IN THE

SUPREME COURT OF VIRGINIA

Record No. 191563

C. ROBERT JOHNSON, III, LISA LAWSON JOHNSON, THOMAS A. HAZELWOOD, JOHNSON AND SONS SEAFOOD, LLC, AND HAZELWOOD OYSTER FARMS, INC.,

Petitioners – Appellants,

v.

CITY OF SUFFOLK and
HAMPTON ROADS SANITATION DISTRICT,

Respondents – Appellees.

BRIEF OF AMICUS CURIAE THE CHESAPEAKE BAY FOUNDATION, INC., IN SUPPORT OF THE APPELLANTS

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Statement of the Case

Amicus Chesapeake Bay Foundation (CBF) adopts the Appellants' Statement of the Case.

Assignments of Error

The Suffolk Circuit Court incorrectly applied the decision in *Darling v City of Newport News*, 249 U.S. 540 (1919), in reaching its decision and erroneously granted the defendants' demurrer.

Introduction

This appeal concerns the right of those who hold oyster leases to recover damages for injury to their leasehold interests due to water pollution. While CBF takes no position on whether the Appellees are liable, we disagree with the circuit court's legal holding. We believe the Appellants should be allowed to protect their property rights in their oyster leases and recover damages for injury to those interests. CBF submits this brief to assist the Court in ruling on this appeal.

I. CBF's Interest in the Issues Presented

CBF recognizes the unique place the Eastern Oyster (*Crassostrea virginica*) retains in the culture, history, economy, and ecology of the Chesapeake Bay and its tidal waters. Almost since its inception over 50 years ago, CBF's mission to Save the Bay has involved educating the public about oysters as well as their restoration

and preservation.[1] Over the years, CBF has invested millions of dollars in oyster restoration throughout the Bay.[2] Our restoration program includes the current effort to add 10 billion oysters to the Bay by 2025. This project is being accomplished through a broad coalition of partners in Maryland and Virginia called the Chesapeake Oyster Alliance.[3]

CBF has established three facilities devoted to the restoration of the Eastern Oyster. Two of those facilities are in Virginia. One is the Virginia Oyster Restoration Center in Gloucester Point.[4] The center maintains four 800-gallon tanks used to grow baby oysters called "spat." In the tanks, the spat attach to recovered oyster shells or concrete reef balls. Once attached, the spat-on-shell and reef balls are relocated to oyster reefs in the Bay or tidal rivers such as the Lafayette River which, in 2018, met Virginia's 80-acre oyster habitat goal.[5] Over the course of several years, CBF placed approximately 470 million spat-on-shell oysters and 1,500 oyster reef balls in the river.

CBF citizen volunteers also grow oysters under their docks as part of CBF's

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[1] https://www.cbf.org/about-cbf/our-mission/restore/oyster-restoration/
[2] https://www.cbf.org/how-we-save-the-bay/through-restoration/
[3] http://www.chesapeakeoysteralliance.org/
[4] https://www.cbf.org/about-cbf/locations/virginia/facilities/oyster-restoration-center/
[5] https://www.cbf.org/how-we-save-the-bay/programs-initiatives/virginia/hampton-roads/lafayette-river-restoration/. This goal was established in the 2014 Chesapeake Bay Agreement. Fn X, *infra.*

oyster gardening program.[6] Once grown to maturity, those oysters are set on local reefs using CBF's oyster restoration vessel *Chesapeake Gold*.

CBF's other Virginia facility is located at its Brock Environmental Center in Virginia Beach. The Brock Environmental Center is the home port of the newly christened Prudence H. and Lewis R. Ryan Mobile Oyster Restoration Center; a remote setting facility built upon two barges. This facility allows CBF to efficiently set spat for transport to Virginia reefs for planting as well as conduct other oyster restoration activities.[7]

In addition to its restoration efforts, CBF has been a strong advocate for science-based regulation of the oyster fishery and for funding to increase the number of oysters in the Chesapeake Bay.[8] With over 300,000 members and advocates, CBF has been a leading voice in the protection and restoration of the Eastern Oyster.

Based upon CBF's longstanding body of work, below, we provide information concerning the unique value of the oyster to Virginia and the Chesapeake Bay.

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[6] https://www.cbf.org/how-we-save-the-bay/programs-initiatives/virginia/oyster-restoration/oyster-gardening/
[7] https://www.cbf.org/how-we-save-the-bay/programs-initiatives/virginia/oyster-restoration/virginia-mobile-oyster.html
[8] https://www.cbf.org/document-library/federal-affairs/cbf-fy-2020-federal.pdf

II. The Importance of the Eastern Oyster to Virginia's History, Ecology, and Economy

Oysters have been closely intertwined with the history of the Chesapeake Bay and Virginia. In fact, the word "Chesapeake" is derived from its Native American name "Chesepioc" which means "great shellfish bay."[9] In the time of Captain John Smith's visits to the Chesapeake Bay, 1607-1609, oysters were a major source of food for both natives and colonists. The abundance of oysters and the height of their reefs or bars presented a hazard to navigation from below Hog Island on the James River to Hampton Roads.[10] The Nansemond River, where the leases at issue are located, empties into the mouth of the James River near the Monitor-Merrimac Bridge Tunnel. Smith and his crew explored the Nansemond River and encountered members of the Nansemond Tribe who attacked him and his crew with arrows.[11] Today, the oyster reefs at the mouth of the river "are faint shadows of their former selves."[12]

Pre-colonial Native Americans harvested oysters from the Bay and its tributaries for centuries. One oyster midden covered 12.1 hectares and was several

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[9] Christopher P. White, *The Chesapeake Bay Field Guide*, 3 (1989). *See, Norfolk Southern Railroad v. City of Roanoke*, 916 F.3d 315, 323 (4th Cir. 2019)(Wilkinson concurring).
[10] Williams, J.P., *Chesapeake, Exploring the Water Trail of Captain John Smith*, National Geographic, Washington DC 2006, pp. 50-51.
[11] Williams, pp. 139-140.
[12] *Id*. at 140.

meters deep representing "hundreds to thousands of years of harvesting."[13] Based upon middens found at Jamestown, European settlers likewise harvested oysters.[14]

The Virginia commercial oyster fishing industry expanded greatly in the mid-1800s.[15] A state program to lease shellfish bottom in public water has been in place in Virginia since the late 1800s, and the lease fee has remained stable since that time.[16] Oysters were canned and shipped throughout the United States.[17] The oyster fishery in Virginia peaked from 1865-1890.[18] This peak was, in-part, engendered by Virginia's decision to codify its oyster bottom leasehold system which legally protected oyster "planters" from pirate fishers.[19] Private leaseholds expanded into 1960 with 52,000 hectares under contract.[20]

Significant declines in the oyster fishery throughout the Bay first began in the late 1880s.[21] Harvests dropped in the early 1900s due to public concern about the transmission of disease through oysters.[22] In 1910, the commercial industry

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[13] Schulte, David M., *History of the Virginia Oyster Fishery*, Chesapeake Bay, USA, Frontiers in Marine Science, May 9, 2017, at p. 2.
[14] *Id*.
[15] *Id*.
[16] Brad Rich, *Growing Oysters Virginia Style*, Coastal Review OnLine (March 8, 2016). https://www.coastalreview.org/2016/03/13357/
[17] Schulte at p. 2.
[18] *Id*. at 3.
[19] *Id*.
[20] *Id*. at 4.
[21] *Id*.
[22] *Id*. at 5.

peaked again in Virginia after which significant declines in oyster stocks occurred due to overharvest, destruction of habitat, and oyster diseases.[23] Oyster stocks throughout the Bay are now a fraction of historic numbers with oyster habitat in Virginia waters in poor condition.[24] The fishery is defined as collapsed with the leasehold fishery at 0.8% of peak harvest since the early 1990's.[25]

As the numbers of oysters declined, so did the number of fishers, also known as watermen. Protective management practices and oyster aquaculture including the planting of oyster spat-on-shell on historic oyster bottom have led to the increase of oyster fishermen and harvest in recent years.

Oysters grow best on the shells of other oysters or on their shell remains. However, there has been a shortage of oyster shells to provide a proper substrate for oyster spat. To make up for this shortage, formerly productive oyster reefs in Virginia, including one at the mouth of the Nansemond River, continue to be dredged to support oyster replenishment and restoration programs.[26]

Economic Impact

In the 1940s, oysters typically accounted for more than half of the value of

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[23] *Id*.
[24] Schulte, at 13. *See also*, https://www.chesapeakebay.net/state/oysters.
[25] Schulte, at 13.
[26] *Id*. at 9.

all edible finfish and shellfish in Virginia.[27] Until 1976, oysters and blue crabs were the two major shellfish species harvested by commercial fishermen.[28]

Up to the late 1980s, the oyster fishery was the predominate Virginia fishery supporting thousands of workers. Oysters were a staple of soldiers during the Revolutionary and Civil Wars.[29] Before 1900, oyster landings regularly exceeded 40 million pounds per year. After 1900 through the early 1960s, landings were typically in excess of 15 million pounds. Since 1965, landings per year have been well below 2 million pounds. Landings in 1994 were only 301,000 pounds.[30] Id. at 28. Landings were over 400,000 in 2018-2019 for current harvest numbers.[31] Traditionally, landings from private grounds exceeded the harvests from the public areas.[32]

Ecology

The oyster is a keystone species, meaning it is exceptionally important to the Chesapeake Bay ecosystem, and the decimation of oysters has contributed to the

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[27] Kirkley, J., *Virginia's Commercial Fishing Industry: Its Economic Performance and Contributions*, Virginia Institute of Marine Science School of Marine Science, College of William & Mary 1997, pg. 25.
[28] *Id*.
[29] *Id*. at 28.
[30] Kirkley, supra, at 28.
[31] *Request for Approval of the 2020 Oyster Replenishment and Restoration Plan and the Associated Procurements Procedure*, Virginia Marine Resources Commission (2020).
[32] Kirkley at 29.

precarious state of the Bay's overall health.[33] One oyster can filter 50 gallons of water a day. Given the number of oysters alive in the 1600s through the mid-1800s, oysters could recycle all the water in the Bay in one day. Oyster reefs also provide habitat and food for scores of marine plants and animals.[34] The three-dimensional relief of oyster reefs provide habitat and shelter for fish and other aquatic organisms thus, increasing Bay productivity.[35]

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[33] *See*, Report and Recommendations of the Blue Ribbon Oyster Panel, May, 2007, Virginia Sec. Natural Resources Preston Bryant and Commissioner of Marine Resources - strategies for native oyster restoration.

"The native oyster Crassostrea virginica is a keystone species in the Chesapeake Bay and the seaside lagoons of the Eastern Shore. It has sustained our economy culture, and the ecology of both ecosystems for centuries. Oysters have declined dramatically since the 1800s, and current estimates place the Chesapeake's native oyster population as low as one percent of its historic level. Largely lost are the critical filtering, fish habitat and fishery functions once provided by this resource.

…

While the Panel did not engage in extensive debate on water quality issues, it acknowledged that any degredation (sic) of water quality has the potential to undermine all oyster restoration efforts. A long-term commitment, therefore, must address funding for sewage treatment plant upgrades, storm water management, agricultural runoff, and atmospheric deposition [of nitrogen]."
https://mrc.virginia.gov/FMAC/Blue_Ribbon_Oyster_Panel_May_2007.pdf at pp. 3 and 10.

[34] https://www.cbf.org/about-the-bay/more-than-just-the-bay/chesapeake-wildlife/; https://www.chesapeakebay.net/discover/field-guide/entry/eastern_oyster

[35] Harding, J. and Mann, R., *Oyster reefs as fish habitat: Opportunistic use of restored reefs by transient fishes*, William and Mary, Virginia

A Morgan State University study compared fully mature oyster reefs in Maryland's Choptank River system to a "fished-down" starting point.[36] The study showed that mature reefs would yield a 160 percent increase in blue crab harvest. Such reefs would also create an nearly $23 million increase in annual fishing revenues in the two closest counties. Further, mature reefs could generate more than 300 (full- and part-time) jobs.[37]

Oysters feed by pumping large amounts of water through their gills and filtering out microscopic-sized food particles. Along with these small particles, they also filter out bacteria and viruses from the water. Since oysters may be eaten raw and sold out of state, Virginia's shellfish program must conform to national standards. Accordingly, the Department of Health must ensure that shellfish harvested for sale are taken from water that is much cleaner than waters approved for other uses. For example, the shellfish standard is at least 14 times more restrictive than the swimming standard.[38]

To determine if waters meet that standard, the Virginia Division of Shellfish

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Institute of Marine Science, 2001. https://scholarworks.wm.edu/vimsarticles/1438//.

[36] https://news.morgan.edu/pearl-project-gains/

[37] https://www.fisheries.noaa.gov/topic/chesapeake-bay#oyster-restoration

[38] Virginia Department of Shellfish Sanitation. https://www.vdh.virginia.gov/environmental-health/environmental-health-services/shellfish-safety/classification-of-shellfish-growing-areas/

Safety undertakes a shoreline survey to determine potential sources of water pollution. It also takes water samples to identify areas that are impacted by direct (point source pollution in Clean Water Act, 33 U.S.C. § 1362(14), parlance) such as from industry or wastewater treatment systems, or from indirect (non-point) sources such as runoff from farmland or urban areas.[39] The object is to identify sources of fecal matter that could or does make its way into oyster grounds. With this information, the Division classifies a body of water for closure or harvest. Some designations are permanent while others are temporary. Currently, portions of the Nansemond River are permanently closed for shellfish harvest while other sections are subject to conditional closures based upon the amount of rainfall in the area.[40]

The Upper Nansemond River is impaired for fecal coliform. Sixty percent of the river is condemned or conditionally condemned.[41] A TMDL has been

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[39] *Id*.

[40] Virginia Department of Shellfish Sanitation. https://www.vdh.virginia.gov/content/uploads/sites/20/2016/05/cond063-008.pdf; Nansemond River Conditional Area C2 – *CLOSED* effective Sunday June 21, 2020 through Tuesday June 30, 2020 and is currently set to reopen on Wednesday July 1, 2020. https://www.vdh.virginia.gov/environmental-health/conditional-shellfish-harvesting-status/

[41] The Virginia Department of Health: Division of Shellfish Safety issues restrictions or conditional restrictions for shellfish harvesting due to high bacteria levels. Restricted or condemned areas are closed year-round. Conditionally restricted areas are closed for 10 days after .5

developed and in 2017 an implementation plan was written to meet state WQS.[42] Suffolk has a TMDL action plan for bacterial reduction for several areas including the Upper Nansemond River.[43] The object of the implementation plans is to restore water quality in the river so that shellfish including oysters can be harvested, marketed, and consumed.

Oyster populations are regularly sampled in the Virginia's major tidal rivers. Two oyster reefs in the James River at the mouth of the Nansemond River, Nansemond Ridge and Cruiser's Rock, show a four-year increase in both oyster spat and market size oysters.[44] Given the close proximity of these reefs to the Nansemond River, it is highly likely that oyster reefs in the Nansemond experienced increased numbers of market size oysters. Thus, had those areas on the Nansemond River been open, leaseholders could have benefited from this naturally occurring reproduction and harvested additional marketable oysters.

Oyster aquaculture – the cultivation of oysters by various means including the distribution of small oysters over leased bottom as well as growing them in

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inch of rain. Closures adversely impact Suffolk's Shellfish Industry. Nansemond River Preservation Society at https://www.Cleanmyrivers.com/water-quality.

[42] https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/ImplementationPlans/nansemondip.pdf.

[43] https://www.suffolkva.us/DocumentCenter/View/214/Action-Plan-for-Bacteria-Reduction-PDF

[44] http://cmap2.vims.edu/VOSARA/viewer/VOSARA.html, James River. See oyster graph.

cages - has expanded exponentially in Virginia with oyster farming worth approximately $9.5 million.[45] Virginia is first on the East Coast of the United States for Eastern Oyster production.[46] Oysters present the most rapidly developing sector of Virginia's shellfish aquaculture[47]

Given the historical, ecologic and economic importance of the Eastern Oyster to Virginia and its citizens, it is inimical to accept that the destruction of oysters subject to a leasehold interest could be allowed without just compensation. Recognizing this importance, Virginia has signed three Chesapeake Bay Agreements which have provided for the restoration of oysters in Bay waters.[48] The most recent agreement set the goal to: "[c]ontinually increase … shellfish habitat and water quality benefits from restored oyster populations. Restore native oyster habitat and populations in 10 tributaries by 2025 and ensure their

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[45] Rich, at 1.
[46] Hudson, K., Virginia Shellfish Aquaculture Situation and Outlook Report Results of the 2018 Virginia Shellfish Aquaculture Crop Reporting Survey. August 2019 Virginia Institute of Marine Science
[47] *Id*.
[48] 1987 Chesapeake Bay Agreement, at 2, https://www.chesapeakebay.net/content/publications/cbp_12510.pdf; Chesapeake 2000 Agreement, at 2, https://www.chesapeakebay.net/channel_files/19193/chesapeake_2000.pdf; 2014 Chesapeake Bay Agreement, pg 4, https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf.

protection."[49]

III. The Appellants' Claims Are Cognizable Under Virginia Law

The circuit court decision should be reversed and Appellants should be allowed to present their case to the trial court. If the circuit court decision is not reversed, then there will be little financial incentive for leaseholders to add to existing oyster stocks by planting substrate or spat-on-shell in leased areas of the Nansemond River or any other leased oyster bottom in Virginia waters. Third-parties can simply take them at will by polluting them and provide no recompense. Thus, a leaseholder cannot recover the cost of their lease or the costs of trying to improve oyster numbers on their leasehold. Such a ruling provides no incentive for lease owners to restore or protect their oysters.

If oyster stocks do not receive the necessary resources to improve, the critical benefits they provide including habitat and water filtration capacity as well as economic activity will be lost within the Chesapeake Bay and its tidal tributaries.

Further, because the circuit court's ruling applies to leased water bottom in Virginia, it applies to the entire molluscan (*e.g.*, clams and scallops) shellfish industry, not just oysters. Given the equally significant economic and ecologic value of those fisheries, the circuit's court decision has broad implications for the

[49] 2014 Chesapeake Bay Agreement, pg 4.

mollusk fishing industry in Virginia waters.

Because the circuit court's decision has adverse implications for oyster restoration in Virginia waters and for Bay water quality, it should be set aside.

A. Oyster leases are a property right

This Court has recognized an oyster lease as a legal property right which the leaseholder may protect in court. *Powell & Kellog* v. *Tazewells,* 66 Virginia, 786 (1875). *See also*, *McCready v. Virginia,* 94 U.S. 391 (1876). However, the circuit court's holding subjugates that right to the whim of government; if the government wants to pollute its waters with sewage then the leaseholder must bear the expense of not being able to harvest the oysters they paid to harvest. In reaching that conclusion the circuit court relied upon an off-point and legally outdated Supreme Court decision, *Darling v. Newport News*, 249 U.S. 540 (1919). There, the court recognized that the ocean had been treated by government as open to the discharge of sewage from coastal cities and that oyster bed leaseholders took their leases subject to being polluted by discharges permitted by the state. Thus, the leaseholders had no right to compensation under the US Constitution or the Fourteenth Amendment.

First, the claims asserted by the Appellants do not arise under the United States Constitution or any of its amendments. Thus, it is not direct precedent which would allow the circuit court to grant the Appellees' demurrer.

Second, in 1919, modern sewage treatment was in its infancy with few technological requirements to ensure the purity of the discharged effluent.[50] The Supreme Court recognized that future science might find a way to avoid using the ocean as a "great purifying basin." *Darling*, at 542-43. Given the sizeable populations in Virginia cities like Newport News, had the court ruled that all en could recover damages from the state or the discharging facility for pollution of oyster beds, the water treatment plants would have not been able to operate leading to the discharge of raw sewage from homes and businesses.

Today, modern wastewater treatment technology allows the discharge of water with little to no bacteria. In fact, wastewater treatment facilities in Virginia must meet stringent discharge limits for bacteria in their permits especially if they are discharging to shellfish waters or to waters with a bacteria TMDL like the Nansemond River.[51] Thus, the factual predicate for the Supreme Court's holding

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[50] The first sewage treatment plant in the United States using chemical precipitation was completed in 1890 in Worcester, Massachusetts. Metcalf, L., American Sewerage Practice, McGraw-Hill Book Co., 1914, p. 29. https://archive.org/details/americansewerag00metcgoog/page/n48/mode/2up

[51] *See*, Virginia Department of Environmental Quality, VPDES Permit Manual 2014, Section MN-3-B, p. 2, standard fecal coliform discharge limits for shellfish waters. https://www.deq.virginia.gov/Portals/0/DEQ/Water/Guidance/142003.pdf

in *Darling* is no longer accurate; the state does not need to pollute its waters and underlying oyster beds to provide for sanitation.

In fact, Virginia law enacted since *Darling* specifically holds that all waters of the state are designated for the propagation and consumption of shellfish including oysters. 9VAC25-260-10(A) ("All state waters, …, are designated for the following uses: …, the propagation and growth of a balanced, indigenous population of aquatic life, …, which might reasonably be expected to inhabit them; …; and the production of edible and marketable natural resources, *e.g.*, fish and shellfish."). By law, the Commonwealth and point source dischargers must meet this water quality standard. 33 U.S.C. §§ 1311(a); 1312(a); 1313(a)(2). Moreover, no wastewater treatment facility shall discharge sewage without a permit and no facility can continue to degrade water quality prior to the passage of the law requiring a discharge permit. VA Code 62.1-44.4; 62.1-44.5(A)(1).

Given these laws and the changes in wastewater treatment technology since 1919, the Court should recognize that if a point source permit holder violates the terms of its permit and discharges more bacteria than the permit allows or in ways not identified in the permit, then it should be subject to suit for damages under Virginia law.

Some argue that leaseholders whose property has been damaged by pollution can seek redress through the Clean Water Act citizen's suit provisions. 33 U.S.C.

§ 1365. However, that statute does not provide for damages, only injunctive relief and penalties which must be directed to the state or federal treasury. Thus, the leaseholder would not be able to recover for financial losses they incurred as a result of such pollution.

Conclusion

Virginia's history, ecology, and economy are inextricably tied to the Eastern Oyster. Sadly, oyster stocks have been decimated by disease, loss of habitat, poor water quality, and overfishing. Restoration of the Chesapeake Bay depends in part upon the restoration of the oyster. Oyster restoration is dependent upon further protecting the economic value of the oyster fishery, growing the oyster aquaculture industry, and increasing the efforts of those who labor to restore native oyster stocks. To generate interest in protecting and expanding the Virginia oyster population, there must be a viable oyster fishery. However, if leaseholders like the Appellants are unable to protect their property interests from acts of pollution and recover compensation for such acts, interests in oysters will continue to wane. Therefore, we ask that the Court recognize the Appellants' right to seek legal redress and set aside the decision of the circuit court granting the defendants' demurrer.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:26(b), this Brief of *Amicus Curiae* in support of the Appellants neither exceed 50 pages nor 8,750 words.

I hereby certify that on June 29, 2020, I filed electronically the foregoing Brief Amicus Curiae Chesapeake Bay Foundation, Inc. in Support of Appellants with the Clerk of Court, in accordance with the Supreme Court of Virginia's Temporary E-Filing Guidelines dated June 2, 2020, using the Virginia Appellate Court Electronic Filing System (VACES), which will then send notification of such filing to the following:

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