court of Appeals has disagreed on this point. *See Lebanon*, 605 F.3d at 519 n.8. As the Solicitor General correctly observed, once Respondent's sewer loan closes, "the first question presented will have no continuing significance to the parties in this case." U.S. Br. 14.

II. Whether Respondent has provided or made available wastewater service is not before the Court and does not warrant review.

Petitioner also asks the Court to decide whether a utility's possession of a valid certificate of convenience and necessity (a "CCN") granted by the Texas state agency which regulates water and wastewater utilities (the Public Utility Commission of Texas, *i.e.*, the "PUC") establishes, for purposes of § 1926(b), that the utility is making service available. Pet. 26-28. Petitioner argues that the Court should impose only the standard of a "pipes in the ground" test. However, the Solicitor General correctly observes that Petitioner "did not raise that question below." U.S. Br. 15. The result is that this

case does not squarely present the question Petitioner attempts to raise.

Certainly, Respondent disagrees with the Solicitor General that the Fifth Circuit's precedent on this issue "is incorrect." U.S. Br. 15. The Fifth Circuit correctly held—back in 1996—that under Texas law, the utility's legal duty to provide service throughout its agency-certificated service area satisfies § 1926(b)'s requirement that the utility provide service in order to be protected from curtailment of its service area. *See N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996). This critical component of Texas water law—imposition of a legal duty—means that contrary to the framing of this case by Petitioner, there is not actually a circuit split on this issue.

The reason why the Fifth Circuit held a Texas CCN proves service is made available is because in Texas, a CCN imposes a legal duty to make service available. *No other* Circuit Court of Appeals has construed § 1926(b) in the context of such a state-law-mandated legal duty to serve all customers. The four other Circuit Courts of Appeals that have weighed in on the meaning of "making service available" in § 1926(b) were analyzing utilities in states in which there was no state law duty to serve. *See, e.g.*, *Lebanon*, 605 F.3d at 518-19 (Missouri utility had no exclusive ability to serve customers already being served by city); *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 707 (6th Cir. 2003) (Ohio utility had right, but no duty, to serve customers outside its boundaries); *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191

F.3d 1192, 1202-03 (10th Cir. 1999) (Oklahoma utility had no obligation or duty to provide service); *Bell Arthur Water Corp.*, 173 F.3d at 526 (North Carolina utility had no statutory duty to provide service). By contrast, in Texas, unless and until the PUC determines that the utility is failing to meet its legal duty to make service available within its CCN service area (in a PUC administrative proceeding for that purpose), the CCN itself is legally sufficient to prove that service is being made available. *See N. Alamo*, 90 F.3d at 916.

Although citing to the four other courts of appeals, the Solicitor General failed to recognize in its Brief this critical component of Texas utility law. U.S. Br. 16-17. This aspect of Texas law is unique to the issue that the Fifth Circuit considered in *North Alamo*. It does not appear in any of the cases that the Solicitor General and Petitioner erroneously cite as contrary to *North Alamo*. Under *North Alamo*, a legal duty to serve (*i.e.*, a valid CCN) and a factual capability to serve (*e.g.*, pipes in the ground) are not a "two-prong test," but rather are independent methods of proving in Texas that service is made available. *See id.* Because the four other courts of appeal could not rely on the former, they were compelled to rely solely on the latter. There is simply not a circuit split on this issue as described by the Petitioner and as uncritically accepted by the Solicitor General.

In states such as Texas, in which a utility has not only a legal right to provide service, but also a legal duty to provide service, it makes sense, as the Fifth Circuit held in *North Alamo*, to allow the CCN to

operate as legal proof that the utility is providing service. A Texas utility has a statutory duty to provide "continuous and adequate" service to all customers within its CCN service area. *See* TEX. WATER CODE § 13.250(a). If the utility fails to meet this obligation, the PUC may decertify such CCN service area under state law. *See id.* § 13.254(a). At that point, if decertification is done correctly, the property is no longer within the CCN, and the utility must turn to the "pipes in the ground" test to establish the utility's right, if any, to the protections of § 1926(b).

Because a legal duty to provide service applies in Texas, the Fifth Circuit's standard for when service is made available appropriately respects the Texas state agency's ability to review the utility's ability to provide service in the first instance. Federal courts in Texas have no need to examine potentially complex factual disputes over how sufficiently and how immediately a utility may be able to provide service to individual properties unless and until the PUC—the state agency that supervises such issues—first makes its own determination that the utility is not complying with its service obligations under state law.

However, this Court need not proceed any farther on this issue in this case. As the Solicitor General recognized, the issue was not properly developed below. This case was adjudicated by the district court on a motion to dismiss based on the pleadings. There has been no record development on any contested factual issue, and no litigation of any contested material facts. The fact is that even if the

"pipes in the ground" test were to be applied here, Respondent *has* pipes in the ground. Thus, any opinion by this Court on this issue would not actually dispose of the case, but would merely serve as an advisory opinion to the parties in the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul M. Terrill, III
Counsel of Record
G. Alan Waldrop
Ryan D. V. Greene
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
pterrill@terrillwaldrop.com

Attorneys for Respondent
Green Valley Special Utility
District