

Duty to Serve: Sovereign Immunity in Municipal Water Utility Suits

Aligning Affordability with Public Health Goals in Rural Water Utility Systems

Sree Yeluri*

This Note examines the competing federal, state, and local interests in the regulation of drinking water utilities in rural areas. Focusing on the U.S. Department of Agriculture’s Water and Waste Disposal Loan and Grant Program (7 U.S.C. § 1926) as a case study, this Note explores legal challenges arising from the statute’s anti-curtalement provision. Suits under this provision are typically brought by state-created water utility districts against state public utility commissions and involve novel questions about the scope of municipal immunity and the likelihood of injunctive relief. These suits reveal a link between regulatory fragmentation and affordability. This Note then proposes two structural changes: first, state utility commissions must clarify that utilities’ public interest obligations include affordability; and second, state and federal agencies involved in regulating water utilities must prioritize regionalization to advance both safety and affordability. Strengthening public control over water utilities can help avoid Section 1926 litigation and facilitate increased access to affordable water for rural communities.

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* J.D. Candidate, Columbia Law School, 2026; B.A., Rice University, 2021. I sincerely thank Professor Camille Pannu for her invaluable mentorship and feedback throughout the development of this Note; Professor Michael Gerrard for his thoughtful comments; and the wonderful staff of the *Columbia Journal of Environmental Law* for their editorial assistance. I am especially grateful to my parents for their patience and support.

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I. INTRODUCTION

Institutional fragmentation at the federal, state, and local levels deepens drinking water insecurity.¹ Recent reporting at the national level has highlighted challenges with water affordability and access across water systems. In December 2024, the U.S. Environmental Protection Agency (EPA) issued a report to Congress on water affordability, estimating that between 12.1 million and 19.2 million households in the United States lack affordable access to water.² The EPA defined water affordability as the “ability of a household to pay for basic water services necessary for drinking, cooking, cleaning, and sanitation without experiencing undue

1. K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America's Water Crisis*, 53 HARV. C.R.-C.L. L. REV. 533 (2018) (arguing that the lack of funding and exclusionary water infrastructure at the federal, state, and local levels is contributing to water insecurity); Camille Pannu, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 CALIF. L. REV. 223 (2012) (arguing that the structure of local water districts contributes to water inequality); Carolina L. Balazs and Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 AM. J. OF PUB. HEALTH 603 (2014) (listing structural failures at all levels of government that are shaping the lack of access to safe drinking water, including “selective enforcement of drinking water regulations, noncompliance with federal standards, inequities in access to funding, and (the absence of) a community’s political power in accessing a safe water supply”); Joseph W. Kane and Anna Singer, *Exploring and improving how state water funding flows amid a surge in federal infrastructure investment*, THE BROOKINGS INSTITUTE (2024).

2. U.S. ENV’T PROT. AGENCY (“EPA”), *WATER AFFORDABILITY NEEDS ASSESSMENT: REPORT TO CONGRESS 2* (2024), <https://www.epa.gov/system/files/documents/2024-12/water-affordability-needs-assessment.pdf> [<https://perma.cc/HZA9-Y3MT>] [hereinafter EPA WATER AFFORDABILITY NEEDS ASSESSMENT].

hardship.”³ The U.S. Water Alliance estimated that more than 2 million people in the United States did not have *any* access to running water and indoor plumbing in 2019.⁴ The U.S. Department of Health and Human Services shared that 28.3 million people served by 787 of the largest drinking water providers experienced undue hardships paying their water utility bills.⁵ The number of Americans facing affordability challenges is expected to increase to over 30% of water users in federally-regulated community water systems.⁶

There are about 50,000 community water systems in the United States, varying in size and ownership structure.⁷ Community water systems include city- and county-owned systems, water cooperatives, special-purpose districts, investor-owned utilities, and nonprofits.⁸ A subset of community water systems, “public water systems,” may be privately or

3. *Id.* at 14. Historically, EPA has stated that water is affordable when the combined cost of water and sewage services falls below 4.5% of net household income. See EPA WATER AFFORDABILITY NEEDS ASSESSMENT, *supra* note 2, at 2. Some states have set affordability at 1.5 to 3% of net household income. Cal. Legislative Analyst’s Office, *Expanding Access to Safe and Affordable Drinking Water in California—A Status Update* (Nov. 10, 2020), <https://lao.ca.gov/Publications/Report/4294> [<https://perma.cc/H5HG-BX3F>] (setting affordability at 1.5–2.5% of community median household income); S.B. 549, 102d Leg. (Mich. 2023) (setting affordability threshold at 3% of household income); Pennsylvania Infrastructure Investment Authority (PENNVEST), *Appendix D – Clean Water and Drinking Water Disadvantaged Community and Affordability Criteria* in DELAWARE RIVER BASIN STATE REVOLVING FUND PLAN (2023), <https://www.americanrivers.org/wp-content/uploads/2023/02/Appendix-D.-Affordability-Criteria.pdf> [<https://perma.cc/JG7F-SQ8N>] (setting affordability at 0.5 to 1.5% of community adjusted median household income).

4. STEPHEN GASTEYER ET AL., U.S. WATER ALLIANCE & DIG DEEP, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL PLAN 8, 12 (2019), https://uswateralliance.org/wp-content/uploads/2023/09/Closing-the-Water-Access-Gap-in-the-United-States_DIGITAL.pdf [<https://perma.cc/JL67-E5LV>].

5. U.S. DEP’T OF HEALTH & HUM. SERVS., LOW INCOME HOUSEHOLD WATER ASSISTANCE PROGRAMS: FINAL IMPLEMENTATION AND IMPACT REPORT 3 (2025), <https://acf.gov/sites/default/files/documents/ocs/LIHWAP-Final-Impact-and-Implementation-Report.pdf> [<https://perma.cc/L3P3-QLPD>] (citing Lauren A. Patterson, Sophia A. Bryson & Martin W. Doyle, *Affordability of Household Water Services Across the United States*, 5 PLOS WATER e0000123 (May 10, 2023), <https://doi.org/10.1371/journal.pwat.0000123> [<https://perma.cc/8MD4-TMU3>]).

6. Nina Lakhani and Juweek Adolphe, *Key findings: The Guardian’s water poverty investigation in 12 US cities*, THE GUARDIAN (Jun 26, 2020), <https://www.theguardian.com/environment/2020/jun/23/full-report-read-in-depth-water-poverty-investigation> [<https://perma.cc/2D7F-6EEL>]; see also Sharmila Murthy, *Disrupting Utility Law for Water Justice*, 76 STAN. L. REV. 597, 610–18 (2024) (describing water affordability challenges across the United States).

7. ELENA H. HUMPHREYS, CONG. RSCH. SERV., R48271, PAYING FOR DRINKING WATER: BACKGROUND AND ISSUES FOR CONGRESS (2026). Community water systems serve at least 25 individuals year-round. Safe Drinking Water Act §1401(15), 42 U.S.C. §300f(15).

8. STEVEN DELLER, ANN HOYT, BRENT HUETH & REKA SUNDARAM-STUKEL, UNIV. WIS. CENT. FOR COOPERATIVES, RESEARCH ON THE ECONOMIC IMPACT OF COOPERATIVES 54 (June 19, 2009), https://reic.uwcc.wisc.edu/sites/all/REIC_FINAL.pdf [<https://perma.cc/WV4E-S483>].

publicly owned, must operate for at least 60 days a year, and serve an average of at least 25 people or provide water to at least 15 service connections.⁹ Ninety percent of the nation's public water systems serve fewer than 10,000 people.¹⁰

In general, the EPA provides federal oversight to these community water systems under the Safe Drinking Water Act ("SDWA");¹¹ state governments require water quality testing, reporting, and rate disclosure;¹² and local governmental and quasi-governmental entities make nearly all funding and operational decisions for the administration of those water systems.¹³ Recognizing the unique role of states in ensuring environmental protection, the Safe Drinking Water Act relies on cooperative federalism and citizen-monitoring for its enforcement.¹⁴ States, in turn, rely on cooperative sub-federalism with water agencies to ensure systems provide SDWA-compliant drinking water services to residents.¹⁵ However, there is significant overlap and sometimes conflict between the three levels; for

9. *Information about Public Water Systems*, EPA (Oct. 30, 2024), <https://www.epa.gov/dwreginfo/information-about-public-water-systems> [https://perma.cc/VVW6-WYL3].

10. NAT'L CONF. OF STATE LEGS., *STATE POLICY OPTIONS FOR SMALL AND RURAL WATER SYSTEMS* (Nov. 23, 2022), <https://www.ncsl.org/environment-and-natural-resources/state-policy-options-for-small-and-rural-water-systems> [https://perma.cc/XQ2R-H5E8].

11. Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26. See *Drinking Water Regulations*, EPA (Feb. 24, 2026), <https://www.epa.gov/dwreginfo/drinking-water-regulations> (for example, while EPA is responsible for setting limits on contaminants in drinking water, states can set and enforce standards above the EPA's minimum).

12. All states have an agency-level department that oversees the environmental and public health mandate of the SDWA. All but five states have public utility commissions or public service commissions that regulate for-profit water systems. Some states' commissions also regulate publicly owned water systems. HUMPHREYS, *supra* note 7; STACEY I. BERAHZER ET AL., UNIV. N.C. CHAPEL HILL ENV'T FIN. CTR., *NAVIGATING LEGAL PATHWAYS TO RATE-FUNDED CUSTOMER ASSISTANCE PROGRAMS: A GUIDE FOR WATER AND WASTEWATER UTILITIES* (2017), <https://efc.sog.unc.edu/wp-content/uploads/sites/1172/2021/06/Navigating-Pathways-to-Rate-Funded-CAPs.pdf> [https://perma.cc/Y8DQ-W65N].

13. Municipally owned utilities are often granted power to make their own operational and financing decisions. See generally, Priya Baskaran, *Thirsty Places*, 3 UTAH L. REV. 501 (2021) (comparing local government financing, taxation, and spending policies in Flint, Michigan, and McDowell County, West Virginia); Comment, *Municipal Operation of Public Utilities*, 41 YALE L.J. 116, 122 (1931); Cleveland Ferguson III, *Have the Courts (Finally) Unscrambled Franchise Rights of IOUs and Local Governments?*, FLA. B.J. at 22, 26 (Nov. 2002) ("This creates a recipe for tension between the statutes, state agencies, and local governments."); Kevin G. Glade, *CP National Corp. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Power Systems*, 1982 UTAH L. REV. 913, 918 (1982) ("Absent state commission jurisdiction, customers beyond corporate limits would be deprived of both political and regulatory recourse against the municipal utility.")

14. See A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 WM. & MARY ENV'T L. & POL'Y REV. 232, 238–47 (1997) (discussing the 1974 amendments to the Safe Drinking Water Act and its cooperative federalism framework).

15. Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 187 (2018); see also Hannah Wiseman, *Dysfunctional Delegation*, 35 YALE J. ON REG. 233, 259–65 (2008).

example, there can be tension between federal, state, and local authorities when it comes to regulating the service territories of water utilities.¹⁶

EPA recently estimated that the cost to improve water infrastructure over the next 20 years will amount to \$1.25 trillion.¹⁷ The current Administration's deregulatory efforts, combined with its significant federal spending cut proposals, place additional stress on an already burdened system. Rural areas are especially impacted by decreased federal funding for water and wastewater infrastructure.¹⁸

Rural water systems face significant challenges fulfilling the dual mandates of affordability and public health.¹⁹ One result of this increased fragmentation is that rural areas are often left to fend for themselves and are burdened with high-cost, low-user systems or systems that fail to keep up with health and safety standards.²⁰ Though small and rural water systems make up 81% of public water systems, they account for 93% of violations for noncompliance with federal drinking water standards.²¹ This Note examines the regulation of water utilities and the lack of universal access to drinking water in rural areas. Part I outlines the federal, state, and local framework surrounding the operation of water utilities, focusing on exclusive service territories and a water utility's "duty to serve." Part II analyzes legal challenges arising from conflict between the local and federal interests in the regulation of water utilities, using the USDA's Water and Waste Disposal Loan and Grant Program (7 U.S.C. § 1926) as a case study. These cases highlight the tension between protecting federal investment in rural infrastructure development and ensuring that local water utilities provide adequate and affordable access to water. Part III

16. See *infra* Section III.A (on decertification challenges).

17. This figure includes both drinking water and clean water (sewage and stormwater) infrastructure. EPA WATER AFFORDABILITY NEEDS ASSESSMENT, *supra* note 2, at 5.

18. Amanda Fencl, *More Federal Funding Can Close the Rural Water Gap. Will Congress and the USDA Step Up?*, THE EQUATION (May 8, 2023), <https://blog.ucs.org/amanda-fencl/more-federal-funding-can-close-the-rural-water-gap/> [<https://perma.cc/U2FQ-MWRB>] ("Rural communities and communities of color are more at risk of unsafe water and inadequate sanitation due to historical disinvestment, regulatory failures, and structural racism.").

19. See, e.g., *Water Week 2025 to Focus on Critical Legislative and Regulatory Challenges Facing the Water Sector*, NAT'L ASS'N OF CMTY. WATER AGENCIES (Apr. 7, 2025), <https://www.nacwa.org/news-publications/news-detail/2025/04/07/water-week-2025-to-focus-on-critical-legislative-and-regulatory-challenges-facing-the-water-sector> [<https://perma.cc/AHZ3-EU22>] ("The water sector is pushing for Congress to establish a permanent low-income water assistance program to help utilities modernize infrastructure while maintaining affordable rates.").

20. See Priya Baskara, *Thirsty Places*, 3 UTAH L. REV. 501 (2021); Sharmila Murthy, *Disrupting Utility Law for Water Justice*, 76 STAN. L. REV. 597 (2024).

21. Eli Gullett, *States Find Innovative Ways to Support Rural and Small Water Systems*, PEW CHARITABLE TRS. (May 22, 2026), <https://www.pew.org/en/research-and-analysis/articles/2026/05/22/states-find-innovative-ways-to-support-rural-and-small-water-systems> [<https://perma.cc/LG46-TGQM>].

explores the link between fragmentation and affordability, and argues that strengthening public control over water utilities and clarifying utilities' "public interest" obligations can facilitate increased access to affordable water for rural communities.

II. REGULATORY FRAGMENTATION IN WATER UTILITIES

Aging water infrastructure and climate change threats drive the enormous investment gap in water infrastructure systems.²² There is clearly a pressing need for significant restructuring in the water utility sector to fulfill the dual goals of public health and affordability.

A. Federal, State, and Local Governmental Funding and Regulation

The federal government has primarily focused on setting health-based regulations, leaving affordability and economic regulation to state and local governments. Although the SDWA mentions affordability, the federal government's involvement in water utility regulation is largely limited to establishing health-based limits for contaminants in drinking water pursuant to its authority under the Safe Drinking Water Act.²³ The EPA sets those limits, called national primary drinking water standards, for public water systems. States and tribes are then responsible for developing regulations regarding the "technical, managerial, and financial capabilities" for enforcing those standards.²⁴ The federal government is not involved in setting rates,²⁵ though certain water utilities receiving federal funding are sometimes subject to federal control and oversight.²⁶

22. Joseph Kane and Anna Singer, *Exploring and improving how state water funding flows amid a surge in federal infrastructure investment*, BROOKINGS INST. (Dec. 5, 2024), <https://www.brookings.edu/articles/exploring-and-improving-how-state-water-funding-flows-amid-a-surge-in-federal-infrastructure-investment/> [https://perma.cc/U3WM-Y479].

23. 42 U.S.C. § 300g-1(b)(1)(A) ("The Administrator shall ... publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for a contaminant ... if the Administrator determines that ... the contaminant may have an adverse effect on the health of persons...").

24. U.S. GOV'T ACCOUNTABILITY OFF. (GAO), GAO21-291, PRIVATE WATER UTILITIES: ACTIONS NEEDED TO ENHANCE OWNERSHIP DATA 11 (Mar. 2021).

25. JANICE A. BEECHER, LINCOLN INST., *Economic Regulation of Utility Infrastructure*, in INFRASTRUCTURE AND LAND POLICIES 87, 97 (Gregory K. Ingram and Karin L. Brandt, eds., 2013) (there is "no federal economic regulatory presence in the water sector, where states have primacy.") [hereinafter BEECHER, *Economic Regulation*].

26. LISA S. BENSON ET AL., CONG. RSCH. SERV., R46471, FEDERALLY SUPPORTED PROJECTS AND PROGRAMS FOR WASTEWATER, DRINKING WATER, AND WATER SUPPLY INFRASTRUCTURE (Sept. 10, 2025) (describing federal regulatory authority over certain water infrastructure projects).

Federal funding to support water utilities is largely focused on improving safety, reliability, and affordability.²⁷

There are several different federal funding mechanisms directed at providing and improving critical water infrastructure, including: EPA's Safe Drinking Water and Clean Water State Revolving Fund programs; EPA's Water Infrastructure Finance and Innovation Act; USDA's Rural Water and Waste Disposal program; Department of Housing and Urban Development's (HUD) Community Development Block Grant program; and the Department of the Interior's municipal and industrial water supply projects.²⁸

The current Administration's deregulatory efforts intensify these challenges through both climate change denial²⁹ and spending cut proposals. Federal spending cuts threaten to exacerbate water insecurity, particularly for people living in rural areas.³⁰ Not only would federal cuts directly diminish rural development programs,³¹ but, on average, states receive around a third of their general revenue from the federal government.³² Those funds have an outsized effect on rural communities, which are net recipients of federal funding. During his first term, Trump proposed eliminating U.S. Department of Agriculture (USDA) funding for water and wastewater infrastructure projects for clean and reliable water systems, without which "many small communities would lack access to clean water."³³ In March 2025, Speaker Mike Johnson proposed eliminating \$1.4 billion in earmarked funding from the EPA's State Revolving Fund (SRF) program and \$117 million from USDA's Rural

27. *See, e.g., id.* at 40 (EPA's SDWA Drinking Water State Revolving Fund Loan Program "directs states to give funding priority to infrastructure projects that are needed to achieve or maintain compliance with SDWA requirements, protect public health, and assist systems with economic need.").

28. BENSON ET AL., *supra* note 26, at 3.

29. *See, e.g.,* Scott Waldman, *Hegseth Orders Elimination of Climate Defense Planning but Still Wants Extreme Weather Preparation*, SCI. AM. (March 21, 2025) <https://www.scientificamerican.com/article/hegseth-orders-elimination-of-pentagon-climate-planning-but-wants-extreme/> [<https://perma.cc/4AKA-V2MZ>] (rejecting need for climate adaptation efforts).

30. CENTER FOR BUDGET AND POLICY PRIORITIES, 2025 BUDGET STAKES: RURAL COMMUNITIES WOULD BE HURT BY PROPOSED POLICIES AND CUTS (Feb. 20, 2025).

31. *Id.*

32. ADAMS G. LEVINE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: TRENDS AND ISSUES (June 26, 2025) ("Federal funds (the vast majority of which are comprised of grants) account for a little over one-third of total state government revenue[.]").

33. SEN. DEBBIE STABENOW, U.S. S. COMM. ON AGRIC., NUTRITION, AND FORESTRY, PRESIDENT TRUMP IS TURNING HIS BACK ON RURAL AMERICA (Apr. 2017).

Water and Waste Disposal assistance program, amounting to a “20 percent cut in funding for rural water and wastewater projects.”³⁴

Public spending on water infrastructure as a share of GDP has remained between 0.73-0.98% over the last 70 years.³⁵ Although the federal government provided nearly half of total funding for water infrastructure project prior to the 1980s,³⁶ the bulk of public funding for water infrastructure today, however, comes from state and local governments, which contribute 96% of funding towards water utilities (including drinking water supply and wastewater treatment facilities) and 69% towards water containment systems (including dams, levees, reservoirs, watersheds, and sources of freshwater, like lakes and rivers).³⁷ Despite the relatively low federal share of public expenditure on water (4% of total spending on water supply and 31% on water containment), federal assistance remains crucial to maintaining the safety, reliability, and affordability of water, particularly in low-income and rural areas.³⁸

Additionally, there are secondary implications for water affordability resulting from federal spending cuts. Without federal support, states would be forced to allocate limited funding to different vital services. Despite local governments investing more than \$2.3 trillion in water and sewer infrastructure between 1993 and 2019 (not adjusted for inflation), many water users still lack access to reliable drinking water and wastewater systems.³⁹ The federal infrastructure funding gap has continued to increase for water infrastructure, resulting in the financial burden largely falling on ratepayers and local governments through debt financing.⁴⁰

Rural communities, however, often lack access to the kinds of municipal funding opportunities available to cities. In recognition of those gaps in funding availability, the federal government has historically provided

34. *House GOP Spending Bill Guts Essential Water, Agriculture Programs*, FOOD & WATER WATCH (March 10, 2025), <https://www.foodandwaterwatch.org/2025/03/10/house-gop-spending-bill-guts-essential-water-agriculture-programs/> [https://perma.cc/6D2D-LPFX].

35. Calculated using Supplemental and Historical Data from the United States, in nominal dollars. U.S. CONG. BUDGET OFFICE, PUBLIC SPENDING ON TRANSPORTATION AND WATER INFRASTRUCTURE, 1956 TO 2023 (Feb. 26, 2025); U.S. CONG. BUDGET OFFICE, HISTORICAL DATA AND ECONOMIC PROJECTIONS (Jan. 2025).

36. JONATHAN L. RAMSEUR AND MARY TIEMANN, CONG. RSCH. SERV., R96647, WATER INFRASTRUCTURE FINANCING: HISTORY OF EPA APPROPRIATIONS (Apr. 10, 2019).

37. U.S. CONG. BUDGET OFF., PUBLIC SPENDING ON TRANSPORTATION AND WATER INFRASTRUCTURE, 1956 TO 2023 (Feb. 26, 2025).

38. LISA S. BENSON, CONG. RSCH. SERV., R46912, USDA RURAL BROADBAND, ELECTRIC, AND WATER PROGRAMS: FY2022 APPROPRIATIONS, CONGRESSIONAL RESEARCH SERVICE (Sept. 16, 2021).

39. *Local Governments Shoulder Heaviest Part of Water Infrastructure Improvement Costs*, NAT'L LEAGUE OF CITIES (Aug. 8, 2022), <https://www.nlc.org/article/2022/08/08/local-governments-shoulder-heaviest-part-of-water-infrastructure-improvement-costs/> [https://perma.cc/FMF2-999C].

40. *Id.*

grant and loan programs through USDA's Water and Waste Disposal Program.

B. USDA's Water and Waste Disposal Program

The focus of Part II is the Consolidated Farm and Development Act of 1926 (7 U.S.C. § 1926), which authorizes USDA's water and waste disposal (WWD) programs.⁴¹ Section 1926 financial assistance—including direct loans, grants, and guaranteed loans—is intended to be used for “installation, repair, improvement, or expansion of rural water facilities, including costs of distribution lines and well-pumping facilities.”⁴² In 2024, the USDA obligated \$1.6 billion in loans and grants for 705 water and waste disposal projects; in 2025, the USDA appropriated \$479 million in grants and loan subsidies for its water and waste disposal programs.⁴³

Loan recipients can be “associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies.”⁴⁴ Additionally, the USDA is directed to prioritize applicants in rural areas with a population of less than 10,000 when issuing grants and direct loans, and 50,000 or fewer for guaranteed loans.⁴⁵ In 2024, the top recipients were National Rural Water Association (\$49M obligated), Municipality of Guayama (\$40M obligated), Charlotte Harbor Water Association (\$22M obligated), Puerto Rico Aqueducts and Sewers Authority (\$20M obligated), and County of Yuma (\$18M obligated).⁴⁶ In 2025, they were the National Rural Water Association (\$22M), City of Fleming Neon (\$17M), Town of Buffalo Gap (\$17M), Eastern Sierra Community Service District (\$14M), and Turtle Mountain Band of Chippewa Indians (\$12M).⁴⁷

41. 7 U.S.C. § 1926; *see also* BENSON ET AL., *supra* note 26, at 3.

42. *Id.*

43. BENSON ET AL., *supra* note 26. Once Congress provides an agency with a set amount of money for its programs (appropriation), the agency can commit these funds for specific purposes, such as when awarding a grant (obligation). After these funds are obligated, they can then be spent in the form of cash disbursements or electronic transfer of funds (outlays). Outlays can pay for obligations incurred in a prior fiscal year or in the current year. U.S. CONG. BUDGET OFF., “GLOSSARY” (July 19, 2016).

44. 7 U.S.C. § 1926(a)(1).

45. *Id.* § 1926(a)(24)(d)(1); *see* BENSON ET AL., *supra* note 26.

46. USA Spending, FY2024 Recipients, Account: Rural Water and Waste Disposal Program Account, Rural Utilities Service, Agriculture, <https://www.usaspending.gov/explorer/agency> [<https://perma.cc/EY4N-N5M7>].

47. *Id.*

Direct loans and grants are geared towards providing “funding and financing to develop and extend clean and reliable drinking water systems, sanitary sewage disposal, and stormwater drainage to rural households and businesses.”⁴⁸ Guaranteed loans program is meant to help “private lenders provide affordable financing to borrowers to improve access to clean, reliable water systems and waste disposal systems that serve rural households and businesses.”⁴⁹

Section 1926 is intended to “[p]rovide loan and grant funds for water and waste projects serving the most financially needy communities.”⁵⁰ Recipients of financial assistance under Section 1926 are typically rural water districts.⁵¹ Congress intended to ensure affordability, provide a safe and adequate supply of water, protect rural water districts from competition, and increase the likelihood of the repayment of federal loans through Section 1926.⁵²

Section 1926(b) provides a private right of action, allowing federally-indebted water utilities to sue any water utility provider that encroaches on their service territories; the anti-curtailed principle applies broadly to any competing utility, even one that has clear state or local authorization.⁵³ Suits under Section 1926 underscore the tensions between local and federal priorities in ensuring adequate access to clean water and regulating monopolies.

C. Economic Regulation and Exclusive Service Territories

The institutional character of utilities is often determined by their ownership structure. Water utilities must comply with environmental regulations regardless of ownership structure. However, ownership structure tends to determine the economic regulations that apply to the utility.⁵⁴ Furthermore, the economic regulation of water utilities is

48. BENSON ET AL., *supra* note 26.

49. *Id.*

50. 7 C.F.R. § 1780.2.

51. Scott Hounsel, *Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 TEX. L. REV. 155 (2001).

52. *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 526 (4th Cir. 1999); *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow, Ok.*, 191 F.3d 1192, 1197 (10th Cir. 1999); *Dupont Water Co. Inc. v. City of Madison, Ind.*, No. 4:23-CV-00041-SEB-KMB, 2024 WL 4348366, at *3 (S.D. Ind. Sept. 30, 2024) (quoting *Jennings Water, Inc. v. City of N. Vernon, Ind.*, 682 F. Supp. 421, 426 (S.D. Ind. 1988)).

53. *See, e.g., City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) (“This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means.”).

54. *See* NAT'L ACADS. OF SCIS., ENG'G & MED. (NASEM), *PRIVATIZATION OF WATER SERVICES IN THE UNITED STATES: AN ASSESSMENT OF ISSUES AND EXPERIENCES* 38 (2002) (“Economic

necessary due to the highly monopolistic nature of water service provision. Drinking water is a finite, essential resource, the provision of which involves high barriers to entry, high fixed costs, economies of scale, and limited substitutes.⁵⁵ There is “generally no competition in water service delivery at the local level.”⁵⁶ A key feature of public utilities, particularly water utilities, is that they often operate in an exclusive service territory.⁵⁷

Water utilities generally fall into three ownership buckets: investor-owned utilities, government-owned utilities, or non-profit utilities.⁵⁸ Investor-owned utilities (IOUs) are for-profit corporations that may be publicly- or privately-owned by shareholders.⁵⁹ Government-owned utilities serve the majority of the population; about 80% of the U.S. population is served by community water systems owned by local governments (including cities, counties, and public water authorities).⁶⁰ Nonprofit utilities are typically water cooperatives, which are consumer-owned and categorized as mutual benefit nonprofits under 501(c)(12).⁶¹

States can directly regulate utilities or allocate certain powers to local entities. Municipal utility districts are created by state law and have the authority to “levy taxes, issue government bonds, and adopt and enforce rules and regulations.”⁶² Numerous state legislatures have “excepted municipally owned utilities from the regulation of state commissions.”⁶³ Because municipal utilities are controlled by local governments that answer directly to their customers, who are voters, state legislatures generally find regulating government-owned utilities to be redundant.⁶⁴

regulation involves the control of prices and profits of investor-owned utilities. Economic regulation by states is regarded as a substitute for competitive markets and public ownership, which presumably ensures accountability by other means[.]”

55. Janice A. Beecher, *Privatization, Monopoly, and Structured Competition in the Water Industry: Is There a Role for Regulation*, 117 J. OF CONTEMP. WATER RSCH. AND EDUC. 13 (2011) [hereinafter Beecher, *Privatization*].

56. Xue Zhang et al, *Water Pricing and Affordability in the US: Public vs. Private Ownership*, 24 WATER POL’Y 500 (2022).

57. BEECHER, *Economic Regulation*, *supra* note 25, at 96.

58. BERAHZER ET AL., *supra* note 12, at 7 n.1 (Appendix B); GAO, *supra* note 24, at 8.

59. Zach Stein, *Investor-Owned Utilities (IOUs)*, CARBON COLLECTIVE (Nov. 3, 2022), <https://www.carboncollective.co/sustainable-investing/investor-owned-utilities-ious> [https://perma.cc/3RGB-D265].

60. GAO, *supra* note 24, at 8; *see also* NASEM, *supra* note 54, at 38.

61. DELLER ET AL., *supra* note 8, at 55. Nonprofit utilities include water cooperatives and homeowner associations. NASEM, *supra* note 54, at 38.

62. DELLER ET AL., *supra* note 8, at 48.

63. Comment, *Municipal Operation of Public Utilities*, 41 YALE L.J. 116, 121 (1931).

64. State PUCs only set rates for government-owned utilities in six states: Indiana, Maine, Pennsylvania, Rhode Island, West Virginia, and Wisconsin. *See* BERAHZER, ET AL., *supra* note 12, at 167–169; George C. Homsy & Mildred E. Warner, *Does Public Ownership of Utilities Matter for Local Government Water Policies?*, 64 UTIL. POL’Y (2020); DELLER ET AL., *supra* note 8, at 55 (“[I]t is presumed that the consumer or the public has control over rates” with publicly owned utilities.”).

In contrast, state public utility commissions (PUCs) or public service commissions (PSCs) regulate investor-owned water utilities in 45 states.⁶⁵ State commissions are authorized to regulate rates, rates of return, and the quality of service for investor-owned utilities, which are often referred to as privately-owned utilities.⁶⁶ Recent studies have found that water utility costs also vary across different ownership structures—municipal, investor-owned, and special district—and that IOUs generally have higher rates and are less affordable to their customers.⁶⁷ One study defined “higher rates” based on the “annual water bill for a typical household” and “affordable” based on “the percent [of household income] low-income families spend on water.”⁶⁸

In addition to setting rates, PUCs also oversee the issuance of Certificates of Convenience and Necessity (CCN), which are permits that allow a utility to operate as a monopoly within the geographic boundaries defined in the permit.⁶⁹ Though there are state-by-state variations, the inquiry when issuing a CCN is typically whether its issuance furthers the public’s interest and ensures adequate service. For example, the South Carolina Constitution requires the state legislature to issue regulation ensuring that utilities serve the public’s interest,⁷⁰ and the Wyoming state legislature passed a statute requiring the Public Service Commission to set rates and regulate services to be consistent with public interest.⁷¹ In Texas, the Public Utility Commission is tasked with ensuring that an applicant for a CCN possesses the “financial, managerial, and technical capability to provide continuous and adequate service.”⁷²

In exchange for monopoly status over specific territories, state-regulated utilities must provide adequate service and must serve the public generally. These duties and obligations were originally imposed by common law and later incorporated in state laws.⁷³

65. PUCs do not regulate the water sector in Georgia, Michigan, Minnesota, North Dakota, and South Dakota because most water is provided by publicly-owned utilities. Homsy & Warner, *supra* note 64.

66. NASEM, *supra* note 54, at 3.

67. Manuel P. Teodoro & Ryan P. Thiele, *Water and Sewer Price and Affordability Trends in the United States, 2017–2023*, 116 J. AM. WATER WORKS ASS’N 14 (2024); Zhang et al., *supra* note 56 (“public systems more likely to institute conservation policies [...] and private systems more likely to charge higher prices and implement water affordability programs”).

68. *Id.* at 505.

69. See, e.g., Katie Olson, *I Think We Should Talk: Why Texas Property Owners Want to Break Up with Their Water and Wastewater Utility Provider and the Fight for Fair Water Utility Rates Across the State*, 46 TEX. TECH L. REV. 23 (2014).

70. S.C. CONST. art. IX § 1.

71. WYO. STAT. ANN. § 37-2-121; see BERAHZER ET AL., *supra* note 12.

72. TEX. WATER CODE ANN. § 13.241(a); Olson, *supra* note 69, at 31.

73. Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 312–313 (1962).

1. Duty to Serve

The duty to serve originated in English common law, based on the idea that monopoly providers had a “near-absolute duty to service all who requested it, and at fair and reasonable rates.”⁷⁴ This principle now undergirds utilities law.⁷⁵ Many state statutes have incorporated this common law duty when evaluating a utility’s request to extend services.⁷⁶ For water utilities, the duty to serve the public generally has important constraints defined in its charter or certificate of convenience and necessity, including geographic and economic limits.⁷⁷ For example, an investor-owned water utility can not be required by a state or local government to extend service without just compensation.⁷⁸ Finally, although the duty to serve addresses the provision of residential water, there is currently no duty to provide *affordable* water.

Refusal to extend service can have major implications for further development of unserved areas. Accordingly, when enforcing the duty to serve, courts weigh a number of factors, including the “amount of demand, the cost of providing service, the immediate and prospective revenues collectible from the proposed extension, and the impact of the extension on the financial condition of the utility.”⁷⁹ “Refusal to extend” cases are particularly challenging and require utilities to balance the pressing public need for water with an insufficient rate of return to cover capital improvement and operating costs of the prospective extension. In these scenarios, courts historically inquired into the underlying economic calculation to assess whether the extension would be “just and reasonable.”⁸⁰ However, courts today are more deferential to findings by

74. Douglas N. Jones, *Regulatory Concepts, Propositions, and Doctrines: Casualties, Survivors, Additions*, 22 ENERGY L. J. 41, 57 (2001).

75. Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1236 (1988).

76. *See, e.g.*, N.J. REV. STAT. § 48:2-27 (2025) (“The board may [...] require any public utility to establish [...] any reasonable extension of its existing facilities where [...] the extension is reasonable.”); 66 PA. STAT. AND CONS. STAT. ANN. § 1501 (1978) (“Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall [...] make all such extensions [...] as shall be necessary or proper for the accommodation, convenience, and safety of [...] the public.”).

77. Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 314–315 (1962).

78. *Id.* at 316; *see also*, *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm’n of W. Va.*, 262 U.S. 679, 690 (1923) (holding that a utility’s opportunity to earn a reasonable rate of return is protected by the Fourteenth Amendment).

79. *Id.*

80. *See, e.g.*, *Langan v. W. Keansburg Water Co.*, 51 N.J. Super. 41, 52 (App. Div. 1958) (“Plaintiffs have failed to demonstrate that the Water Company should, at its own expense, extend the mains.”).

public utility commissions.⁸¹ The “just and reasonable” analysis requires a balancing of the costs to water utilities with the benefits to ratepayers.⁸²

2. Rural Water Systems

Affordable water is an even greater concern in rural areas. While urban water utility systems benefit from monopoly control, the same can not be said of rural water systems. Though an important characteristic of monopolies is “decreasing unit costs of production with increasing output,”⁸³ rural water systems “have high per-capita costs . . . because they are less dense, require more miles of water lines per customer and tend to be located in more economically distressed areas.”⁸⁴

City-based community water systems tend to extend service to adjacent municipalities where residents are more able to pay. This results in “some communities get[ting] high-quality water service, while others—often rural communities or places where poverty is concentrated— get[ting] lower-quality service. Repairs or upgrades to pipes and other infrastructure are made less frequently, allowing leaks and increasing the potential risks of contamination.”⁸⁵ The primary revenue source for any water utility, whether publicly or privately owned, is customer rate revenue from user fees.⁸⁶ Aside from user fees, water utilities can also raise money through federal and state grants and loans, as well as municipal bonds.⁸⁷ Urban

81. *See, e.g.*, *Fountain Water Dist. v. Illinois Commerce Com'n*, 684 N.E.2d 145, 151 (Ill. App. 5 Dist., 1997) (affirming the decision of the Illinois Commerce Commission to grant a certificate of public convenience and necessity to Illinois–American Water Company to extend its water service).

82. *See generally*, Emma Shumway et al., *Addressing Energy Insecurity Upstream: Electric Utility Ratemaking and Rate Design as Levers for Change*, 45 ENERGY L.J. 361 (2024), https://scholarship.law.columbia.edu/faculty_scholarship/4582 [<https://perma.cc/ZYY5-4Q9S>] (discussing applicable public utility principles in the context of energy regulation).

83. JANICE A. BEECHER, NAT'L REG. RSCH. INST., THE REGIONALIZATION OF WATER UTILITIES 5 (July 1996) <https://pubs.naruc.org/pub/FA85F2B5-EE10-3E8C-9C2A-E1746482E9A9> [<https://perma.cc/UG2P-2896>] [hereinafter BEECHER, NRRI REPORT].

84. *See* Zhang et al., *supra* note 56.

85. Megan Mullin, *The Effects of Drinking Water Service Fragmentation on Drought-Related Water Security*, 368 SCIENCE 274 (Apr. 17, 2020).

86. Katy Hansen & Megan Mullin, *Barriers to Water Infrastructure Investment: Findings from a Survey of U.S. Local Elected Officials*, 1 PLOS WATER e0000039, at 2 (2022) (“Unlike other local government functions that draw from a general fund, drinking water is funded by revenues generated from fees for service.”).

87. USDA has focused on funding water infrastructure development in rural areas, offering grants and loan programs for utilities operating in rural areas. *See* CMTY. WATER CTR., THE RURAL WATER GAP: A RETROSPECTIVE EQUITY ANALYSIS OF USDA RURAL DEVELOPMENT'S WATER AND ENVIRONMENTAL PROGRAMS (May 2023), <https://www.communitywatercenter.org/the-rural-water-gap> [<https://perma.cc/87P8-LYVF>]. Around 90 to 95 percent of the financing for drinking water infrastructure comes from issuing municipal bonds. Ashwini Agrawal & Daniel Kim, *Municipal Bond Insurance and the U.S. Drinking Water Crisis* (Paul Wooley Ctr. for the Study of Cap. Mkt.

areas that are not “shrinking” are more easily able to finance infrastructure improvements by issuing bonds, while rural areas are more dependent on grants and subsidies to maintain affordable rates.⁸⁸ While it is clear that the user costs may be more difficult to regulate in rural water systems, it is less clear what the best approach is to providing water services in rural areas. The expansion of urban development into more rural areas has resulted in the consolidation of utilities and conflict between public and private utilities.⁸⁹ The next Part will focus on a specific category of legal challenges faced by federally-indebted water utilities operating in rural areas.

III. LEGAL CHALLENGES TO SECTION 1926(B)

Section 1926(b) prevents a municipality, private corporation, or other body from encroaching on the service provided by a utility that receives a USDA loan (“federally-indebted water utility”).⁹⁰ Only public, quasi-public, Indian tribes on Federal and State reservations, and nonprofit organizations can receive loans or grants from the USDA.⁹¹ Cases arising from Section 1926(b) provide further insight into the problem of institutional fragmentation and the conflict between federal and local interests in ensuring adequate access to water. Section 1926(b) states:

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.⁹²

Courts have interpreted Section 1926(b) broadly to prohibit municipal actions that would result in competition with water utilities that have

Dysfunctionality, Working Paper No. 85, Nov. 2021), <https://researchonline.lse.ac.uk/id/eprint/118888/1/DP846.pdf> [<https://perma.cc/V6BJ-ANTX>].

88. U.S. GOV'T ACCOUNTABILITY OFFICE., GAO15-450T, RURAL WATER INFRASTRUCTURE: FEDERAL AGENCIES PROVIDE FUNDING BUT COULD INCREASE COORDINATION TO HELP COMMUNITIES 7 (Feb. 27, 2015), <https://www.gao.gov/assets/gao-15-450t.pdf> [<https://perma.cc/GJ4H-6NAZ>]

89. Katie Olson, *I Think We Should Talk: Why Texas Property Owners Want to Break Up with Their Water and Wastewater Utility Provider and the Fight for Fair Water Utility Rates Across the State*, 46 TEX. TECH L. REV. 23, 32.

90. 7 U.S.C. § 1926(b); *see also* Green Valley Special Util. Dist. v. City of Schertz, Tex., 969 F.3d 460, 475 (5th Cir. 2020).

91. 7 U.S.C. § 1926(a)(1).

92. *Id.* § 1926(b).

outstanding loans.⁹³ Courts tend to side with the federally-indebted utilities, recognizing that the congressional purpose behind Section 1926 is to “encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost.”⁹⁴ Section 1926 has withstood facial constitutional challenges.⁹⁵

The background constitutional principle providing Congress with the authority to enact and uphold this provision is the Spending Clause.⁹⁶ Legislation enacted pursuant to the Spending Clause conditions a state’s receipt of federal funds on accepting the conditions that accompany them.⁹⁷ As a result, recipients of federal funding are “quasi-municipal corporation[s] that can only obtain federal loans under § 1926(a) and [receive] the accompanying protections under § 1926(b) if the state authorizes rural water districts to do so.”⁹⁸ The quasi-municipal status of a rural water district provides it with certain rights and privileges, depending on state law.

In Texas, for example, a water utility operates pursuant to a certificate of convenience and necessity issued by the Texas Public Utility Commission. Prior to 2020, there was a circuit split on whether a water association had “provided or made available” water service for purposes of Section 1926(b).⁹⁹ These suits can hinge on the interpretation of state

93. *See, e.g.*, *Rural Water Dist. No. 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818, 824 (N.D. Okla. 1979) (as a federal statute, Section 1926(b) preempted state and local laws); *City of Madison, Miss. v. Bear Creek Water Ass’n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987).

94. *City of Madison, Miss.*, 816 F.2d 1057, at 1060; *Rural Water Dist. No. 5 Wagoner Cnty. v. City of Coweta, Okla.*, 202 F. Supp. 3d 1268, 1276 (N.D. Okla. 2016) (quoting *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cnty., Okla. v. City of Guthrie*, 654 F.3d 1058 (10th Cir. 2011) (“Any doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the ... indebted party seeking protection for its territory”) (citations omitted).

95. *See, e.g.*, *Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1215–17 (10th Cir. 1988) (“Glenpool I”) (rejecting the plaintiff-appellee’s argument that Section 1926 violated the Tenth Amendment by attempting “to contract away the property rights of a third party (Glenpool) [plaintiff] and that such an action violates the tenth amendment to the U.S. Constitution by infringing unconstitutionally upon the powers and duties of local governments”).

96. U.S. CONST. art. I, § 8, cl. 1; *Deer Creek Water Corp. v. City of Okla. City*, 82 F.4th 972, 987 (10th Cir. 2023), *cert. denied sub nom. City of Okla. City, Okla. v. Deer Creek Water Corp.*, 144 S. Ct. 1099 (2024).

97. *Id.* at 988.

98. *Id.* at 988 (internal quotations omitted).

99. Scott Hounsel, *Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 TEX. L. REV. 155, 170 (2001) (“To summarize, cases involving competition over future or prospective customers reveal a divergence of opinion among the Courts of Appeal regarding the definition of service made available by a federally indebted water association seeking protection. Much of the divergence can be attributed to differences in state laws.”).

law.¹⁰⁰ For interpreting “provided or made available,” the Fourth, Sixth, Eighth, and Tenth Circuits had adopted a “pipes in the ground” test,” which asked “whether a water association has adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made.”¹⁰¹ The Fifth Circuit diverged from this interpretation, applying a state-law-duty rule, where a utility’s “state law duty to provide service is the legal equivalent to . . . making service available under § 1926(b).”¹⁰² However, in *Green Valley Special Utility District v. City of Schertz, Texas*, the Fifth Circuit overruled the state-law-duty rule, stating that it was inconsistent with the purpose of Section 1926(b).¹⁰³

A. Decertification Challenges

One common type of conflict between state laws and Section 1926(b) involves decertification or expedited release statutes, in which an applicant (“CCN-seeker”) seeks to provide services to customers located in an existing utility’s service territory (“CCN-holder”) who are not currently being served.¹⁰⁴ Ordinarily, these applications are highly efficient, encourage development, and aim to ensure more comprehensive provision of water services. However, when the CCN-holder is also a federally indebted utility, courts must assess whether the state law interferes with Section 1926(b). Another dimension to this federal-state-local conflict is that the CCN-holders that are the plaintiffs opposing decertification are often special utility districts, which are creatures of state law, and the defendants are typically commissioners of PUCs, who are state officials.

Perhaps the clearest conflict between state and federal law is in Texas. Federal courts in Texas hear a high volume of cases involving Section 1926(b), and many of these involve decertification challenges.¹⁰⁵ In one

100. Helen Gilbert, *Expedited & Streamlined Expedited Releases from a CCN – 7 USC § 1926(B) Considerations* (State Bar of Texas 24th Annual Changing Face of Water Rights Conference), 2023 WL 3080280 (2023).

101. *Pub. Water Supply Dist. No. 3 of Laclede Cnty. v. City of Lebanon, Mo.*, 605 F.3d 511, 523 (8th Cir. 2010). *See Chesapeake Ranch Water Co. v. Board of Comm’rs of Calvert Cnty.*, 401 F.3d 274, 281 (4th Cir. 2005); *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 705 (6th Cir. 2003); *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow, Okla.* 191 F.3d 1192, 1197 (10th Cir. 1999).

102. *N. Alamo Water Supply Co. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996) (internal quotations omitted), *overruled by Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460 (5th Cir. 2020).

103. *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 477 (5th Cir. 2020).

104. *See, e.g., Rockett Special Util. Dist. v. Gleeson*, 2025 WL 3217760 (W.D. Tex. 2025).

105. There have been 58 cases in federal courts sitting in Texas involving § 1926 since the year 1983, according to a WestLaw search (May 31, 2026). *See Citing Reference - § 1926. Water and Waste*

such case, *Rockett Special Utility District v. Gleeson*, a federally-indebted special utility district sought a temporary restraining order (TRO) against the Commissioners of the Texas Public Utility Commission in their official capacities in response to the a private company filing a service application to provide service to a customer inside Rockett's CCN. The CCN-seeker had filed a petition for expedited release pursuant to Texas Water Code § 13.2541. Rockett opposed the petition, arguing that Section 1926 expressly preempted the Texas Code by stating that the "utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program." The court granted Rockett the TRO, agreeing that Rockett did have a federally protected right under Section 1926.

Another illustrative case, and the focus of the rest of this Section, is *Green Valley Special Utility District v. City of Schertz, Texas*.¹⁰⁶ Though this case involved a similar decertification challenge to the one at issue in *Rockett*, it is significantly more complicated. In *Green Valley*, a federally-indebted rural water district, Green Valley Special Utility District, sued the state Public Utility Commission, the City of Schertz, and several state and local officials in their official capacities.¹⁰⁷ Green Valley had received a \$584,000 USDA loan to fund its water service and was authorized by the state PUC pursuant to two CCNs.¹⁰⁸ However, the City of Schertz and the Guadalupe Valley Development Corporation¹⁰⁹ sought to decertify Green Valley's service territory so they could both provide service. The PUC granted these decertification petitions, leading Green Valley to sue on the grounds that its USDA loan protected it from encroachment under Section 1926(b) and that Section 1926(b) preempted the PUC's order and underlying state law.¹¹⁰ Green Valley sought injunctive and declaratory relief to prevent PUC from decertifying any portion of its service territory and from allowing other utilities to make service available in its service territory.¹¹¹

Because this case involved state and city governmental entities as defendants, Green Valley could only seek injunctive and declaratory relief

Facility Loans and Grants, WESTLAW, [https://www.westlaw.com/Document/NEB162670240311E9BD1CBEF2B42AF27F/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/NEB162670240311E9BD1CBEF2B42AF27F/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (hover over "Citing References"; then click "Citing Cases" from the drop-down menu; then filter by "Jurisdiction" selecting federal district courts in Texas and the Fifth Circuit) [<https://perma.cc/2W72-8LCN>].

106. *Green Valley*, 969 F.3d at 471.

107. *Id.*

108. *Id.* at 466.

109. *Green Valley* ultimately settled with GVDC, depriving the court of jurisdiction over *Green Valley's* claims related to GVDC's certification. *Id.* at 469.

110. *Id.* at 465.

111. *Green Valley*, 969 F.3d at 467.

pursuant to Section 1983 and *Ex parte Young* actions.¹¹² The Fifth Circuit described the doctrine of sovereign immunity as a jurisdictional bar to "suits against state officials or agencies that are effectively suits against a state."¹¹³ Green Valley used the vehicles of Section 1983 and *Ex parte Young* to overcome this jurisdictional bar. An interesting puzzle in the development of the sovereign immunity doctrine is whether a political subdivision has legal standing to sue its parent state; the next few sections describe the development of the doctrine and explore this puzzle.

B. Sovereign Immunity

The doctrine of sovereign immunity, embedded in the Eleventh Amendment, prevents individuals from suing nonconsenting federal and state governments in federal court.¹¹⁴ The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹¹⁵ The text of the amendment itself does not foreclose a suit against a state by citizens of that state, but the Supreme Court made it clear in *Hans v. Louisiana* and later cases that states have immunity from being sued without their consent.¹¹⁶ The underlying policy rationales that have been used to justify the doctrine of state sovereign immunity include shielding government treasuries from suits for money damages, protecting the separation of powers and insulating government from undue judicial interference, and recognizing the existence of adequate alternative remedies such as injunctive relief.¹¹⁷

In tension with these principles is the idea that plaintiffs should be allowed to seek redress for legal wrongs and to vindicate their federal rights.¹¹⁸ The Supreme Court has narrowly tailored the exceptions to the state sovereign immunity doctrine. The three main exceptions are

112. *See id.* at 471.

113. *Id.* (quoting *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019)).

114. WILLIAM BAUDE ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1161 (8th ed. 2025); Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1506 n.63 (2021) ("The sovereign immunity question asks whether a state official may be sued, the Eleventh Amendment notwithstanding.").

115. U.S. CONST. amend. XI.

116. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890); *see also* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 2, 9 (2017).

117. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. R. 1201, 1216 (2001).

118. Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068, 1069 (2016) ("Today, an individual whose federal rights have been violated by a state has relatively limited options.").

congressional abrogation of state sovereign immunity, *Ex parte Young*, and a voluntary waiver of state sovereign immunity.¹¹⁹

Officer suits, or suits against officials who act for governments, have been an alternative form of redress.¹²⁰ The justification for officer suits—excepting them from the sovereign immunity bar—is that officials acting unlawfully cannot enjoy the protections of immunity.¹²¹ This has long been considered a legal fiction, narrowly tailored to avoid infringing on sovereign immunity.¹²²

Many, if not all, suits under Section 1926 are between a rural water district and a state or local governmental actor (and sometimes a private company).¹²³ Suits under Section 1926 have typically pursued one of two options to challenge state or local action: through Section 1983 actions or through *Ex parte Young*. Some suits have pleaded causes of action under both. For example, in *Public Water Supply District No. 1 of Greene County (PWSD) v. City of Springfield, Missouri*, the PWSD “asserted 42 U.S.C. § 1983 claims against the City on grounds that the City deprived PWSD of its right under 7 U.S.C. § 1926(b) to be protected from curtailment or limitation of its provision of water service within its service area.”¹²⁴

The type of remedy requested (equitable or monetary) and from whom (state or local official) are two questions central to determining the

119. Miles McCann, *State Sovereign Immunity*, NAT’L ASSOC. OF ATT’Y GENs (Nov. 11, 2017), <https://www.naag.org/attorney-general-journal/state-sovereign-immunity/> [https://perma.cc/BXH7-C3RM].

120. Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); see also *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 646 (2002) (“Indeed, *Ex parte Young* itself was a suit against state officials (including state utility commissioners, though only the state attorney general appealed) to enjoin enforcement of a railroad commission’s order requiring a reduction in rates.”).

121. Kathryn E. Kovacs, *Revealing Redundancy: The Tension between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 89 (2005).

122. See Eric Schnapper, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213, 255 (1979)

In the Court’s view this doctrine was necessarily subject to two important limitations. First, the defendant official must be in some way responsible for the violation at issue [...]. Second, the relief available against a state official was limited to either a prohibition against unconstitutional conduct or a direction that the official perform some act “merely ministerial in nature[.]” [...] Both of these restrictions were closely related to the legal fiction underlying *Ex parte Young*.

123. There were 309 cases referencing 7 U.S.C. § 1926 on Westlaw at the time of writing. Overwhelmingly, water utility districts initiated suits against state or local agencies. In some cases, localities initiated suits against USDA to enjoin the agency from authorizing loans to certain rural water districts. See *Citing Reference - § 1926. Water and Waste Facility Loans and Grants*, WESTLAW, <https://1.next.westlaw.com/Document/NEB162670240311E9BD1CBEF2B42AF27F/View/FullText.html> (hover over “Citing References”; then click “Citing Cases” from the drop-down menu) [https://perma.cc/WV4M-VETS] (last visited May 31, 2026).

124. 52 F.4th 372, 374 (8th Cir. 2022); see also *Xenia Rural Water Dist. v. City of Johnston*, 959 N.W.2d 113, 120 (Iowa 2021) (“Count One alleges that Johnston violated 42 U.S.C. § 1983 by depriving Xenia of its rights under 7 U.S.C. § 1926(b) . . .”).

appropriate cause of action. There are two general categories of actions that lead to accrued losses: summary (nonformal) actions and adjudicatory (formal) actions.¹²⁵ The latter describes harms or losses incidental to an unfavorable judgment that may not be fully redressed by a later, favorable judgment, including the “loss of profit pending license adjudication, loss of salary pending job adjudication, loss of reputation with or without consequent financial loss, emotional distress where the issue is alleged misconduct, and, of course, the ubiquitous costs of litigation.”¹²⁶ It is typically the latter actions that are being challenged in Section 1926(b) cases seeking redress for formal actions by state and local officials that results in encroachment of the rural water district’s service area.¹²⁷

The majority in *Green Valley* highlights the following unresolved questions relevant to sovereign immunity doctrines arising in Section 1926 litigation:

- (1) Whether municipalities can be plaintiffs in a Section 1983 action.¹²⁸
- (2) Whether a discrete agency order qualifies as “continuing harm” that merits injunctive relief.¹²⁹

C. Political Subdivisions as Plaintiffs in Section 1983 Suits

Congress created a cause of action through section one of the Civil Rights Act of 1871 known as Section 1983.¹³⁰ This statute allows “every person” to bring a suit against a state actor for violations of a federal

125. Jaffe, *supra* note 120, at 214.

126. *Id.*

127. *See, e.g.,* N. Collin Special Util. Dist. v. City of Princeton, Tex., 696 F. Supp. 3d 254, 264 (E.D. Tex. 2023) (“[F]or damages for lost net revenue suffered by North Collin for such encroachment.”); Spanish Fort Water Sys. v. N. Baldwin Utils., 618 F. Supp. 3d 1321, 1333 (S.D. Ala. 2022) (“[T]he loss of new customers within the Brentwood development area, the potential loss of revenue due to unavailability, or delayed availability, of services created by NBU’s presence in the Brentwood development area, and any increase in expenses for repairs and other changes created by NBU’s actions are all economic in nature and, therefore, redressable through economic damages.”).

128. *Compare* Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690 (1978) (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . .”), with *Green Valley*, 969 F.3d at 476 n.26 (“*Monell* did not address whether municipalities qualified as ‘any citizen of the United States or other person’ such that they could be proper *plaintiffs*.”).

129. *Green Valley*, 969 F.3d at 472; *see also* T.W. v. N.Y. State Bd. of L. Exam’rs, 110 F.4th 71 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 2700 (2025).

130. Casewell F. Holloway, *City v. City: The Case for Full Municipal Personhood under 1983*, U. CHI. LEGAL F. 479, 479 (2001) (citing *City of New Rochelle v. Town of Mamaroneck*, 111 F Supp 2d, 353, 368 (S.D.N.Y. 2000)).

right.¹³¹ Because Section 1926 creates a federal right, but does not provide an explicit enforcement mechanism, Section 1983 is one vehicle a plaintiff can use to bring a private right of action.¹³²

1. Municipal Liability

Bringing a successful Section 1983 suit *against* a municipality and its officers is challenging. This section discusses the development of Section 1983 case law and its limitations as a tool for holding municipalities and other state actors accountable for violations of federal law.

Conceptualizing direct municipal liability after *Monell v. Department of Social Services*—in which the Supreme Court held that courts may only find a municipality liable if its officials commit a tort pursuant to municipal policy—is difficult.¹³³ *Monell* attempted to differentiate direct municipal liability from *respondeat superior* liability by focusing the inquiry on “municipal policy,” which the Court does not define in the case.¹³⁴ In fact, “municipal policy” has been incredibly difficult to define, underscored in several cases, including *Oklahoma City v. Tuttle*,¹³⁵ *Board of the County Commissioners of Bryan County v. Brown*,¹³⁶ and most recently, *Connick v. Thompson*.¹³⁷ In *Connick v. Thompson*, the plaintiff, Thompson, sued Connick in his official capacity as New Orleans District Attorney for failing to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court held that Thompson failed to establish a “municipal policy” under his failure-to-train theory, as there wasn’t sufficient evidence that there was a need for more *Brady*-related

131. Pub. Water Supply Dist. No. 1 of Greene Cnty., Mo. v. City of Springfield, Mo., 567 F. Supp. 3d 1091, 1094 n.5 (W.D. Mo. 2021), *aff’d sub nom.* Pub. Water Supply Dist. No. 1 of Greene Cnty. v. City of Springfield, Mo., 52 F.4th 372 (8th Cir. 2022) (“Section 1983 authorizes a cause of action against a state actor for the deprivation of rights secured by federal law.”); *see also*, Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 177 (2023) (“The first section of that statute [Civil Rights Act of 1871], as reenacted in 1874, created the federal cause of action now codified as § 1983.”).

132. Wayne v. Vill. of Sebring, 36 F.3d 517, 529 (6th Cir. 1994) (“Congress provided no enforcement mechanism for protecting the right that § 1926(b) creates. Thus, pursuant to § 1983, § 1926(b) gives rise to a private right of action on the part of rural water service users.”); N. Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 917 (5th Cir. 1996) (“[s]ection 1926(b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations[.]”).

133. Larry B. Kramer & Alan O. Sykes, *Municipal Liability under 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 253 (1987) (“Both the plurality and the dissent in *Pembaur* read *Monell* as holding that municipalities cannot be vicariously liable under §1983, and both reason that municipal liability is direct rather than vicarious only when a tort is committed pursuant to policy.”).

134. *Id.* at 250; *Monell*, 436 U.S. 658.

135. *Board of Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397 (1997).

136. *Okla. City v. Tuttle*, 471 U.S. 808 (1985) (plurality).

137. *Connick v. Thompson*, 563 U.S. 51 (2011).

training.¹³⁸ Despite evidence of past *Brady* violations by attorneys in the same office, the Court deemed these violations insufficient to establish a pattern or custom.¹³⁹

How does this inquiry into play out in Section 1926 cases? In *Dupont Water Company Inc. v. City of Madison, Indiana*, a federally-indebted rural water district, Dupont Water Company, brought a Section 1983 suit against the City of Madison, for allegedly violating Dupont's exclusive monopoly to provide water pursuant to Section 1926.¹⁴⁰ Jefferson County intervened in the litigation, seeking declaratory judgment that its agreement to receive water services from the City was legal.¹⁴¹ Dupont then filed counterclaims against the County under Sections 1983 and 2201, alleging that the County conspired with the City to violate Dupont's rights under Section 1926(b) and that the County did violate Dupont's federally protected rights by entering into an agreement to receive water services from the City.¹⁴² The City and County both moved to dismiss Dupont's Section 1983 claims under Federal Rule of Civil Procedure 12(b)(6), arguing that Dupont did not "adequately plead that its alleged injury was caused by a custom, policy, or decision by a final policymaker . . . as is required for municipal liability to arise under the statute."¹⁴³ The court found that Dupont's complaint did not identify a policy, custom, or a specific City official responsible for the decision to provide water in Dupont's service area. The court accordingly dismissed the Section 1983 action against the City. As to the County's liability, the court held that Dupont's allegation that "[t]he vote by Jefferson County's Council to receive water service from Madison—despite being warned that this violates Section 1926(b)—constitutes an official policy of Jefferson County," was sufficient to state an actionable claim.¹⁴⁴

Another potential restriction of officer liability is the affirmative defense of qualified immunity.¹⁴⁵ *Harlow v. Fitzgerald* affirmed that the qualified immunity doctrine applies to public officials, shielding them from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

138. *Id.* at 60–62, 64–65.

139. *Id.* at 63, 66.

140. *Dupont Water Co. Inc. v. City of Madison, Ind.*, 2024 WL 4348366, at *3 (S.D. Ind., Sept. 30, 2024).

141. *Id.* at *1.

142. *Id.* at *1.

143. *Id.* at *3.

144. *Id.* at *6.

145. Michael E. Beyda, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte*, 89 *FORDHAM L. REV.* 2693 (2021).

would have known.”¹⁴⁶ Qualified immunity, or “good faith” immunity, does not extend to municipalities under Section 1983.¹⁴⁷

In *Wayne v. Village of Sebring*, however, the Sixth Circuit found that individual municipal officials acting in their official capacities were entitled to qualified immunity for “conduct in performing discretionary functions so long as that conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known.”¹⁴⁸ The court based this determination on the lack of sufficient evidence establishing the defendants’ knowledge of their obligation not to encroach on the plaintiff’s service area.¹⁴⁹

The Supreme Court has justified narrowing the scope of Section 1983 municipal liability and the cases under which municipalities and municipal officers can be held liable as its understanding of congressional intent has evolved. The *Monell* Court overruled *Monroe v. Pape*,¹⁵⁰ rejecting the *Monroe* Court’s recitation of congressional intent in enacting the Civil Rights Act of 1871.¹⁵¹ In *Monroe v. Pape*, the Court held that municipalities are not ‘persons’ within the meaning of Section 1983, preventing the plaintiffs from suing the City of Chicago for constitutional violations following a warrantless search and seizure by the city’s police officers.¹⁵² The *Monell* Court specifically rejected *Monroe*’s assessment that Congress’s decision to discard the Sherman Amendment indicated that “Congress could not have intended municipalities to be among the ‘persons’ to which that section applied.”¹⁵³ However, in doing so, the *Monell* Court also introduced a “policy rule” that has been criticized as highly inefficient and difficult to define.¹⁵⁴ *Monell* clarified that municipalities are not immune from suits under Section 1983 and can be a ‘person’ as defined by the statute.

146. 457 U.S. 800 (1982).

147. Larry B. Kramer & Alan O. Sykes, *Municipal Liability under 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (1987).

148. *Wayne v. Village of Sebring*, 36 F.3d 517, 530–31 (6th Cir. 1994).

149. *Id.*

150. *Monroe v. Pape*, 365 U.S. 167, 170 (1961).

151. *Monell*, 436 U.S. at 664.

152. *Monroe v. Pape*, 365 U.S. 167, 170 (1961).

153. *Monell*, 436 U.S. at 664–66 (discussing and rejecting *Monroe*’s reliance on the rejected Sherman Amendment as proof that Congress did not intend municipalities to be “persons” under § 1983).

154. Kramer & Sykes, *supra* note 147, at 250 (“The policy rule has been extremely difficult to apply coherently, and there is no reason to continue the exercise. The *Monell* Court read the language and legislative history of § 1983 erroneously.”).

2. Circuit Split: Proper Plaintiff?

With this understanding of the difficulty in holding municipalities and its officers liable under Section 1983, the next question is whether Congress intended for municipalities (and, generally, all political subdivisions) to bring suit under Section 1983. This is a question potentially left open in *Monell* and highlighted in *Green Valley*: can municipalities be plaintiffs in Section 1983 suits when claiming a violation of Section 1926(b)?¹⁵⁵ Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.¹⁵⁶

The general rule is that political subdivisions—such as special utility districts—cannot sue their parent states: the “Fifth, Seventh, and Eleventh Circuits have specifically held that a municipality is not a ‘person’ capable of bringing suit under § 1983, despite its potential liability to suit under the statute.”¹⁵⁷ Furthermore, in *City of Newark v. State of New Jersey*, the Supreme Court held that a “city cannot invoke the protection of the Fourteenth Amendment against the state.”¹⁵⁸

Despite this general rule, some circuit courts—the Sixth and Tenth—have held in the context of rural water district encroachment cases that “in light of *Monell*, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a ‘person’ within

155. *Green Valley*, 969 F.3d at 475 (“*Monell* did not address whether municipalities qualified as ‘any citizen of the United States or other person’ such that they could be proper plaintiffs.”)

156. 42 U.S.C. § 1983.

157. Casewell F. Holloway, *City v. City: The Case for Full Municipal Personhood under 1983*, 2001 U. CHICAGO LEGAL FORUM 479, 489 (2000); *Rural Water Dist. No. 1, Ellsworth Cnty., Kansas v. City of Wilson, Kansas*, 243 F.3d 1263, 1274–75 (10th Cir. 2001) (listing cases in which 5th, 7th, and 11th circuit courts held that the municipality could not bring certain constitutional challenges against another political subdivision); see Michael A. Lawrence, *Do Creatures of the State Have Constitutional Rights: Standing for Municipalities to Assert Procedural Due Process Claims against the State*, 47 VILL. L. REV. 93 (2002).

158. *City of Newark v. State of New Jersey*, 262 U.S. 192 (U.S. 1923) (“The city cannot invoke the protection of the Fourteenth Amendment against the state.”).

one clause of § 1983, but not a ‘person’ within another clause of that same statute.”¹⁵⁹

The Fifth Circuit, relying on a pre-*Monell* case, *City of Safety Harbor v. Birchfield*, has acknowledged this circuit split and noted the tension between *Birchfield* and *Monell*, yet declined to overrule *Birchfield*.¹⁶⁰ The *Birchfield* court explained that the “fact that public entities are not right-holders in the same sense as private parties has particular relevance in determining whether a municipality is a ‘person’ entitled to bring suit under the 1871 Civil Rights Act.”¹⁶¹

However, if a municipality can *be sued* as a defendant (“Every person”), it follows that it should be able to *sue* as a plaintiff (“other person”) under Section 1983.¹⁶² When the same word is used multiple times in a statute, it is typically interpreted as having the same meaning.¹⁶³ A broader reading of *Monell* affirms the same: “[o]ur analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”¹⁶⁴ Though the holding in *Monell* was restricted to defining municipalities as ‘persons’ that can be sued under Section 1983, a consistent reading of *Monell* would require that municipalities are also persons that can bring suit under Section 1983.

Part of the underlying justification for preventing political subdivisions from bringing suit under Section 1983 is that political subdivisions have no rights independent of those expressly provided to them by the state.¹⁶⁵ However, this conception of a political subdivision as a creature of the

159. *S. Macomb Disposal Auth. v. Washington Twp.*, 790 F.2d 500, 503 (6th Cir. 1986); *Rural Water Dist. No. 1, Ellsworth Cnty., Kansas v. City of Wilson, Kansas*, 243 F.3d 1263, 1273–75 (10th Cir. 2001).

160. *Green Valley*, 969 F.3d at 475 n. 26 (“That approach [the Sixth Circuit’s] may well be more faithful to § 1983’s text than is *Birchfield*. But given that the parties do not ask us to overrule *Birchfield*, we leave it, as unnecessary to decide here, for another day.”) (citing *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976)).

161. *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976).

162. *See generally* *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 658, 689–90.

163. *Green Valley*, 969 F.3d at 475 n. 26 (citing *United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring in part and concurring in the judgment)).

164. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978).

165. Casewell F. Holloway, *City v. City: The Case for Full Municipal Personhood under 1983*, 2001 U. CHICAGO LEGAL FORUM 479 (2000).

state¹⁶⁶ is at odds with state sovereign immunity doctrine, which does not extend to municipalities.¹⁶⁷

Congress enacted Section 1983 to provide a federal cause of action to protect federal rights. It is “not itself a source of substantive rights, but a [procedural] method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”¹⁶⁸ In *Thiboutot v. Maine*,¹⁶⁹ the Court clarified that the phrase “and laws” used in Section 1983 “encompassed all federal statutory claims.”¹⁷⁰ However, the modern understanding of Section 1983 exempts certain federal *statutory* rights. After *Thiboutot*, the Court clarified that a federal statute can only be enforced using Section 1983 when the federal statute unambiguously creates a federal right and lays out an exclusive means of enforcement.¹⁷¹

Given the already difficult “policy rule” standard for bringing a Section 1983 suit against state and local actors, further restricting the “proper plaintiff” has significant implications for the enforcement of federal rights. This circuit split should be resolved in favor of allowing political subdivisions to bring suit under Section 1983. Adopting the Sixth and Tenth Circuits’ interpretation¹⁷² would allow government-owned federally-indebted water utilities to bring suit against encroaching government-owned water utilities, clarifying the “proper plaintiff” in Section 1983 litigation.¹⁷³ There are several arguments for why cities

166. *See* *City of Trenton v. New Jersey*, 262 US 182, 189–90 (1923) (“A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The City is the creature of the state.”).

167. Margreth Barrett, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L. J. 1042 (1979) (describing how political divisions are considered to be part of the state, except for when it comes to the Eleventh Amendment, political subdivisions are seen as separate from the state).

168. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2016) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

169. 448 U.S. 1 (1980).

170. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORN. L. REV. 482, 490 n.39 (1982).

171. MARTIN A. SCHWARTZ, KATHRYN R. URBONYA, *FED. JUD. CTR., SECTION 1983 LITIGATION* 75 (2d Ed. 2009).

172. *See* *S. Macomb Disposal Auth. v. Washington Twp.*, 790 F.2d 500, 503 (6th Cir. 1986); *Rural Water Dist. No. 1, Ellsworth Cnty., Kansas v. City of Wilson, Kansas*, 243 F.3d 1263, 1274 (10th Cir. 2001).

173. There are also a few arguments that attempt to differentiate the “proper plaintiff” based on the source of the underlying federal right; this approach further dilutes the efficacy of § 1983 as a vehicle to vindicate all federal rights. *See, e.g.*, *N. Collin Special Util. Dist. v. Lake*, No. 1:21-CV-807-DAE, 2023 WL 2561730, at *3 (W.D. Tex. Jan. 11, 2023) (“Additionally, North Collin’s argument that it alleges a statutory right, and not a constitutional right, is of no consequence as the same statutory right was before the court in *Green Valley*. Therefore, the § 1983 claims against the PUC Defendants will

should be able to sue: it is the most consistent, plain-meaning understanding of Section 1983; it is consistent with the Supreme Court's application of the Eleventh Amendment to cities; and it "will promote the representation-reinforcing principles underlying the Court's decision to subject cities to liability under Section 1983."¹⁷⁴ Furthermore, expanding the "proper plaintiff" to include political subdivisions also broadens the scope of subdivision-led civil rights litigation.

D. Defining "Ongoing Harm" That Merits Injunctive Relief

Ex parte Young is a historical, judge-made remedy that is an exception¹⁷⁵ to the Eleventh Amendment's bar on individual suits against state sovereign immunity doctrine.¹⁷⁶ An *Ex parte Young* suit clears the Eleventh Amendment's jurisdictional bar by seeking injunctive relief against a state *officer* in their official capacity, claiming that the state official is stripped of their official or representative character due to violating federal law.¹⁷⁷

More than 100 years after *Ex parte Young* was decided, "[t]he Court and the academy [continue to be] remarkably confused about the legal basis for and proper scope of the vital injunctive power recognized in that case."¹⁷⁸ To determine whether an *Ex parte Young* suit can avoid the sovereign immunity bar, the Supreme Court requires courts to assess whether "the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."¹⁷⁹ Another important factor is that the sovereign immunity exception only applies when the plaintiff is suing a state official.¹⁸⁰

be dismissed."); Michael A. Lawrence, *Do 'Creatures of the State' Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 116 (2002) ("It has been said, . . . that the nature of the relationship between a municipal corporation and its creating state is such that the municipal corporation 'cannot invoke the protection of the Fourteenth Amendment' and other constitutional provisions against the state.").

174. Casewell F. Holloway, *City v. City: The Case for Full Municipal Personhood under 1983*, 2001 U. CHI. LEGAL FORUM 479 (2000).

175. Henry P. Monaghan, *The Sovereign Immunity Exception Comment*, 110 HARV. L. REV. 102, 127 (1996) ("To characterize *Young* as an exception, however, gets matters nearly backward: the Eleventh Amendment is an exception to *Young*.").

176. *Id.* at 126. ("*Ex parte Young* long ago confirmed that citizens seeking prospective relief in suits against 'the state' could simply recast their complaints as suits against state officials and bring them in federal court, 'notwithstanding the obvious impact on the State itself.'")

177. *Id.* at 127.

178. Jack Goldsmith, *Erie and Contemporary Federal Courts Doctrine*, HARV. J.L. & PUB. POL'Y PER CURIAM (2023).

179. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 298–299 (1997)).

180. *Id.* at 645.

While lower federal courts have generally adopted the Supreme Court's test, there is some divergence in how to determine an "ongoing violation of federal law." In suits concerning the encroachment of a federally-indebted water district's service territory, courts have found that injunctive and declaratory relief are the appropriate remedies for these violations, particularly when there is conflict between Section 1926(b) and a state or local regulation.¹⁸¹ It is interesting to note, however, that there are very few cases under Section 1926 that request injunctive relief under *Ex parte Young*.¹⁸² Most appear to be seek injunctive relief through Section 1983 suits.¹⁸³

In *Green Valley*, the *Ex parte Young* test is formulated as follows: "(1) A plaintiff must name individual state officials as defendants in their official capacities, (2) the plaintiff must 'allege[] an ongoing violation of federal law,' and (3) the relief sought must be 'properly characterized as prospective[.]'"¹⁸⁴ The *Green Valley*¹⁸⁵ and *Crystal Clear*¹⁸⁶ courts have discussed what exactly constitutes "ongoing violation," arriving at the conclusion that an *allegation* of an ongoing violation is sufficient to state an *Ex parte Young* claim, and, perhaps even a single violation of federal law resulting in ongoing harm satisfies the *Young* standard.¹⁸⁷

Green Valley's Certificate of Convenience and Necessity, issued by the Public Utility Commission, had been altered ("decertified"). *Green Valley*

181. See, e.g., *Crystal Clear Special Util. Dist. v. Walker*, No. A-17-CV-00254-LY, 2018 WL 6242370, at *2 (W.D. Tex. Nov. 29, 2018), *report and recommendation adopted as modified sub nom.* *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019), *vacated and remanded sub nom.* *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556, 2020 WL 13336877 (5th Cir. Oct. 15, 2020) ("The Fifth Circuit has noted that although § 1926(b) does not create or specify a remedy for the enforcement of violations, an injunction has been "the principal tool employed by the courts with which to enforce the statute and prevent violations.")

182. Out of 309 cases on Westlaw referencing 7 U.S.C. § 1926, only 16 mention "Ex parte Young." See *Citing Reference - § 1926. Water and Waste Facility Loans and Grants*, WESTLAW, <https://1.next.westlaw.com/Document/NEB162670240311E9BD1CBEF2B42AF27F/View/FullText.html> (hover over "Citing References"; then click "Citing Cases" from the drop-down menu; then filter by "ex parte young") [<https://perma.cc/3WGM-F5DR>] (last visited May 31, 2026).

183. Out of 309 cases on Westlaw referencing 7 U.S.C. § 1926, 147 mention "1983." *Id.* (hover over "Citing References"; then click "Citing Cases" from the drop-down menu; then filter by "1983") [<https://perma.cc/VN4V-ELQF>] (last visited May 31, 2026);

184. *Green Valley Special Util. District v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (citations omitted); see also *N. Collin Special Util. Dist. v. Lake*, No. 1:21-CV-807-DAE, 2023 WL 2561730, at *3 (W.D. Tex. Jan. 11, 2023) ("(1) [plaintiff] is suing the PUC Defendants in their official capacities as commissioners of the PUC, a state agency; (2) [plaintiff] alleges an ongoing violation of federal law in that it seeks a declaratory judgment based on federal preemption; and (3) [plaintiff] requests only prospective relief against the PUC Defendants to refrain from taking future actions to enforce an allegedly unlawful order.")

185. *Green Valley*, 969 F.3d at 471.

186. *Crystal Clear Special Util. Dist. v. Cobos*, No. 1:22-CV-01293-DAE, 2024 WL 5455984, at *3 (W.D. Tex. Dec. 13, 2024).

187. *Green Valley*, 969 F.3d at 471.

requested the court “to declare unlawful the defendants’ continuing conduct and to prohibit both the PUC Officials’ grant of relief ... [and Schertz’s] pursuit of relief arising from the PUC’s orders.”¹⁸⁸ Defendants, PUC Officials, characterized this decertification as a discrete event, rather than an ongoing violation. Thus, they contended, the relief being sought was retroactive (declaring the decertification unlawful), rather than prospective, and *Ex parte Young* would not apply.¹⁸⁹ The plaintiff, on the other hand, characterized the request for relief as prospective, and the Court agreed, choosing to frame the “complaint as a request to restrain state officials from enforcing an unlawful order[.]” analogizing the case to *Verizon Maryland*.¹⁹⁰

Though the harm suffered by Green Valley was ongoing, it was debatable whether the violation of federal law was ongoing. The court in *Crystal Clear Special Utility District v. Cobos* found that the Fifth Circuit was unclear on whether a request for recertification is within the bounds of an *Ex parte Young* claim, choosing to hold that the request for an injunction to require state officials to recertify tracts of land is prospective.¹⁹¹ The Defendants in *Crystal Clear* expressed similar concern that “allowing Crystal Clear’s request for injunctive relief in the form of an order for recertification would allow plaintiffs to avoid the bar of sovereign immunity through creative pleading,” however the court found that “on the flip side the PUC Defendants’ argument would serve to insulate state officials from any suit where the proposed prospective relief would implicate a past agency order that results in a continuing violation of federal law.”¹⁹² The court also identified a central tension in defining ongoing relief.

These two ideas—ongoing violation and ongoing harm—are not the same thing, however, and other circuits have arrived at slightly different formulations in a wide variety of contexts outside of Section 1926(b) suits.

The Supreme Court recently denied a petition for writ of certiorari on this exact question, allowing the U.S. Court of Appeals for the Second Circuit’s holding to stand.¹⁹³ In *T.W. v. New York State Board of Law Examiners*, the Second Circuit held that alleging “an ‘ongoing violation’

188. *Id.* at 473 (citations omitted).

189. *Id.*

190. *Id.*

191. *Crystal Clear*, 2024 WL 5455984, at *3 (citing *Green Valley*, 969 F.3d 472) (“Absent further instruction from the Fifth Circuit regarding whether a request for recertification falls within the scope of *Ex parte Young*, the undersigned finds that Crystal Clear’s request for an injunction requiring the PUC Defendant to recertify the at-issue tracts of land is prospective in nature and thus is not barred by sovereign immunity.”).

192. *Id.*

193. *T. W. v. N.Y. State Bd. of L. Examiners*, 145 S. Ct. 2700 (2025).

not only required identifying a violation with ‘continuing effects’ that could be redressed prospectively,” but it also held that the plaintiff “had to show that [defendant’s] continuing conduct—the maintenance of records and refusal to disavow the test results here— independently violated federal law.”¹⁹⁴

Nonetheless, there is a clear circuit split in determining whether an ongoing violation exists. The First Circuit has recently dismissed an *Ex parte Young* suit for failure to allege an “ongoing violation,” holding that “the continued withholding of funds owed is not an ongoing violation.”¹⁹⁵ However, the Second Circuit determined that the “ongoing enforcement of New York fishing regulations” against the Unkechaug Indian Nation was violative of the Nation’s “federally-guaranteed rights.”¹⁹⁶ Meanwhile, the Sixth Circuit held that state officials blocking a pipeline project was an ongoing violation of federal law, rejecting defendants’ claims that the plaintiff was seeking “specific performance of a state contract,” which would be characterized as retroactive relief beyond the ambit of *Ex parte Young* claims.¹⁹⁷

Looking beyond the Fifth and Tenth Circuits, the bounds of an “ongoing violation” under Section 1926(b) are unclear.¹⁹⁸ In *Pottawatomie County Rural Water District No. 3 v. Fallin*, the U.S. District Court for the Western District of Oklahoma found that an order by a state official “violated § 1926(b) by imposing new extra-statutory requirements on the

194. *T.W. v. N.Y. State Bd. of L. Examiners*, 110 F.4th 71 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 2700 (2025); *see also* T.W.’s Petition for Certiorari in *T.W. v. N.Y. State Bd. of L. Examiners* (Dec. 31, 2024), https://www.supremecourt.gov/DocketPDF/24/24-714/336287/20241231110529896_2024-12-31%20T.W.%20Cert%20Petition%20with%20Petition%20Appendix.pdf [https://perma.cc/VR4C-ZX9K].

195. *Cotto v. Campbell*, 126 F.4th 761, 769 (1st Cir. 2025); *see also*, *Papasan*, 478 U.S. at 280, 106 S. Ct. 2932 (dismissing a breach of trust claim, based on funding disparities between Chickasaw Cession schools and other Mississippi public schools on the grounds that withholding payments to the Chickasaw Cession schools was not an ongoing violation, but rather, that “past violations that amounted to ‘accrued monetary liabilities,’ so their claim was barred by the Eleventh Amendment.”).

196. *Unkechaug Indian Nation v. Seggos*, 126 F.4th 822, 829 (2d Cir. 2025).

197. *Enbridge Energy, LP v. Whitmer*, 2025 WL 1174379, at *6 (6th Cir. 2025) (“Enbridge seeks only to bring the State’s regulatory activities into compliance with federal law and the Constitution. Accordingly, even if Enbridge received its requested relief, the State would retain the ability to regulate the submerged lands so long as its regulation did not violate federal law.”).

198. *See, e.g.*, *Pottawatomie Cnty. Rural Water Dist. No. 3 v. Fallin*, No. CIV-16-6590M, 2017 WL 744638, at *2 (W.D. Okla. Feb. 24, 2017) (characterizing a discrete decision imposing ongoing harm to the operation of the plaintiff’s business and reduction of the plaintiff’s customer pool as an ongoing violation of federal law); *see also* *Muscogee (Creek) Nation v. Oklahoma Tax Comm’n*, 611 F.3d 1222, 1226 (10th Cir. 2010) (identifying defendant’s illegal searches and seizures of property as ongoing violations of plaintiffs’ Fourth Amendment rights).

[plaintiff] which . . . resulted in an interference in the operations of the [plaintiff] and reduction of the [plaintiff's] customer pool."¹⁹⁹

The continuing violation doctrine may provide insight into assessing *Ex parte Young* claims.²⁰⁰ The continuing violation doctrine tolls the limitations period based on the theory that each discrete violation causes the claim to accrue anew. However, a key difference between an ongoing violation for the purposes of determining the statute of limitations and an ongoing violation under *Ex parte Young* is that an *allegation* of an ongoing violation is sufficient to state a claim under *Ex Parte Young*,²⁰¹ while a continuing violation claim requires an inquiry into the accrual of a cause of action depending on the nature of the underlying claim.²⁰²

Whether decertification is a discrete event or ongoing violation presents a much larger question, with significant implications for suits seeking injunctive relief. There are also broad implications for resolving conflicts between local governments and their creating states. These injunctive suits do not seem to be the most appropriate vehicle for relief, when conflict stems from fragmented regulations. This conflict is further discussed in the following section.

IV. "PUBLIC INTEREST" OBLIGATIONS AND REGIONALIZATION

Federal funding from the USDA is accompanied by certain obligations, including service provision requirements for the recipient and encroachment restrictions on other water utilities. These obligations sometimes conflict with state-imposed obligations, leading to suits under *Ex parte Young* and Section 1983 against water utility districts and PUCs. For example, a state's decision to grant a decertification petition may give a competing water utility the license to expand service into the territory of a federally-indebted water utility in violation of Section 1926,²⁰³ or a state may impose statutory obligations that reduce a federally-indebted utility's

199. Fallin, 2017 WL 744638, at *2.

200. *See, e.g., Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 979 (5th Cir. 1983) ("[T]he precise contours and theoretical bases of [continuing violations] are at best unclear"); *Pub. Water Supply Dist. No. 1 of Greene Cnty. v. City of Springfield, Mo.*, 52 F.4th 372, 375 (8th Cir. 2022) ("PWSD asserts its claims are timely under the continuing-violations doctrine because the City continues to provide water to customers within the Disputed Subdivisions. . . . However, '[a]cts that are merely unabated inertial consequences (of a single act)' do not reset the statute of limitations.") (citations omitted); *see generally*, Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271 (2008) (describing the applications in different areas of law and different circuits).

201. *Coeur d'Alene*, 521 U.S. 261 at 281 ("An allegation of an ongoing violation of federal law ... is ordinarily sufficient").

202. Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271 (2008).

203. *N. Collin*, 2023 WL 2561730; *Green Valley*, 969 F.3d 460.

customer base and thereby interfere with its ability to provide water services in violation of Section 1926.²⁰⁴

A service territory dispute in Oklahoma provides one example of this tension between state and federal interests. In *Rural Water District No. 5 of Wagoner County v. City of Coweta, Oklahoma*, the court relied on testimonial evidence that a nearby city's competition with a federally-indebted rural water district could result in the loss of actual or potential customers, which would necessarily result in increased costs for remaining customers or decreased revenues for the indebted utility.²⁰⁵ That case highlights two competing interests: the strong federal interest in loan repayment, and the City's "vested right to serve" granted by state law.²⁰⁶ Both Section 1926 and Oklahoma statutes are silent as to how these interests should be balanced, leaving the courts as the ultimate decision-makers.

However, when it comes to institutional competence, local and state legislative bodies are often better positioned than courts to make affordability and public interest determinations, given their ability to issue regulations, ensure transparency, and promote democratic accountability.²⁰⁷ State and local governmental entities are beholden to "citizen-customers" in ways that courts and federal actors are not.²⁰⁸ In this Part, this Note will argue for two structural changes: first, state utility commissions must clarify that utilities' public interest obligations include affordability; and second, state and federal agencies involved in regulating water utilities must prioritize regionalization to advance both safety and affordability.

A. Affordability as a Public Interest Obligation

There is no federally recognized right to affordable drinking water. A handful of states have passed legislation or amended their state constitutions to recognize a right to clean water; however, this language is

204. Fallin, 2017 WL 744638.

205. *Rural Water Dist. No. 5 Wagoner Cnty. v. City of Coweta*, 202 F. Supp. 3d 1268, 1271 (N.D. Okla. 2016).

206. Reply Brief of Defendants' Motion for Summary Judgment, *Rural Water Dist. No. 5 Wagoner Cnty. v. City of Coweta*, No. 08-CV-252-JED-FHM, (N.D. Okla. Jan. 25, 2013).

207. State and local governments have the ability to "make it easier for residents to overcome the difficulties of collective action: by providing a formal political structure, special districts could house greater participation and collaborative governance of water resources." K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America's Water Crisis*, 53 HARV. C.R.-C.L. L. REV. 533, 553 (2018).

208. DAVID CATT, RAND INSTITUTE, ASSESSING THE GOVERNANCE OF WATER UTILITY FINANCIAL AND INFRASTRUCTURE MANAGEMENT 37 (Sep. 19, 2023).

oftentimes difficult to operationalize.²⁰⁹ Though the congressional intent behind Section 1926 protection is to ensure affordable access to water, there is limited research on whether rural areas receive more affordable rates from federally-indebted utilities rather than other types of water utilities. One commentator argues that Section 1926 protection has the effect of limiting opportunities for economic development and consolidation.²¹⁰ Furthermore, rural water systems are more limited in terms of financing options; because rural water utilities serve smaller populations, it is often not cost-effective for them to issue their own bonds.²¹¹ Fragmentation of the water sector, characterized by “too many small utilities,” results in difficulties with conducting routine maintenance, investing in infrastructure upgrades, reaching economies of scale, and meeting health and safety standards.²¹²

Government regulation of monopolies like water utilities is a substitute for market competition, intended to “protect consumers from extortionate rates” and further “the public interest” in supplying adequate utility services at reasonable rates to all individuals. When state and federal regulations are in conflict, this makes protecting consumer interests more difficult, especially given that state law defines the “public” to be served and federal law guarantees a service provider a monopoly through Section 1926.

Historically, utility governance defined “public interest” as preventing price-gouging and limiting anticompetitive effects through rate regulation.²¹³ More recently, to specifically address unaffordability, some states and local governments allow utilities to offer customer assistance programs, which can include low-income discounts or repayment plans.²¹⁴ However, the legal landscape for establishing customer assistance

209. For example, California amended its water code to declare “that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” CAL. WATER CODE. ANN. § 106.3; Jenny Linder Rempel & Kristin Babson Dobbin, *When “symbolic” policy is anything but: Policy design and feedbacks from California’s human right to water law*, 53 POLICY STUD. J. 701 (2024). New York voters approved an environmental rights amendment to the state constitution that to state that “[e]ach person shall have a right to clean air and water, and a healthful environment.” N.Y. CONST. art. I, § 19; Michael B. Gerrard & Edward McTiernan, *New York’s Green Amendment: The First Decisions*, N.Y. L.J. (2023), https://scholarship.law.columbia.edu/faculty_scholarship/3906 [<https://perma.cc/GJ4C-6SND>].

210. Scott Hounsel, *Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 TEX. L. REV. 155, 177 (2001) (“[S]ection 1926(b) can retard economic development when inadequate water infrastructure drives investment elsewhere”).

211. CATT, *supra* note 208, at 33.

212. *Id.* at 8.

213. Shumway et al., *supra* note 82, at 361, 365.

214. Kayleigh Ward et al., *Municipal Capacity for Water Justice: A Cross-Case Comparison of Affordability and Equity Policies in Pennsylvania and Massachusetts*, 26 J. ENV’T. POL’Y. & PLAN. 4 353 (2024), <https://doi.org/10.1080/1523908X.2024.2369286> [<https://perma.cc/QS5N-VWQV>].

programs is unsettled; some states have restrictive statutory language that creates the impression that utilities can't fund these programs using their primary revenue source, customer rate revenues.²¹⁵ In some circumstances, state constitutions limit cross-subsidization of customers.²¹⁶ Other states require utilities to ensure "reasonable" and "nondiscriminatory" rates, which prevent subsidization of a subset of customers.²¹⁷ Due to the uniquely public nature of water system operators, there is a general presumption against cross-subsidies.²¹⁸ But cross-subsidization has always existed; for example, ratepayers in the same class pay the same cost, even though actual cost depends on distance from a water plant, and high-volume consumers receive inherent subsidies.²¹⁹

More generally, rate structures are perhaps the most important decision that water utilities make.²²⁰ Those decisions are governed by statutory "public interest" obligations. Most states require water rates to "reflect the cost of service" and to be "just, reasonable, nondiscriminatory, and/or uniform."²²¹ A few states mandate "affordable" rates, and most that do primarily do so through customer assistance programs.²²² Some states, like Rhode Island, have statutory language directing municipal water utilities to "make a basic level of water use affordable."²²³ This gives municipalities, rather than the state public utility commission, the authority to define "affordable." California's legislatively recognized human right to water is another example of how states can recognize a duty to provide affordable water. However, California's legislation lacks private enforcement mechanisms,²²⁴ and affordability gaps remain for low-income households and households served by small water systems in California.²²⁵

States must go one step further by clarifying that a utility's public interest obligations include the duty to ensure that rural communities have access to *affordable* water. Courts hearing challenges to rate

215. Sharmila Murthy, *Disrupting Utility Law for Water Justice*, 76 STAN. L. REV. 597, 646 (2024).

216. *Id.*

217. *Id.*

218. Murthy, *supra* note 215, at 645–646.

219. *Id.*

220. CATT, *supra* note 208, at 20.

221. Murthy, *supra* note 215 at 640.

222. BERAHZER, *supra* note 12.

223. 45 R.I. GEN. LAWS § 45-39.1-5(b)(3).

224. Rempel & Dobbin, *supra* note 209.

225. Jessica J. Goddard, Isha Ray & Carolina Balazs, *Water affordability and human right to water implications in California*, 16 PLOS ONE e0245237, at 1 (2021) ("...we identify high unaffordability for households in poverty in a large fraction of water systems. We identify several scenarios with different policy implications for the human right to water, such as very small systems with high water bills and low-income households within large water systems.").

determinations are typically very deferential to the findings of public utility commissions.²²⁶ Adopting legislation that defines affordability and requires utility commissions to consider affordability in rate determinations is one step states can take to ensure that rural communities will have access to affordable drinking water. The New York HEAT Act is one example of proposed legislation that aims to limit the energy burden on low-income households by defining “affordability” in terms of a six percent cap: low-income households’ energy utility bills should be six percent or less of household income.²²⁷ States should similarly codify a price ceiling for water utilities; by legally capping water utility rates, states would be closer to recognizing water as a necessity rather than a commodity. Further state-specific research is necessary to define “high water burden,” but a recent EPA report using a 4.5% threshold offers some guidance: water utility bills greater than 4.5% of household income were used to estimate the number of households experiencing high water burdens.²²⁸

B. Incentivizing Regionalization

Another necessary, concurrent structural change in the rural water utility landscape is regionalization. Regionalization is defined as the “consolidation of two or more water systems for the purpose of increased viability.”²²⁹ In rural areas, consolidation has the potential to improve affordability and resiliency. Additionally, regionalization may help avoid Section 1926 issues by allowing systems to merge and assume indebtedness, rather than compete. States and the federal government should incentivize regionalization through fair market value laws, consolidation mandates, and technical assistance programs.

The EPA and USDA have long collaborated on improving small rural public water systems’ compliance with drinking water regulations.²³⁰ In a

226. *See supra* Section II.C.1 Duty to Serve.

227. S.B. 4158, 2025–2026 Leg., Reg. Sess. (N.Y. 2025) (“Requires the Public Service Commission to develop a plan to ensure that all residential customers be adequately protected from bearing energy burdens greater than 6% of their household income.”).

228. EPA WATER AFFORDABILITY NEEDS ASSESSMENT, *supra* note 2, at 19–20.

229. BEECHER, NRRI REPORT *supra* note 83, at 5.

230. *See, e.g., The Needs of Drinking Water Systems in Rural and Smaller Communities: Hearing Before the H. Subcomm. on Environment and the Economy*, 114TH CONG. (2015), <https://democrats-energycommerce.house.gov/sites/evo-subsites/democrats-energycommerce.house.gov/files/documents/Memo-EE-Drinking-Water-Systems-2015-2-27.pdf> [<https://perma.cc/KQ86-7RZU>] (memorandum by Fred Upton, Chairman, H. Comm. on Energy and Commerce and Frank Pallone, Ranking Member, H. Comm. on Energy and Commerce) (“Since 2011, EPA and USDA have coordinated their efforts under a Memorandum of Agreement (MOA) to promote the sustainability of rural water and wastewater systems.”).

Memorandum of Agreement (MOA) signed by the EPA's Office of Water and USDA's Rural Utilities Service in 2020, the two highlighted areas for ongoing collaboration and noted that rural water utilities struggled to comply with certain EPA rules.²³¹ In the MOA, the EPA and USDA committed to encouraging water utilities to explore collaboration and partnership options with neighboring water systems, including the sharing of costs, infrastructure, and management.²³²

In 2024, the EPA proposed the Water System Restructuring Assessment Rule (WSRAR), under which chronically noncompliant public water systems would be required to identify and implement feasible restructuring options—such as resource sharing, consolidation, or transfer of ownership—that could bring the system into compliance with drinking water standards.²³³ The National Rural Water Association submitted public comments, highlighting the following: firstly, restructuring assessments should only be required for public water systems with health-based violations, rather than monitoring and reporting violations; secondly, consolidation can result in new compliance challenges, so the EPA should clarify who is liable for “new” violations; and thirdly, consolidation oftentimes results in rate increases that will disproportionately affect small and disadvantaged communities.²³⁴

Amending WSRAR to address the concerns of rural communities would ensure that the proposed rule still targets chronic noncompliance without adding unnecessary financial burdens on low-income ratepayers living in these communities.

State legislatures can also play an important role. States should direct environmental agencies to prioritize the consolidation of small and rural water utilities, especially those struggling to achieve compliance with federal drinking water standards while maintaining affordability. States are often well-positioned to promote or require consolidation because state agencies such as the environmental department and utility commission are already involved in issuing rules and regulations concerning the operation of water utilities.²³⁵ Many states have already established programs to

231. EPA & USDA, MEMORANDUM OF AGREEMENT BETWEEN THE EPA OFFICE OF WATER AND USDA RURAL DEVELOPMENT RURAL UTILITIES SERVICE ON PROMOTING SUSTAINABLE RURAL WATER AND WASTEWATER SYSTEMS (2020), https://www.epa.gov/sites/default/files/2020-02/documents/epa-usda_moa_sustainable_rural_water_and_wastewater_systems_508.pdf [<https://perma.cc/658S-S4FZ>].

232. *Id.* at 3.

233. Water System Restructuring Assessment Rule, 89 Fed. Reg. 46998 (proposed May 30, 2024).

234. Nat'l. Rural Water Ass'n, Comment Letter on Proposed Water System Restructuring Assessment Rule (July 29, 2024), <https://www.regulations.gov/comment/EPA-HQ-OW-2022-0678-0020> [<https://perma.cc/5D36-ZTYZ>].

235. Jessica Norriss et al., *Too Small to Succeed: State-Level Consolidation of Water Systems*, 113 JOURNAL AWWA 13 (2021).

incentivize consolidation.²³⁶ Some states also have “fair market value” laws to increase the sale price of water systems to incentivize consolidation.²³⁷

The success of water utilities consolidation depends heavily on their governance structures and financial privileges; for example, publicly-owned water systems in California are subject to restrictions under Proposition 218 and “cannot charge above the cost of service provision,” have wide-reaching legal and financial abilities, and have elected officials who are more visible and accountable to the public.²³⁸ IOUs in California, on the other hand, have the ability to provide subsidized rates to low-income customers and have greater economic incentives to invest in infrastructure upgrades.²³⁹

However, state and local actors are sometimes unreceptive to proposals to consolidate, citing loss of autonomy, job loss, physical distance between utilities, political issues, fear of increasing rates, and lack of resources as barriers.²⁴⁰ In rural areas, the physical distance between utilities is a particularly difficult barrier to overcome, given the high costs of building out pipes; in fact, “at longer distances, regionalization introduces inefficiencies in the total water system.”²⁴¹ Political considerations, such as re-election concerns, also pose a barrier; local officials may face perverse incentives to keep rates low, leading to neglected repairs and upgrades for water systems.²⁴²

Regionalization involves bringing together local and state actors to coordinate infrastructure upgrades and reduce redundancies. It has often been prompted by water quality violations.²⁴³ Though there is no one approach that guarantees affordable and compliant water systems, a reduction in the number of water districts can be in the public’s interest when it eliminates inefficiencies and results in more affordable rates.²⁴⁴

236. *Id.* at 12.

237. GAO, *supra* note 24, at 5 (“Fair market value laws generally permit private companies to acquire water utilities at higher than book value—which is based on original cost, less depreciation—and allow companies to factor the acquisition value into the rates they charge for water.”).

238. KRISTIN DOBBIN, JUSTIN MCBRIDE & GREGORY PIERCE, U.C.L.A. LUSKIN CTR. FOR INNOVATION, DESIGNING WATER SYSTEM CONSOLIDATION: CONSIDERATIONS FOR CALIFORNIA COMMUNITIES 3, 12, 13 (2022), <https://innovation.luskin.ucla.edu/wp-content/uploads/2022/10/Designing-Water-System-Consolidation-Projects.pdf> [<https://perma.cc/R54J-2P9W>].

239. *Id.* at 15.

240. *Id.* at 8, 13.

241. BEECHER, NRRI REPORT *supra* note 83, at 9.

242. Hansen & Mullin, *supra* note 86, at 3.

243. Norriss et al., *supra* note 235, at 12.

244. CATT, *supra* note 208, at 43.

V. CONCLUSION

The highly fragmented nature of U.S. water infrastructure makes it difficult for rural water utilities to remain both affordable and compliant with federal and state regulations. Additionally, with declining federal funding for rural water utilities, state and local governments are further constrained. Regionalization is one option that rural water utilities have to meet their dual mandate to provide safe and affordable water.

Rural water affordability, in particular, is linked to the rights and obligations water utilities have under federal and state law. Section 1926(b) creates federal obligations and rights, providing an exclusive service territory in exchange for loan repayment. State law interacts with these federal rights and obligations; the federally-indebted water utility must be certified under state law to provide these services. Historically, these separate goals have been in conflict, undermining rural water provision and system stability.

Suits under Section 1926(b) highlight the tensions between local and federal priorities in ensuring adequate access and regulating water utility monopolies. Unfortunately, these suits do no more than reveal that the underlying system of water provision is highly fragmented in ways courts are ill-equipped to address. Instead of relying on litigation to balance competing interests, federal, state, and local governments must mandate affordability and develop more robust, consolidated water delivery systems; reducing the number of smaller, under-resourced utilities can help achieve economies of scale and ensure more affordable water rates.