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July 26, 2018

VIA ELECTRONIC FILING

Mr. Joel H. Peck, Clerk
c/o Document Control Center
State Corporation Commission
Tyler Building — First Floor
1300 East Main Street
Richmond, Virginia 23219

RE: Case No. _____ -2018 - _____
Seth G. Heald, et al. v. Rappahannock Electric Cooperative

Dear Mr. Peck,

Please find enclosed for filing the following:

- a Verified Petition for Declaratory and Injunctive Relief, separated into two volumes:
  - Volume I, which contains the Petition itself, and
  - Volume II, which contains nine exhibits to the Petition, marked as Exhibits A–I; and

Please do not hesitate to contact me if you have any questions regarding these filings.

Thank you,

Evan D. Johns
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Enclosure

Copied: John R. Walk
Charles W. Payne, Jr.
State Corporation Commission, Office of General Counsel

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

SETH G. HEALD,
MICHAEL F. MURPHY,
and
JOHN C. LEVASSEUR,
Petitioners;

v.

RAPPAHANNOCK ELECTRIC COOPERATIVE,
a nonstock Virginia cooperative,
Respondent.

Case No. _____

VERIFIED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

VOLUME I:

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

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and
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Case No. _____

VERIFIED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Under Virginia Code § 13.1-828(B)(3) and Rules 100(B) and 100(C) of the Rules of Practice and Procedure of the Virginia State Corporation Commission, 5 VAC 5-20-100(B)–(C), three owner-members of the Rappahannock Electric Cooperative (REC)—Seth G. Heald, Michael F. Murphy, and John C. Levasseur (collectively, the Members)—file this petition for a declaration that certain bylaws adopted by REC's board of directors are void as inconsistent with law and REC's charter and/or void as unreasonable, oppressive, unduly burdensome, arbitrary, or capricious. In the alternative, and to the extent the challenged bylaws are valid, Members Heald, Murphy, and Levasseur request that the Commission enforce those bylaws as written through preliminary and permanent injunctive relief.

After wrongfully denying Mr. Heald his statutory right to present proposed bylaw amendments for a vote by his fellow-members in 2012, REC's board of directors unilaterally

amended the cooperative's bylaws to restrict *any* exercise of that right by the members. As amended, the bylaws now require that any member wishing to propose a bylaw amendment collect the physical signatures of 500 fellow-members, evenly distributed throughout REC's twenty-two-county service territory, on a board-approved form-petition. Because those and other board-mandated restrictions are inconsistent with Virginia law and are unreasonable in their practical effect, the board acted *ultra vires* and the resulting bylaws are void *ab initio*.

Nonetheless, when Members Heald, Murphy, and Levassuer decided to propose additional bylaw amendments some years later, they requested a copy of the board-mandated form-petition in a good faith effort to follow the bylaws' arbitrary and oppressive amendment procedures. Although their request fully complied with the bylaws, with REC's charter, and with Virginia law, the board refused to provide the Members with a form-petition. Even assuming the board-mandated amendment procedures were not themselves *ultra vires*, the board's denial of any opportunity to follow those procedures certainly was.

Members Heald, Murphy, and Levasseur file this Petition to correct these violations of Virginia law and to restore their statutory rights as member-owners of a democratically controlled cooperative. In support of their request for declaratory and injunctive relief, the Members attach as Exhibit A to this Petition an affidavit of Mr. Heald, and further state as follows:

THE PARTIES

The Petitioners

1. Seth G. Heald is a citizen and resident of Rixeyville, Virginia. Mr. Heald is an owner and member of REC and has been since August 7, 2008.
2. Michael F. Murphy is a citizen and resident of Boston, Virginia. Dr. Murphy is an owner and member of REC, and has been since March of 2009.

3. General John C. Levasseur is a citizen and resident of Fredericksburg, Virginia, and a retired Army Brigadier General. General Levasseur is an owner and member of REC, and has been since the summer of 2008. General Levasseur also served on REC's Board of Directors between January of 2014 and August of 2017.

4. Mr. Heald, Dr. Murphy, and General Levasseur are co-founders of Repower REC, a campaign to reform undemocratic and unfair practices at REC—including board election practices that hinder informed member participation in the election process. The Repower REC campaign also seeks to improve transparency at REC in order to enable meaningful democratic governance.

The Rappahannock Electric Cooperative

5. The Rappahannock Electric Cooperative is a nonstock utility consumer services cooperative organized under the Virginia Consumer Services Cooperatives Act (the Cooperatives Act), Virginia Code §§ 56-231.15 – 56-231.37, and the Virginia Nonstock Corporation Act (the Nonstock Act), Virginia Code §§ 13.1-802 – 13.1-946.

6. REC's principal office is located in the City of Fredericksburg, Virginia.

JURISDICTION AND VENUE

7. The Commission serves under a constitutional charge to "administer[ ] the laws made . . . for the regulation and control of corporations doing business in th[e] Commonwealth." Virginia Constitution, art. IX, § 2. *See also* Virginia Code § 12.1-12(A).

8. The Commission has jurisdiction under Virginia Code § 56-6 to consider and pass upon complaints brought by "[a]ny person . . . aggrieved by anything done or omitted in violation

of any of the provisions of [Title 56 of the Code of Virginia] by any public service corporation" and to "enjoin obedience to the requirements of th[e] law."

9. The Commission also has jurisdiction under Virginia Code § 13.1-828—as incorporated into the Cooperatives Act by Virginia Code § 56-231.19—to consider and pass upon challenges to a cooperative's authority to act. *See also Uplinger v. Alexandria Overlook Condominium Council*, Case No. CLK-2015-00006, Hearing Examiner's Report at 5 (August 28, 2015), available at https://bit.ly/2LxkuQn. In such a proceeding, the Commission may temporarily or permanently enjoin any *ultra vires* act. Virginia Code § 12.1-13.
10. Under Virginia Code § 12.1-32, the Commission's authority to award costs, fees, and expenses is the same as that of a court of record.
11. Finally, where no other adequate remedy lies, the Commission may issue a declaratory judgment under Rule 100(C) of its Rules of Practice and Procedure. 5 VAC 5-20-100.

LEGAL FRAMEWORK

Nature and Structure of Electric Cooperatives

12. Cooperatives are legal business entities organized to provide economic services to their members, who own and control the entity. *See United Grocers v. United States*, 186 F. Supp. 724, 733 (N.D. Cal. 1960), *affirmed* 308 F.2d 634 (9th Cir. 1962).
13. In many respects "the operation and governance of the cooperative appear similar to that of any typical corporation," and cooperative members are "much like shareholders" of a conventional stock corporation. Charles T. Autry & Roland F. Hall, *The Law of Cooperatives* 53 (2009). The law typically imbues cooperative members with many of "the same rights and responsibilities as shareholders in a traditionally organized corporation." Lewis D. Solomon

& Melissa B. Kirgis, *Business Cooperatives: A Primer*, 6 DePaul Business Law Journal 233, 246 (1994).

14. Nonetheless, "[c]ooperatives and corporations operate on different principles," *United States v. Mississippi Chemical*, 405 U.S. 298, 308 n.14 (1972), and therefore "even those aspects of operation and governance that appear to be taken directly from corporate models must be understood in light of cooperative principles and values," Autry & Hall, *supra*, at 53. *See also* Israel Packel, *The Law of the Organization and Operation of Cooperatives* § 1 (1940).

15. Specifically, electric cooperatives "distinguish themselves through the seven cooperative principles," which "serve as the guiding business philosophies for cooperatives across the country." *Governance and Financial Accountability of Rural Electric Cooperatives: The Pedernales Experience*: *Hearing Before the House Committee on Oversight & Government Reform*, 110th Congress, House Document No. 110-107, 126 (2008) (hereinafter *Pedernales Experience*), available at https://bit.ly/2tUgZc1 (statement of Glenn English, CEO of the National Rural Electric Cooperative Association). Those seven principles—often referred to as the "Rochdale Principles," after a seminal consumer cooperative in nineteenth-century England, *Puget Sound Plywood v. Commissioner of Internal Revenue*, 44 T.C. 305, 307–308 (1965)—include:

    (a) Voluntary and Open Membership;

    (b) Democratic Member Control;

    (c) Member Economic Participation;

    (d) Autonomy and Independence;

    (e) Education, Training, and Information;

(f) Cooperation Among Cooperatives; and

(g) Concern for Community.

Pedernales Experience, *supra*, at 126 (statement of Glenn English). *See also* Rappahannock Electric Cooperative, *Cooperative Principles*, http://www.myrec.coop/aboutus/cooperative-principles.cfm (accessed July 2, 2018).

16. The second Rochdale Principle, democratic member control, "is a fundamental principle of being an electric cooperative." *In re Cajun Electric Power Cooperative*, 230 B.R. 693, 713 (Bankr. M.D. La. 1999). The principle of democratic control "envision[s] . . . a model of a widely-based participatory democracy," *Etter Grain v. United States*, 462 F.2d 259, 262 (5th Cir. 1972), and provides members "more ability to exert control" over the enterprise than is enjoyed by corporate shareholders, Autry & Hall, *supra*, at 56 (noting that this "makes the member-cooperative relationship unique"). *See also Denton County Electric Cooperative v. Hackett*, 368 S.W.3d 765, 777 (Tex. App. 2012) ("[C]haracteristics that distinguish cooperatives from other business structures include the features of democratic control and voting[.]") (internal quotation marks omitted); National Rural Electric Cooperative Association, *Electric Consumer Bill of Rights* (1999), available at https://bit.ly/2NeB8T8 (stating that the "co-op difference resides in consumer ownership and control"). Indeed, REC has previously invoked its adherence to the principle of democratic control as a justification for proposed exemptions from utility regulations. *See Commonwealth ex rel. State Corporation Commission,* No. PUE980812, Hearing Examiner's Report, 1999 WL 35764083, *53 (August 6, 1999).

17. Democratic control over a corporation is exercised both directly and indirectly: "[M]embers of the co-op govern the business directly by voting on significant and long-term business decisions and indirectly through their representatives on the board of directors." Kimberly A. Zeuli & Robert Cropp, *Cooperatives: Principles and Practices in the Twenty-First Century* 1 (2004). *See also* Internal Revenue Service Ruling 55-240, 1955-1 C.B. 406, 1955 WL 9740, *1 (January 1, 1955) (democratic control relates *both* to the "control that the shareholders as a group exercise over the operations of the company" *and* to the "[v]oting rights of shareholders"). Direct democratic control includes the authority to "[a]dopt and amend articles of incorporation, bylaws, and any resolutions or motions presented at cooperative annual meetings." Zeuli & Cropp, *supra*, at 49; United States Department of Agriculture, *Co-Op Essentials: What They Are and the Role of Members, Directors, Managers, and Employees* 15 (2014), available at https://bit.ly/2NwCrw6 (enumerating responsibilities of cooperative members, including "approv[ing] (and chang[ing]) articles of incorporation, bylaws, and major policies"). *See also* Internal Revenue Service, Private Letter Ruling No. 201309017, 2013 WL 771299 (February 23, 2009) (concluding that cooperative is democratically controlled where members "may submit resolutions to change the cooperative operations, subject to approval of the majority of members"). "Because of the importance of the bylaws to the governance of the cooperative," the members' authority over those bylaws "is of critical importance." Autry & Hall, *supra*, at 55.

18. Commentators note, however, that without openness and transparency, "co-op democracy is a sham." *See Pedernales Experience*, *supra*, at 59 (statement of Rep. Jim Cooper). *See also id.* at 106 (statement of Patrick M. Rose, Texas State Representative) (emphasizing that "real local

control" requires "open meetings and open records [for] all co-ops"). Accordingly, other large electric cooperatives provide their members access to board meetings—both in person and through online video. *Id.* at 98 (statement of Juan Garza, General Manager of Pedernales Electric Cooperative). *See also Socorro Electric Cooperative v. West*, No. D1314-CV-2010-0849, Order on Hearing on Partial Merits (N.M. Dist. June 24, 2011), available at https://bit.ly/2O40bc3 (upholding cooperative bylaw mandating member access to board meetings); Marias River Electric Cooperative, *Co-op Transparency Standards Statement*, http://www.mariasriverec.com/content/co-op-transparency-standards-statement (last visited July 12, 2018) ("Any member may attend board meetings and address the board.").

19. Cooperative principles like democratic control "are more than just good practices, policies or common sense. They distinguish a cooperative from other kinds of business [and] are also recognized in State and Federal statutes and regulations as criteria for a business to qualify as a cooperative." United States Department of Agriculture, *Co-Ops 101: An Introduction to Cooperatives* 9 (1997), available at https://bit.ly/2ycYvat. *See also* Zeuli & Cropp, *supra*, at 17 (noting that all fifty "states have cooperative statutes that are remarkably uniform").

20. Those statutes and regulations include the Virginia Consumer Services Cooperatives Act (the Cooperatives Act), Virginia Code §§ 56-231.15 – 56-231.37, and the Nonstock Corporations Act (the Nonstock Act), Virginia Code §§ 13.1-802 – 13.1-946, which together govern the structure and administration of Virginia nonstock electric cooperatives.

The Utility Consumer Services Cooperatives Act

21. The Consumer Services Cooperatives Act permits five or more individuals to organize a nonprofit cooperative "for the principal purpose of making energy, energy services, and other

utility services available at the lowest cost consistent with sound economy and prudent management of the business" by formally "executing, filing and recording articles of incorporation" to that effect with this Commission. Virginia Code § 56-231.16.

22. The Cooperatives Act allows cooperatives to form "either with or without capital stock." Virginia Code § 56-231.16. A nonstock cooperative is owned and controlled by members rather than stockholders, and membership is limited to individuals and entities that actually "use utility services supplied by [the] cooperative." Virginia Code § 56-231.32.

23. Under Section 56-231.17 of the Cooperatives Act, a cooperative's articles of incorporation represent the foundational governing document and may contain "any provision not inconsistent with law . . . for the regulation of the business and conduct of the affairs of the cooperative" or the "internal regulation or government of the cooperative, its directors and [its] members." Virginia Code § 56-231.17(B).

24. Section 56-231.28 of the Cooperatives Act requires each cooperative organized thereunder to "have a board of directors of five or more members" that "constitute[s] the governing body of the cooperative." Virginia Code § 56-231.28.

Section 56-231.29(1) — Directors' Bylaw Authority

25. Section 56-231.29 of the Cooperatives Act outlines the powers of the board of directors to "do all things necessary or incidental in conducting the business of the cooperative." Virginia Code § 56-231.29.

26. Under subsection (1) of that section, the board of directors may, if so authorized by the articles of incorporation or by a resolution of the cooperative's members, "adopt and amend

bylaws for the management and regulation of the affairs of the cooperative, subject, however, to the right of the members to alter or repeal such bylaws." Virginia Code § 56-231.29(1).

27. Section 56-231.29(1) restricts board-adopted bylaws to the following subject matters:

    (a) the admission, suspension, or expulsion of members;

    (b) the transfer of membership;

    (c) the fees and dues of members and the termination of membership on nonpayment of dues or otherwise;

    (d) the number, time, and manner of choosing officers and directors, as well as their qualifications, terms of office, official designations, powers, duties, and compensation;

    (e) the determination of and the manner of filling a vacancy on the board or in any office;

    (f) the number of members to constitute a quorum at meetings;

    (g) the date and notice required of the annual meeting and any special meetings;

    (h) the terms and conditions upon which the cooperative renders electric service to its members;

    (i) the disposition of the revenues and receipts of the cooperative; and

    (j) the nature and notice required of regular and special meetings of the board.

    Virginia Code § 56-231.29(1).

28. Section 56-231.29(1) further restricts board-adopted bylaws to only those that are consistent with the law and with the articles of incorporation.

Section 56-231.29(4) — Directors' Procedural Rulemaking Authority

29. Subsection (4) of Section 56-231.29 authorizes a board of directors to "make its own rules and regulations as to its procedure." Virginia Code § 56-231.29(4).

The Nonstock Corporations Act

30. Section 56-231.19 of the Cooperatives Act incorporates by reference "[a]ll of the provisions of the Virginia Stock Corporation Act (§ 13.1-601 *et seq.*) and the Virginia Nonstock Corporations Act (§ 13.1-801 *et seq.*), insofar as not inconsistent with" the Cooperatives Act itself. Virginia Code § 56-231.19.

Voting Threshold for Member Action

31. As relevant here, Section 13.1-849 of the Nonstock Act provides that, absent a provision in the articles of incorporation expressly requiring a higher threshold, the "vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members." Virginia Code § 13.1-849(A).

Challenges to Ultra Vires Action

32. Section 13.1-828 of the Nonstock Act states that any *ultra vires* act of a corporation may be challenged either:

    (a) in a direct "proceeding by a member . . . against the corporation to enjoin the act," Virginia Code § 13.1-828(B)(1);

    (b) in a "proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former officer, director, employee, or agent of the corporation," Virginia Code § 13.1-828(B)(2); or

    (c) in a "proceeding against a corporation before the [State Corporation] Commission," Virginia Code § 13.1-828(B)(2).

FACTUAL BACKGROUND

The Rappahannock Electric Cooperative

33. REC was organized in 1979 as the surviving entity of a merger between the Northern Piedmont Electric Cooperative and the Virginia Electric Cooperative. *See* Rappahannock Electric Cooperative, *A Powerful History: How Local People Brought Electricity to the Area* 11 (2010), available at https://bit.ly/2NagTpI. With over 165,000 customers in twenty-two counties, REC is now the largest electric cooperative in Virginia and among the largest in the United States.

34. REC's operations are governed primarily by Articles of Restatement approved by its Board and its members on June 25, 2009. A copy of the Articles of Restatement is attached as Exhibit B to this Petition.

35. REC's Articles of Restatement provide, in relevant part, that REC's Board "shall have the power to adopt and amend bylaws for the management and regulation of the affairs of the Cooperative, subject to the right of the members to alter or repeal such bylaws." Exhibit B.

36. REC's operations are also governed by its Bylaws, which REC's Board most recently amended and restated on October 18, 2017. A copy of those Bylaws is attached as Exhibit C to this Petition.

37. REC's Bylaws divide the cooperative's twenty-two-county service area into nine discrete, geographic regions and require that its board of directors include at least one member from each of these regions. *See* Exhibit C at 7.

Member Heald's Predicate Bylaw Amendment Proposals

38. On April 3, 2012, Member Heald submitted two proposed amendments to the REC Bylaws in accordance with Article XII of the Bylaws, as then constituted.

39. Article XII of the REC Bylaws, as amended on February 15, 2012 and as effective on April 3, 2012, provided, in its entirety:

> These Bylaws may be altered or amended by either the membership or the Board of Directors. Amendments may be adopted by the affirmative vote of not less than two-thirds (2/3) of the total membership of the Board of Directors at any regular or special meeting of the Board, subject, however, to the right of the members of the Cooperative to alter, amend, or repeal such Bylaws by an affirmative vote of not less than two-thirds of the members present in person or by proxy at any annual or special meeting of the members. Any proposed amendment to these Bylaws must be presented in writing ten (10) days prior to their consideration by the Board of Directors or if to be considered by the membership, the proposed bylaw amendment must be presented to the Secretary of the Cooperative not less than one hundred (100) days prior to the annual or special members' meeting at which they are to be considered. (This will allow time for the amendment to be distributed to the membership in the member publication.) A copy of such amendment shall be sent to each member of the Cooperative within a reasonable time after such action has been taken. (This may be accomplished through the member publication.)

A copy of the REC Bylaws, as amended on February 15, 2012 (the February 2012 Bylaws) and as effective on April 3, 2012, is attached as Exhibit D to this Petition.

40. In accordance with Article XII of the February 2012 Bylaws, Member Heald sent a letter to Linda R. Gray, REC's Secretary, dated April 3, 2012—a copy of which is attached as Exhibit E to this Petition—proposing two amendments to Article IV, Section 7 and Article V of the REC Bylaws.

41. Specifically, Member Heald's April 3, 2012 letter proposed:

    (a) amending Article IV, Section 7 of the February 2012 Bylaws to require that REC annually publish in *Cooperative Living*, a magazine REC distributes to each of its members, the total annual compensation provided each Board member, and to require that the Board give notice to the members in advance of any vote to increase the compensation of any Board member, Exhibit E at 3; and

(b) amending Article V of the February 2012 Bylaws to require REC provide its members with notice of and an opportunity to attend and observe all meetings of the Board (except for any executive sessions permitted by law), *id.* at 3–4.

42. Charles W. Payne Jr., counsel for REC, responded to Member Heald by letter dated April 25, 2012, a copy of which is attached as Exhibit F to this Petition.

43. Mr. Payne's April 25, 2012 letter advised Member Heald that the Board was exercising a purported right to "review and determin[e] whether such an amendment(s) is consistent with REC's articles of incorporation and bylaws, and applicable law." Exhibit F at 3. Mr. Payne informed Member Heald that REC would not allow the proposed amendments to be considered for incorporation into the Bylaws because REC took "the position [that the] proposed amendments are inconsistent with applicable Virginia law" *Id.* at 4–5.

44. Mr. Payne's April 25, 2012 letter also advised Member Heald that his proposal represented "the first time any member has desired to amend the particular sections of the . . . bylaws referenced" thereby and that REC was "confused as to the basis for [the] request." Exhibit F at 1.

The Board Restricts Members' Ability to Propose Bylaw Amendments

45. Following Member Heald's April 3, 2012 bylaw amendment proposal, REC announced in the November/December issue of *Cooperative Living* that its Board had voted to amend the Bylaws at a recent meeting. A copy of that announcement is attached as Exhibit G to this Petition.

46. As relevant here, the Board voted in September of 2012 to amend Article XII of the Bylaws by adding a new section titled "Procedures for Bylaw Amendments, Alterations or Repeal" and providing, in its entirety:

> Notwithstanding anything to the contrary under this article or these Bylaws, for purposes of approving any proposed amendment, alteration, or repeal of these Bylaws by the members or the Board of Directors (as applicable herein), the following requirements shall first be satisfied and confirmed:
>
> a. Written submission to the Cooperative of clear and concise language regarding the proposed bylaws alteration, amendment, or repeal;
>
> b. For purposes of proposed member alterations or repeal only, the submission of a written petition in a form approved and provided by the Cooperative and that includes at a minimum:
>
> i. original signatures (not electronic or other form) of those in support of the petition of no less than five hundred (500) members, with no more than the whole number equivalent of one-eighth (1/8) of the minimum of 500 members from any board region; and
>
> ii. all members signing the petition shall be current members and in good standing; and
>
> iii. all members signing the petition shall provide their respective full names and addresses; and [sic]
>
> c. All proposed alterations or amendments to or repeal of the Bylaws shall be in accordance with applicable state code, the Cooperative Articles of Incorporation and these Bylaws;
>
> d. Once all the requirements under this article have been satisfied, the Board of Directors will prepare and provide the form of the final submission for vote by the membership or the Board of Directors, as applicable and described hereunder.

Exhibit G at 23.

47. REC's announcement of the Bylaw amendments claimed that the Board adopted them "as part of the normal review process of the Cooperative's Bylaws" and that the amendments would "better serve its member-owners" by "provid[ing] consistency and ensur[ing] concerns brought up are representative of REC's entire membership." Exhibit G at 22.

The Members' April 19, 2018 Request for Form-Petitions and a Member Record

48. On April 19, 2018, Members Heald, Murphy, and Levasseur jointly submitted notice of their intent to propose three amendments to the REC Bylaws in accordance with Article XII of those Bylaws, as then constituted.

49. The language of Article XII of the REC Bylaws, as amended on October 18, 2017 and as effective on April 19, 2018, was substantially similar to the language of the September 2012 Bylaws quoted above in paragraph 46. *See* Exhibit C at 22.

50. In accordance with Article XII, Section 2 of the Present Bylaws, Members Heald, Murphy, and Levasseur sent a letter dated April 19, 2018, by electronic and United States certified mail to Ms. Gray, REC's Secretary, care of Deanna Kurz, REC's Assistant Secretary and Executive Assistant. The Members also sent a copy of their April 19, 2018 letter to Christopher Shipe, Chair of REC's Board, also care of Ms. Kurz. A copy of the Members' April 19, 2018 letter is attached as Exhibit H to this Petition.

51. The Members' April 19, 2018 letter notified REC of their intent to propose three amendments to the Bylaws. Noting that Article XII, Section 2 of the Bylaws requires any "proposed member alterations" thereto be submitted by a "written petition in a form approved and provided by the Cooperative," the Members' April 19, 2018 letter requested that REC provide them with a copy of the form-petition described in Article XII, Section 2 of the Bylaws. *See* Exhibit H at 2.

52. Further noting that Article XII, Section 1 of the Bylaws provides that any bylaw amendments to be considered by the members must be presented in writing to REC's Secretary at least 180 days prior to the annual or special meeting at which they are to be considered, the

Members' April 19, 2018 letter requests that REC advise them of the date of the August 2019 meeting so as to determine the deadline for submission. *See* Exhibit H at 2.

53. Finally, in light of the requirement that a member seeking to propose a bylaw amendment obtain 500 signatures of REC members in good standing supporting the amendment, the Members' April 19, 2018 letter requested that REC provide them with a list containing the contact information for all REC members in good standing, broken down by REC's nine regions, in electronic format. *See* Exhibit H at 2. The letter explains that, without such a list, "there is no practical way to determine" whether any particular individual residing within REC's service territory "is or is not an REC member." *Id.*

54. Although REC's Bylaws do not require submission of member-proposed amendments as a condition-precedent to receiving the form-petition described in Article XII, Section 2 of the Bylaws, the Members' April 19, 2018 letter included as an attachment the full text of the bylaw amendments that the Members intended to propose. *See* Exhibit H at Attachment. Specifically, the Members' April 19, 2018 letter proposed:

    (a) amending Article V, Section 5 of the Bylaws to require that REC provide its members notice of and an opportunity to observe all Board's meetings (except for any executive sessions permitted by law) in person, by streaming video, and by audio recording, *id.* at 1–2;

    (b) amending Article IV, Section 2 of the Bylaws to provide that, in director elections, cooperative members' valid proxy forms may not be counted as votes for any particular candidate unless the proxy form either (i) specifically indicates which candidate the cooperative member authorizes their proxy to vote for, or (ii)

specifically indicates that the cooperative member wants their proxy (which may include the incumbent Board, acting by majority vote) to determine which candidate the member's vote will be cast for, *id.* at 2–3; and

(c) amending Article VI, Section 11 of the Bylaws to require that REC annually publish in *Cooperative Living* the total compensation provided each Board member, and to require that the Board notify the members in advance of any vote to increase the compensation of any Board member, *id.* at 3.

55. On April 20, 2018, Ms. Kurz responded by electronic mail to Member Heald—with copies to Members Murphy and Levasseur and to Kent Farmer, REC's President and Chief Executive Officer—confirming that she had received and "forwarded for review" the Members' April 19, 2018 letter.

REC Refuses the Members' Requests

56. Mr. Payne, counsel for REC, responded to the Members' April 19, 2018 Letter by letter dated May 25, 2018, a copy of which is attached as Exhibit I to this Petition.

57. Mr. Payne informed the Members that, after "carefully reviewing the proposed Bylaw amendments in [the] April 19, 2018 letter," the Board "respectfully decline[d] to provide a form petition" because it concluded each of the amendments to be "inconsistent with the Cooperative's Bylaws and applicable state code." Exhibit I at 3–4.

58. As to their consistency with the current Bylaws, Mr. Payne argued that, "[a]s it stands, the Bylaws vest the Board with sole authority regarding its meetings, elections, and compensation." Exhibit I at 3.

59. Mr. Payne then argued that "each of the proposals attempt to usurp the Board's exclusive 'procedure' authority" under Virginia Code § 56-231.29(4). Exhibit I at 3. Mr. Payne argued that this provision granted the Board the "*sole* authority to develop and establish its rules and regulations affecting [its] procedure" and that "no other statute or provision of the Bylaws or Articles of Incorporation supersedes this authority to regulate Board procedure." *Id.* (emphasis added). Mr. Payne contended that this "'procedure' authority" broadly included "meetings, elections, and compensation." *Id.*

60. Finally, Mr. Payne argued that the proposed amendments

> would have an adverse effect on REC's membership, including without limitation (i) substantially increasing the expense for all Board meetings, (ii) heightening security and public safety concerns, (iii) creating unnecessary exposure to potential legal liability, (iv) leading to the potential loss of highly regarded and professional personnel, and (v) causing inefficient corporate governance, oversight and management practices.

Exhibit I at 3. The letter further argued that REC "should be allowed to operate like any other private company." *Id.*

61. More generally, Mr. Payne expressed his opinion that the concerns underlying the Members' requests were "based on hearsay, misinterpretations, and lack of transparency as to [their] true underlying agenda and motives versus good faith pursuits of the best interest of the membership." Exhibit I at 2. Mr. Payne did not, however, articulate what he believed the Members' "true underlying agenda" to be.

CLAIMS AND PRAYERS FOR RELIEF

I.

Article XII, Section 2(b) of the REC Bylaws is void as inconsistent with law and with REC's Articles of Restatement.

62. The Members incorporate by reference all allegations contained in the paragraphs above.

63. The Cooperatives Act permits a duly authorized cooperative board to adopt only such bylaws as are "not inconsistent with law or its articles of incorporation." Virginia Code § 56-231.29(1). *See also Kaplan v. Block*, 183 Va. 327, 334 (1944) (affirming "fundamental" and "strict[ ]" principle that "all by-laws which are inconsistent with the charter of a corporation or with the governing law are void"); Packel, *supra*, at § 15(f) ("A by-law even though duly adopted will not be given effect as a by-law if it is inconsistent with the statute under which the cooperative was incorporated.").

64. The Cooperatives Act also states that even a duly authorized cooperative board's power to adopt bylaws is "subject . . . to the right of the members to alter or repeal such bylaws." Virginia Code § 56-231.29(1).

65. Furthermore, under Virginia law, even a board of directors duly authorized to adopt bylaws may not "alter another by-law, which was intended to impose a limitation on [its] powers." *Stevens v. Davison*, 59 Va. 819, 819 (1868). As further detailed below in paragraph 108, charter provisions and statutes are superior to bylaws. Accordingly, a board's bylaw authority is similarly restricted by any provision in the articles or in the organizing statute "intended to impose a limitation on [its] powers." *Id.*

66. Moreover, the Board cannot amend the bylaws in a manner that disrupts, divests, or even "changes" a vested right without "the consent of the . . . parties whose rights are affected."

Blue Ridge Property Owners Association v. Miller, 216 Va. 611, 615 (1976) (quoting *Bechtold v. Coleman Realty*, 79 A.2d 661, 663 (Pa. 1951)). *See also Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013) ("[B]oards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent stockholder consent."); Packel, *supra*, at § 15(f) ("A by-law even though duly adopted will not be given effect as a by-law if it is . . . inconsistent with what are deemed to be vested rights of members.").

67. The right of the general membership to alter or repeal Board-adopted bylaws entails an individual right of a member to personally propose an alteration or repeal. *See Lake Monticello Owners' Association v. Lake*, 250 Va. 565, 572 (1995) (finding that individual member had a "right to submit . . . proposals to a vote of his fellow members" under statute providing that membership of nonstock corporation had right to "repeal or amend any rule or regulation adopted by the board"). *See also* Ethan G. Stone, *Business Strategists and Election Commissioners: How the Meaning of Loyalty Varies with the Board's Distinct Fiduciary Roles*, 31 Journal of Corporation Law 893, 941 n.216 (2006) (noting that both courts and commentators consider an individual right to propose bylaw amendments "self-evident" given the rights vested in the collective body). *Cf. also* Brett McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 Berkeley Business Law Journal 205, 223 (2005) ("The fundamental power to elect would seem to carry with it the power to nominate[.]").

68. Article XII, Section 2(b) of the REC Bylaws is inconsistent with law and with REC's Articles of Restatement because it attempts to condition, limit, and modify the statutory and common law right of REC's members to alter or repeal any bylaws adopted by the Board. Both the

Cooperatives Act and the Articles of Restatement are explicit that the Board's bylaw authority is "*subject to*" that right, Virginia Code § 56-231.29(1) (emphasis added), and the Board's bylaw authority cannot therefore condition, limit, burden, disrupt, or usurp that right. *Datapoint Corp. v. Plaza Securities*, 496 A.2d 1031, 1036 & n.8 (Del. 1985) (where statute "confers its mandate of action exclusively upon the shareholders . . . without delegating any authority to the board to regulate" that action, the board cannot adopt a bylaw that burdens that right without "intrud[ing] upon fundamental stockholder rights guaranteed by statute"); *In re Osteopathic Hospital Association of Delaware*, 191 A.2d 333 (Del. Ch. 1963) (striking board-enacted bylaw that "impaired a valuable right of [corporation's] members"). *See also* Packel, *supra*, at § 14 ("Even when the directors [of a cooperative] have the power to amend the bylaws[,] it must be remembered that this power is subordinate to that of the members."); 8 William Meade Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Private Corporations* § 4178 (2001) ("The delegation by the shareholders to the directors of power to amend the bylaws does not abridge the power of the stockholders themselves to amend them, especially when a subsequent statute provides that the amending power shall be in the shareholders."); *Brewster v. Hartley*, 37 Cal. 15, 24 (Cal. 1869) (where power to elect directors was "lodged by statute in the hands of the stockholders," a bylaw cannot "extend or limit the right, as regulated by th[at] statute"); *McCool v. New Hampshire Electric Cooperative*, 442 A.2d 988, 991 (N.H. 1982) (because cooperative board's rulemaking authority was subject to membership's authority to amend the cooperative's bylaws, board could not impose procedural requirements on member proposals to amend bylaws); *Sunshine Villa Apartments*

v. Haddad, 312 So.2d 810, 814 (Fla. Dist. Ct. App. 1975) (A bylaw "cannot limit the power to amend another by-law since the limiting by-law is itself subject to amendment or repeal.").

69. Furthermore, Section 56-231.29(1) of the Cooperatives Act vests in REC's members a clear statutory "*right* . . . to alter or repeal" any bylaws adopted by the Board. *See Lake Monticello*, 250 Va. at 568 (holding that similar provision in the Virginia Property Owners' Association Act "*vests* in a majority of [association's] members *the right* to 'repeal or amend any rule or regulation adopted by the board of directors'") (quoting Virginia Code § 55-513(A)) (emphasis added); *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 232 (Del. 2008) (similar language in general corporation statute "*vests* in the shareholders a power to adopt, amend or repeal bylaws that is legally *sacrosanct*, *i.e.*, the power cannot be non-consensually eliminated *or limited* by anyone other than the legislature") (emphasis added); *Boilermakers*, 73 A.3d at 956 (similar language in general corporation statute "provides . . . indefeasible right of the stockholders to adopt and amend bylaws themselves").

70. Accordingly, the five-hundred-signature requirement contained in Article XII, Section 2(b) of the REC Bylaws is inconsistent with the Cooperatives Act and with REC's Articles of Restatement because the members' right to alter or repeal any Board-adopted bylaws is one already vested in the members by those authorities and therefore cannot be "changed" by a bylaw amendment adopted without the members' consent. *See Blue Ridge*, 216 Va. at 615. *See also* James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 Washington Law Review 257, 287 (2015) ("[T]he shareholders' authority to adopt bylaws empowers shareholders with authority to act on matters of process germane to their authority to so vote.").

71. Furthermore, the five-hundred-signature requirement contained in Article XII, Section 2(b) of the REC Bylaws is inconsistent with law because the regulation of member proposals to amend the bylaws is not among the matters enumerated in Virginia Code § 56-231.29(1) as a proper subject for a board-adopted bylaw. *See Boilermakers*, 73 A.3d at 948–49 (bylaw is facially invalid if it "do[es] not address proper subject matters of bylaws as defined" in the basic corporate statute); Fletcher, *supra*, at § 4171 ("[A]n express grant of the power to adopt bylaws, but for enumerated or specified purposes, is a limitation upon the power of the corporation to enact bylaws for other purposes than those enumerated or specified in the grant"); *Oakley v. Longview Owners*, 628 N.Y.S.2d 468, 470 (N.Y. Sup. 1995) (directors of cooperative exceeded authority by imposing restraints on members for which the board was "not granted by language expressed, or implied, authority to impose").

72. By contrast, the Nonstock Act provides that "articles of incorporation may set forth . . . provisions not inconsistent with law . . . [d]efining, limiting and regulating the powers of the corporation, its directors, and its members." Virginia Code § 13.1-819(B)(2)(c). Because Virginia Code § 56-231.29(1) lacks any similar language authorizing Board-adopted bylaws that "defin[e], limit[,] and regulat[e] the power of . . . members," the Board lacks the authority to adopt such a bylaw. Section 13-819(B)(2)(c) of the Nonstock Act demonstrates that "the General Assembly knew how to broaden" the Board's bylaw authority to include the adoption of such bylaws, and the "absence of any such provision[ ]" in Section 56-231.29(1) of the Cooperatives Act "indicates the General Assembly's intent to limit" that authority so as to preclude any bylaw "defining, limiting, [or] regulating the power of . . . members." *See Oraee v. Breeding*, 270 Va. 488, 506 (2005) (quoting *Greenberg v.*

Commonwealth ex rel. Attorney General, 255 Va. 594, 601 (1998)). "To determine otherwise would be to rewrite the statute and to contradict the General Assembly's express intent." *Oraee*, 270 Va. at 506 (quoting *Greenberg*, 255 Va. at 601). *See also Roanoke Industrial Development Authority v. Montgomery County Board of Supervisors*, 263 Va. 621, 623 (2002) ("[W]hen the General Assembly includes specific language in one section of an act, but omits that language from another section, we presume that the exclusion of the language was intentional.") (citing *Halifax Corp. v. First Union National Bank*, 262 Va. 91, 100 (2001)).

73. WHEREFORE, Members Heald, Murphy, and Levasseur respectfully ask the Commission to:

(a) declare that the Board's adoption of Article XII, Section 2(b) of the REC Bylaws was *ultra vires* as inconsistent with law and with REC's Articles of Restatement, and that Article XII, Section 2(b) of those Bylaws is therefore void *ab initio*;

(b) enjoin REC from enforcing Article XII, Section 2(b) of the Bylaws;

(c) order that REC rescind Article XII, Section 2(b) of the Bylaws;

(d) award the Members their reasonable costs in bringing this action; and

(e) grant such additional relief as the Commission deems just and proper.

II.

Article XII, Section 2(b) of the REC Bylaws is void as unreasonable, arbitrary, capricious, oppressive, and unduly burdensome.

74. The Members incorporate by reference all allegations contained in the paragraphs above.

75. In addition to being consistent with law, bylaws must also be reasonable. *Unit Owners Association of Buildamerica-1 v. Gillman*, 223 Va. 752, 768 (1982). In determining whether bylaws are reasonable, "inquiry must be made whether an [entity] has acted within the scope of its authority as defined under the" organizing statute. *Id.*; Fletcher, *supra*, at § 4191 ("In

evaluating the reasonableness of a bylaw, a court should consider the effect of the bylaw on the exercise of power conferred by relevant statutes."). A court must also consider whether the rules are "arbitrary and capricious," *Gillman*, 223 Va. at 768–69, or are "oppressive," *Conlee Construction v. Cay Construction*, 221 So.2d 792, 796 (Fla. Dist. Ct. App. 1969). Furthermore, "[b]ylaws must not only be reasonable in themselves but they must not be unreasonable in their practical application." Fletcher, *supra*, at § 4191; *Granbois v. Big Horn County Electric Cooperative*, 986 P.2d 1097, 1101 (Mont. 1999) (electric cooperative's "bylaws, rules, and regulations, as well as their implementation, must be reasonable").

76. Whether a bylaw is reasonable or not is a question of fact. *Brennan v. Minneapolis Society for the Blind*, 282 N.W.2d 515, 521 (Minn. 1979); *Slattery v. Madiol*, 668 N.W.2d 154, 160 n.12 (Mich. App. 2003). The reasonableness of a bylaw is decided "not . . . by any universal test or general rule" but "almost entirely upon the facts and circumstances of each particular case," *Conlee Construction*, 221 So.2d at 797.

77. As detailed above in paragraphs 64 through 70, Article XII, Section 2(b) of the REC Bylaws impinges on the statutory right of cooperative members to exercise democratic control by submitting, voting on, and enacting bylaw amendments. *See* Fletcher, *supra*, at § 4191 ("A bylaw which infringes upon the constitutional *or statutory rights* of a member as a citizen is unreasonable.") (emphasis added).

78. Furthermore, the requirement that any member wishing to propose a bylaw amendment must obtain the original, physical signatures of at least five-hundred fellow members, equally distributed across at least eight of the nine geographic regions of REC's twenty-two-county service territory places an unreasonable, oppressive, and undue burden on the exercise of the

members' vested, statutory rights. Complying with the requirements of Article XII, Section 2(b) will entail hundreds of hours of time and likely many thousands of dollars of expense unless REC provides a list of all members' email addresses.

79. The requirement that the five-hundred signatures be spread relatively evenly over eight of REC's nine separate geographic regions adds greatly to the difficulty and expense of collecting the required signatures, as REC's service territory covers all or part of twenty-two Virginia counties—including rural areas where homes and businesses are located far apart from each other. Moreover, REC has failed to provide *any* membership list, and there is therefore no reasonable way to ascertain which homes and businesses in this service territory territory are served by REC. In some cases, for example, households across the street from each other are served by different utilities.

80. Also exacerbating the burden of compliance is the fact that REC's members generally assemble together on only two occasions. One is the annual "Get Connected" event, where REC provides a free meal and entertainment to its members. Several hundred members attended this year's event on May 16, 2018. Had REC provided the form-petition promptly when it was requested in April, petition signatures could have been gathered there. Next year's "Get Connected" event will come too late to obtain signatures for the proposed bylaw amendments to be voted on in 2018. The other annual REC event is its annual meeting, which will next be held on August 15, 2018. Typically, however, only several dozen members attend that event.

81. Given these constraints, the available methods for soliciting and obtaining the signatures required by Article XII, Section 2(b) of the Bylaws include:

(a) canvassing, which requires many hours of time and the expense of hiring canvassers;

(b) sending letters or postcards to members, which can be done only if and when REC provides its membership list and will require many hours of time and thousands—if not tens of thousands—of dollars in printing and postage fees; and

(c) newspaper advertising, which will require thousands of dollars of expense given REC's large service territory and the many newspapers published therein.

82. The burden of complying with Article XII, Section 2(b) of the REC Bylaws is particularly unreasonable given that many of the requirements imposed therein are arbitrary and capricious and bear no rational connection to a compelling need sufficient to burden the members' statutory and common law rights. *See Lennane v. ASK Computer Systems*, Civ. No. 11744, 1990 WL 154150, *8 (Del. Ch. 1990) (holding that when the basic law or the corporate charter imbue shareholders with a "right to vote on a matter, loyalty to shareholders will ordinarily require directors to establish a compelling justification for action that significantly impairs that right."). Given Mr. Payne's admission in his April 25, 2012 letter that bylaw proposals of the type involved in this case are exceedingly rare, *see* Exhibit F at 1, there is no compelling reason to set the threshold for member signatures at five-hundred. *Cf. Vermont Electric Cooperative*, Docket No. 5806, Findings and Board Order, 6 (Vt. P.S.B. June 9, 1999), available at https://bit.ly/2KAPlrA (*Vermont Electric I*) (finding that a 150-signature threshold for member-initiated bylaw amendments ably "protect[ed] against casual submission of proposals").

83. Similarly, the Board has not explained why the requisite five-hundred member signatures must be evenly distributed across eight geographic regions. Many bylaw amendments—

including those proposed by the Members in their April 19, 2018 letter—will have no disproportionate impact on members in one territory as compared to those in another; nor is there any reason to believe that the relevant interests of members in one region will differ substantially from those in any other region. Moreover, any concerns to the contrary are protected by the general requirement that bylaws be reasonable—which includes the "general rule" that "bylaws must be . . . uniform in their operation and effect upon all persons or subjects . . . standing in equal status or circumstances and without unreasonable discrimination as to any particular person or thing." Fletcher, *supra*, at § 4192.

84. Furthermore, even if the requirements imposed by Article XII, Section 2(b) of the REC Bylaws were reasonable in the corporate context, they are unreasonable and inconsistent with public policy in the context of a democratically controlled cooperative. *See*, *e.g.*, *Cajun Electric*, 230 B.R. at 712–13 (board could not strip electric cooperative members of their right to control cooperative's activities given that "[d]emocratic control by the members is a fundamental principle of being an electric cooperative").

85. WHEREFORE, Members Heald, Murphy, and Levasseur respectfully ask the Commission to:

(a) declare that the Board's adoption of Article XII, Section 2(b) of the REC Bylaws was *ultra vires* as unreasonable, arbitrary, capricious, oppressive, unduly burdensome, and that Article XII, Section 2(b) of the Bylaws is therefore void *ab initio*;

(b) enjoin REC from enforcing Article XII, Section 2(b) of the Bylaws;

(c) order that REC rescind Article XII, Section 2(b) of the Bylaws;

(d) award the Members their reasonable costs in bringing this action; and

(e) grant such additional relief as the Commission deems just and proper.

III.

Article XII, Section 2(c) of the REC Bylaws is void as inconsistent with law to the extent it requires that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves.

86. The Members incorporate by reference all allegations contained in the paragraphs above.

87. The Cooperatives Act permits a duly authorized cooperative board to adopt only bylaws that are "not inconsistent with law or its articles of incorporation." Virginia Code § 56-231.29(1). *See also Kaplan*, 183 Va. at 334 (affirming "fundamental" and "strict[ ]" principle that "all by-laws which are inconsistent with the charter of a corporation or with the governing law are void").

88. The Cooperatives Act also states that even a duly authorized cooperative board's power to adopt bylaws is "subject . . . to the right of the members to alter or repeal such bylaws." Virginia Code § 56-231.29(1).

89. Section XII, Section 2(c) of the REC Bylaws provides, in relevant part, that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves. *See* Exhibit C at 22.

90. A bylaw "cannot limit the power to amend another by-law since the limiting by-law is itself subject to amendment or repeal." *Sunshine Villa*, 312 So.2d at 814; Fletcher, *supra*, at § 4176 (collecting "authority for the proposition that a corporation cannot bind itself not to amend its bylaws").

91. Furthermore, if enforced, the requirement that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves would wholly deprive REC's members of their statutory right under Virginia Code § 56-231.29(1) to "alter

or repeal such bylaws." Any exercise of that statutory right would, by definition, not "accord[ ]" with the existing Bylaws.

92. WHEREFORE, Members Heald, Murphy, and Levasseur respectfully ask the Commission to:

(a) declare the requirement in Article XII, Section 2(c) of the REC Bylaws that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves to be *ultra vires* and inconsistent with law and with REC's Articles of Restatement, and that the requirement is therefore void *ab initio*;

(b) enjoin REC from enforcing the requirement in Article XII, Section 2(c) of its Bylaws that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves;

(c) order that REC rescind from its Bylaws the requirement in Article XII, Section 2(c) of those Bylaws that "[a]ll proposed alterations or amendments to or repeal of the Bylaws be in accordance . . . with the[ ] Bylaws" themselves;

(d) award the Members their reasonable costs in bringing this action; and

(e) grant such additional relief as the Commission deems just and proper.

IV.

In the alternative, and to the extent Article XII, Section 2(b) of the REC Bylaws is valid, REC has violated that Section by denying the Members the form-petition requested in their April 19, 2018 letter.

93. The Members incorporate by reference all allegations contained in the paragraphs above.

94. Article XII, Section 2(c) of the REC Bylaws provides that "[a]ll proposed alterations or amendments to or repeal of the Bylaws shall be in accordance with applicable state code, the Cooperative Articles of Incorporation and the[ ] Bylaws" themselves. Exhibit C at 22.

95. The plain language of Article XII, Section 2(c) of the REC Bylaws does not, however, provide that the Board shall act as the arbiter of whether a proposed bylaw is "in accordance" with applicable law. *See River Place North Housing v. American Landmark Equity*, 250 Va. 215, 218 (1995) (construing bylaw according to its "plain language"). *See also Hill International v. Opportunity Partners*, 119 A.3d 30, 38 (Del. 2015) ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholder's electoral rights."). In fact, nothing in the language of the Bylaws or in any applicable statute suggests the Board has any more authority to make that determination than does REC's membership—whose statutory bylaw authority is superior to the Board's.

96. The Vermont Public Service Board—the body charged with reviewing issues of corporate governance regarding Vermont utilities—has determined that a bylaw materially identical to Article XII, Section 2(c) of the REC Bylaws cannot be read to "authorize the [directors] to make th[e legality] determination on their own," but rather must be construed only to allow the directors to prevent a member-initiated proposal from being presented to cooperative membership if a tribunal of competent jurisdiction has already declared the proposed bylaw to be inconsistent with law. *Vermont Electric I*, *supra*, at 10. The contrary interpretation—that a cooperative board has authority to determine whether a member-proposed bylaw is inconsistent with law and to disqualify it accordingly—would represent an "impermissible infringement by management upon the member-initiated proposal process" guaranteed by statute. *Id.* at 8 n.33. Moreover, such review is unnecessary because any bylaw inconsistent with law—even one formally approved by the membership—is automatically "of no force and effect." *Id.* at 7.

97. As such, if the Board believes a member-proposed bylaw amendment is inconsistent with the law, it must seek a judicial declaration to that effect rather than unilaterally disqualifying it. *Cf. generally*, *e.g.*, *Vermont Electric Cooperative*, Docket No. 8551, Order Denying Requested Declaratory Ruling (Vt. P.S.B. April 22, 2016), available at https://bit.ly/2NcDmCq (*Vermont Electric II*) (request by electric cooperative for a declaratory judgment that a member-proposed bylaw amendment was inconsistent with law and therefore need not be submitted to vote of members); *Socorro Electric*, *supra*, Order on Hearing on Partial Merits (same). Given that the Board's bylaw authority is subordinate to the members' right to alter and repeal the bylaws, *see* Packel, *supra*, at § 14, the burden should be on REC to seek a declaratory ruling as to the legality of a validly-adopted bylaw—rather than forcing its members to do so, as it has done here.

98. In the alternative, to the extent that the Board is entitled to pass upon the legality of any member-proposed bylaw, the Board improperly disqualified the proposed amendments described in the Members' April 19, 2018 letter.

99. Under Virginia Code § 56-231.29(1), the right of members to alter or repeal bylaws applies to *all* of the subjects enumerated therein as appropriate for regulation by bylaw. Because the Board's authority extends only to those enumerated subjects, *see* Fletcher, *supra*, at § 4171, bylaws are necessarily either (i) facially invalid or (ii) subject to the members' right to amend or repeal.

100. Moreover, the members' bylaw authority is *not* limited to the subjects enumerated in Virginia Code § 56-231.29(1). The plain language of the statute limits only the *Board's* authority to adopt bylaws—subject to the right of the members to alter or repeal those bylaws. Therefore,

as further discussed in paragraph 125 below, the Cooperatives Act preserves the members' bylaw authority at common law, which extends to "practically any phase of the relations between the directors . . . and the . . . members." Fletcher, *supra*, at § 4210.

101. As long as a proposed amendment addresses a proper subject for regulation by bylaw, directors have no grounds to disqualify it or prevent it from going before the membership for a vote. *See Lake Monticello*, 250 Va. at 571–72.

102. The Members' April 19, 2018 letter proposed three bylaw amendments:

(a) amending Article V, Section 5 of the Bylaws to require that REC provide its members notice of and an opportunity to observe all Board's meetings (except for any executive sessions permitted by law) in person, by streaming video, and by audio recording, Exhibit H Attachment at 1–2;

(b) amending Article IV, Section 2 of the Bylaws to provide that, in director elections, valid proxy forms may not be counted as votes for any particular candidate unless they specifically state as much or they designate an eligible proxy (which may include the incumbent Board) to cast a vote by proxy, *id.* at 2–3; and

(c) amending Article VI, Section 11 of the Bylaws to require that REC annually publish in *Cooperative Living* the total compensation provided each Board member, and to require that the Board notify the members in advance of any vote to increase the compensation of any Board member, *id.* at 3.

103. The Members' proposal to amend Article V, Section 5 of the Bylaws falls within the members' statutory authority to alter bylaws "regulating . . . regular and special meetings of the board and the giving of notice thereof." Virginia Code § 56-231.29(1). The proposal also

falls within the members' right at common law to enact bylaws regulating the "mode of holding and conducting directors' meetings," Fletcher, *supra*, at § 4210, and to enact bylaws ensuring the members receive "accurate information as to what transpires respecting [a] corporation." *Securities & Exchange Commission v. Transamerica Corporation*, 163 F.2d 511, 517–18 (3d Cir. 1947).

104. The Members' proposal to amend Article IV, Section 2 of the REC Bylaws falls within the statutory authority of the members to alter bylaws "regulating the . . . manner of choosing . . . directors." Virginia Code § 56-231.29(1). The proposal also addresses "elections and related procedural and administrative matters"—topics that are "peculiarly within the sphere of regulation by bylaws" at common law. Fletcher, *supra*, at § 4208.

105. The Members' proposal to amend Article VI, Section 11 of the REC Bylaws falls within the statutory authority of members to alter bylaws "regulating the . . . powers, duties, and compensation of . . . directors," Virginia Code § 56-231.29(1), and to alter bylaws "regulating . . . regular and special meetings of the board and the giving of notice thereof," *id.* The proposal also falls within the members' right at common law to enact bylaws ensuring the members receive "accurate information as to what transpires respecting [a] corporation," *Transamerica*, 163 F.2d at 517–18, and to enact bylaws requiring that the Board provide notice to members before approving certain contracts. *See* John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 Miami Law Review 605, 614 (1997) (remarking that such a bylaw "seems clearly valid").

106. Furthermore, contrary to the arguments made in Mr. Payne's May 25, 2018 letter, Exhibit I at 3, the Members' proposals are not inconsistent with Virginia Code § 56-231.29(4)'s grant of authority to the Board to "make its own rules and regulations as to its procedure."

107. The plain language of Virginia Code § 56-231.29(4) does not state the Board's authority thereunder is exclusive, inviolate, or not subject to any other provision of law.

108. Moreover, by using the term "rules and regulations" rather than "bylaws," Virginia Code § 56-231.29(4) subordinates the board's procedural rulemaking authority to the members' bylaw authority. The language of the statute "reflects a long-standing hierarchical conception of forms of corporate authority," wherein:

> [t]hat which is superior overrides all below it in rank. The by-laws must succumb to the superior authority of the charter; the charter if it conflicts with the statute must give way; and the statute, if it conflicts with the constitution is void.

Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 Delaware Journal of Corporate Law 1, 7 (quoting *Gaskill v. Gladys Belle Oil*, 146 A. 337, 340 (Del. Ch. 1929)). In this hierarchy, so-called "rulemaking" authority is subordinate to bylaw authority. *See McCool*, 442 A.2d at 991 (holding that a "bylaw is outside *and above* the domain of those rules and regulations which the directors of the corporation may establish") (emphasis added) (citing 18 C.J.S. Corporations § 179); *Olszewski v. Cannon Point Association*, 49 N.Y.S.3d 571, 577 (N.Y. App. Div. 2017) (board of homeowners' association may adopt rules "only if [they] do not in fact conflict with the . . . relevant provisions of the bylaws"); *Dulaney Towers Maintenance v. O'Brey*, 418 A.2d 1233, 1237–38 (Md. Ct. Spec. App. 1980) (statute authorizing board to enact "rules and regulations" nonetheless required it do so "in accordance with the bylaws"). The REC

Bylaws themselves reflect this hierarchy: Article XI, Section 3 of the Bylaws provides that the "Board of Directors shall have the power to make and adopt such policies, rules and regulations, *not inconsistent with* the law, the Articles of Incorporation or *these Bylaws*, as it may deem advisable for the management of the business and affairs of the Cooperative." Exhibit C at 21 (emphasis added).

109. And even if Virginia Code § 56-231.29(4) *does* constrain the members' common law and statutory bylaw authority, it only does so "as to [the Board's] procedure." Although the statute does not define what constitutes the Board's "procedure," the term does not appear in Virginia Code § 56-231.29(1), and therefore must be construed so as to exclude the matters enumerated as proper subjects for regulation by bylaw. *Klarfeld v. Salsbury*, 233 Va. 277, 284–85 (1987) ("When the General Assembly uses two different terms in the same act, it is presumed to mean two different things."). *See also* Ben Walther, *Bylaw Governance*, 20 Fordham Journal of Corporate & Financial Law 399, 407 (2015) (construing similar statutory scheme in Delaware to mean that "managers have exclusive managerial authority on all issues that lay *beyond* the shareholders' bylaw power") (emphasis added). Furthermore, because Virginia Code § 56-231.29(1) enumerates *specific* matters encompassed within the membership's bylaw authority, any conflict between that authority and a board's more *general* authority to regulate "its procedure" under Virginia Code § 56-231.29(4) must be resolved in favor of the membership's bylaw authority. *See Virginia Department of Health v. Kepa, Inc.*, 289 Va. 131, 142 (2015) ("When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, . . . the latter prevails.") (quoting *Virginia National Bank v. Harris*, 220 Va. 336, 340 (1979)).

110. Furthermore, Virginia Code § 56-231.29(4) grants the Board authority only to "make its *own* rules and regulations as to its procedure." (Emphasis added). The General Assembly's use of the word "own" indicates that the Board's authority under Virginia Code § 56-231.29(4) is limited to internal, parliamentary procedures. By contrast, bylaws regulate the relationship "between the corporation and its members and as between the members themselves." *Lee v. Virginia Educational Association*, 2 Va. Cir. 319, 1969 WL 101681, *1 (Fairfax 1969). *See also Hill International*, 119 A.3d at 38 (bylaws "constitute part of a binding broader contract among the directors, officers and stockholders"). Because the bylaw amendments proposed in the Members' April 19, 2018 letter deal with the "allocation of power between [members] and directors prospectively," they are "sound[ly]" within the membership's bylaw authority. Coffee, *supra*, at 614. *See also* McDonnell, *supra,* at 217 (shareholders' bylaw authority pertains to "structural, governance matters as opposed to business decisions"); Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws*, 19 Cardozo Law Review 511, 548 (1997) (shareholders' bylaw authority includes regulating the board's "mode of accountability to shareholders").

111. Moreover, the mere fact that the proposed bylaws may incidentally "touch and concern the Board's . . . procedures," Exhibit I at 4, is an insufficient ground for disqualification. In reviewing a statutory provision that expressly gave even broader powers to the board, the Supreme Court of Delaware rejected

> the premise that *any* bylaw that in *any* respect might be viewed as limiting or restricting the power of the board of directors automatically falls outside the scope of permissible bylaws. That simply cannot be. That reasoning, taken to its logical extreme, would result in eliminating altogether the shareholders' statutory right to adopt, amend or repeal bylaws. Bylaws, by their very nature, set down rules and procedures that bind a corporation's

> board and its shareholders. In that sense, most, if not all, bylaws could be said to limit the otherwise unlimited discretionary power of the board. Yet [the statute] carves out an area of shareholder power to adopt, amend, or repeal bylaws that is expressly inviolate.

CA, Inc., 953 A.3d at 234 (emphasis in original).

112. Moreover, it is irrelevant that the Board believed the amendments "would have an adverse effect on REC's membership." Exhibit I at 3–4. The Board cannot disqualify proposals to amend the bylaws based on its view of "the advisability or wisdom of the proposals." *Lake Monticello*, 250 Va. at 572. Rather, the only question is whether the law gives a member "the right to submit the[ ] proposals to a vote of his fellow members." *Id. See also Vermont Electric I*, *supra*, at 9 (holding that the board of an electric cooperative "may not prevent amendments from being placed before [the] members because the [directors] disagree with the policy that those amendments seek to advance" and that the "members must have the right to vote on policy changes, even those with which the [directors] disagree"); *Vermont Electric II*, *supra*, at 14 ("As a general principle, it is for [cooperative] members to evaluate the merits and defects of proposed bylaw members . . . . It is not for the [cooperative] Board, its counsel, or, for that matter, the [Commission] to undertake this evaluation on behalf of, or in place of, the members[.]"); *Blasius Industries v. Atlas Corporation*, 546 A.2d 651, 663 (Del. Ch. 1988) (because the law "confers power upon directors as the agents of the shareholders" rather than "Platonic masters," shareholders who "view the matter different than d[oes] the board . . . are entitled to employ the mechanisms provided by the corporation law and the [charter] to advance that view" and "restrain their agents, the board, from acting for the principal purpose of thwarting that action"); *Rogers v. Hill*, 289 U.S. 582, 589 (1933) ("It would be

preposterous to leave the real owners of the corporate property at the mercy of their agents, and the law has not done so.") (quoting *In re Griffing Iron*, 41 A. 931, 933 (N.J. 1898)).

113. More specifically, the mere fact that a bylaw addressing an otherwise appropriate subject for shareholder action would cost money is irrelevant. *See CA, Inc.*, 953 A.2d at 237 ("That the implementation of that proposal would require the expenditure of corporate funds will not, in and of itself, make such a bylaw an improper subject matter for shareholder action."); *Transamerica*, 163 F.2d at 517–18 (holding that, even though shareholder-proposed bylaw would require corporation incur $20,000 annually, it was nonetheless "[c]ertainly . . . proper" given their "absolute" interest in "accurate information as to what transpires respecting the corporation").

114. Finally, as discussed above in paragraphs 87 through 91, the fact that the Members' amendment proposals are inconsistent with the current Bylaws is an invalid ground for disqualification.

115. The Board therefore violated Article XII, Section 2 of the REC Bylaws and acted beyond the scope of its authority by unilaterally disqualifying the bylaw amendments proposed by Members Heald, Murphy, and Levasseur in their April 19, 2018 letter and by denying them the form-petition described in that Section.

116. Members Heald, Murphy, and Levasseur are entitled to equitable relief as a remedy for the Board's breach of Section XII, Section 2 of the REC Bylaws. To the extent the procedural requirements contained in Article XII, Section 2(b) of the REC Bylaws are necessary for any member-initiated bylaw amendment proposal to proceed, an injunction ordering REC to provide Members Heald, Murphy, and Levasseur with the form-petition required thereby is

the only adequate remedy. *See Birbiglia v. Saint Vincent Hospital*, No. CA911280, 1994 WL 878836, *11 (Mass. Sup. Ct. December 29, 1994) ("[I]n a situation in which specific procedures are prescribed by the Bylaws and . . . authorities did not comply with these procedures," such a violation "permit[s] only equitable relief."); *Allen v. Prime Computer*, 540 A.2d 417, 421 (Del. 1988) (holding that infringement of participatory rights in a business organization, "regardless of duration, is an injury not reasonably compensable by damages").

117. Furthermore, Members Heald, Murphy, and Levasseur are entitled to preliminary injunctive relief, as they will suffer irreparable harm if their right to the form-petition described in Article XII, Section 2(b) of the REC Bylaws is withheld until the Commission issues final relief. As described above in paragraphs 78 through 81, the Board has imposed onerous procedural requirements on a member's submission of a bylaw amendment proposal. Complying with those requirements—particularly the requirement to obtain five-hundred physical, member signatures, spread evenly over at least eight of REC's nine geographic regions, in support of the proposal—will take substantial time. Although Members Heald, Murphy, and Levasseur will ultimately prevail on the merits, they cannot begin collecting the five-hundred physical, member signatures until they receive the form-petition approved by the Board. The continuing denial of that form-petition deprives the Members of their right to begin collecting those signatures and will frustrate their ability to obtain the requisite five-hundred signatures before the submission deadline for REC's next annual meeting. *See Moran v. Walsh*, 759 F. Supp. 1067, 1071 (S.D.N.Y. 1991) (preliminary relief appropriate to prevent "[d]elay in the presentation of by-law proposals for a vote by membership"); *Jewelcor Management v. Thistle Group Holdings*, No. 2623, 2002 WL 576457, *8 (Pa. Ct.

Comm. Pl. March 26, 2002) (finding with "little difficulty" that a shareholder's "inability to involve itself in the corporate election process and to solicit the proxy votes of other . . . shareholders constitutes immediate and irreparable harm" in light of upcoming meeting); *EMC Corp. v. Chevedden*, 4 F. Supp. 3d 330, 342 (D. Mass. 2014) ("[A] shareholder's inability to present its proposal to other shareholders for another year may constitute 'irreparable harm.'"); *New York City Employees' Retirement System v. Dole Food Company*, 795 F. Supp. 95, 103 (S.D.N.Y. 1992) (shareholder suffered irreparable harm when corporation excluded its proposal from upcoming annual shareholder meeting, delaying vote on proposal until next annual meeting), *vacated as moot*, 969 F.2d 1430 (2d Cir. 1992). *See also Lovenheim v. Iroquois Brands*, 618 F. Supp. 554, 561 (D.D.C. 1985) (where shareholders' proposals are excluded from a corporate vote, they suffer irreparable harm regardless of "whether or not their proposals are likely to pass"). Each day that REC continues to withhold the form-petition for the proposed bylaw amendments will make it more difficult—and ultimately, if uncorrected, impossible—for the Members to collect the required signatures in time.

118. REC, by contrast, will suffer no harm if preliminary relief is granted. Merely permitting Members Heald, Murphy, and Levasseur to begin the bylaw amendment process will not negatively impact any cognizable right or privilege enjoyed by REC, its Board, or its membership. Even if the Commission is unable to issue a final decision on the merits before REC's membership votes on any proposed bylaw, REC can seek to enjoin the enforcement of any bylaw it believes unlawful pending a final determination of its validity.

119. Finally, preliminary relief is consistent with the only public interest relevant here: upholding the policies of democratic control and member participation embodied in the Cooperatives

Act. *See AHI Metnall v. J.C. Nichols Company*, 891 F. Supp. 1352, 1360 (W.D. Mo. 1995) (public interest favored awarding preliminary injunction that would "further the interests of corporate democracy and shareholder participation" embodied in state corporate law); *Lovenheim*, 618 F. Supp. at 562 (awarding preliminary relief consistent with the "overriding public interest . . . in assuring shareholders the right to control the important decisions which affect corporations") (internal alterations omitted). More specifically, the public interest favors allowing REC's members ample "time for the discussion and analysis of the proposed amendments before the[y] vote on whether to approve the[m]." *Ute Indian Tribe v. Ute Distribution Corp.*, No. 2:06CV557DAK, 2006 WL 1993776, *5 (D. Utah July 14, 2006).

120. WHEREFORE, Members Heald, Murphy, and Levasseur respectfully ask the Commission to:

(a) promptly issue a preliminary injunction directing REC to provide the Members with the form-petition contemplated by Article XII, Section 2(b) of its Bylaws;

(b) issue a permanent injunction directing that REC process and prepare for a vote any member-submitted bylaw proposal supported by a petition meeting all valid, technical requirements of Article XII of the REC Bylaws—unless and until REC obtains a declaration from a tribunal of competent jurisdiction that the proposal is inconsistent with the law or with its Articles of Restatement;

(c) award the Members their reasonable costs in bringing this action; and

(d) grant such additional relief as the Commission deems just and proper.

V.

Article XII, Section 1 of the REC Bylaws is void as inconsistent with law to the extent it requires "an affirmative vote of not less than two-thirds of the members present in person or by proxy at an annual or special meeting of the members to alter or repeal the Bylaws."

121. The Members incorporate by reference all allegations contained above.

122. Article XII, Section 1 of the REC Bylaws requires "an affirmative vote of not less than two-thirds of the members present in person or by proxy at an annual or special meeting of the members to alter or repeal the Bylaws." *See* Exhibit C at 21–22.

123. The Cooperatives Act permits only such bylaws as are "not inconsistent with law or its articles of incorporation." Virginia Code § 56-231.29(1). *See also Kaplan*, 183 Va. at 334 (affirming "fundamental" and "strict[ ]" principle that "all by-laws which are inconsistent with the charter of a corporation or with the governing law are void").

124. The Cooperatives Act also imbues the members with a statutory right "to alter or repeal such bylaws" as are adopted by the Board. Virginia Code § 56-231.29(1).

125. Because the Cooperatives Act does not further define the statutory "right of the members to alter or repeal [any] bylaws" adopted by a cooperative board, Section 56-231.29(1) incorporates the rights of members at common law to alter or repeal a cooperative's bylaws. *See Union Recovery Limited Partnership v. Horton*, 252 Va. 418, 424 (1996) ("[W]here statutes are absolutely silent on a matter, it is an axiomatic principle of statutory construction that in effectuating [legislative intent,] courts are to fill the inevitable statutory gaps by reference to the principles of the common law.") (quoting *Federal Deposit Insurance Corporation v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993)) (internal alterations omitted). *See also* Fletcher, *supra*, at

§ 4172 ("At common law the power to adopt and to amend bylaws was held to reside inherently and primarily in the shareholders and not in the officers or board of directors").

126. Under Virginia common law, "the vote of a majority of those present is sufficient to . . . decide any question" put to the voting body of a corporation. *Kaplan*, 183 Va. at 333. *See also Roach v. Bynum*, 403 So. 2d 187, 192 (Ala. 1981) ("At common law, the presence of a simple majority of shareholders entitled to vote on a matter constituted a quorum, and a majority vote of that quorum was all that was necessary to validly transact shareholder business.").

127. Furthermore, Section 13.1-849 of the Nonstock Act provides that, absent a provision in the articles of incorporation expressly requiring a higher threshold, the "vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members." Virginia Code § 13.1-849(A).

128. REC's Articles of Restatement do not expressly provide for a higher voting threshold for action by its members. *See generally* Exhibit B.

129. By requiring more than the majority required at common law and by statute, the requirement quoted above in paragraph 122 is inconsistent with law and with REC's Articles of Restatement and illegally infringes on the vested rights of the members to amend or repeal by simple majority vote any Bylaws passed by the Board. *See Chesapeake Corporation v. Shore*, 771 A.2d 293, 343 (Del. Ch. 2000) ("[A] board decision to adopt a supermajority bylaw is . . . almost always a method of minimizing the ability of stockholders to interfere with the board's control or management of the company.").

130. WHEREFORE, Members Heald, Murphy, and Levasseur respectfully ask the Commission to:

(a) declare as *ultra vires*, inconsistent with law, and therefore void *ab initio* the provision contained in Article XII, Section 1 of the REC Bylaws that requires "an affirmative vote of not less than two-thirds of the members present in person or by proxy at an annual or special meeting of the members to alter or repeal the Bylaws;"

(b) enjoin REC from enforcing the provision contained in Article XII, Section 1 of its Bylaws that requires "an affirmative vote of not less than two-thirds of the members present in person or by proxy at an annual or special meeting of the members to alter or repeal the Bylaws;"

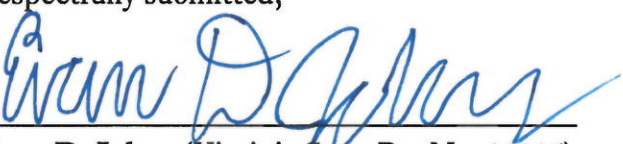
(c) order that REC rescind from its Bylaws the requirement contained in Article XII, Section 1 of those Bylaws requiring "an affirmative vote of not less than two-thirds of the members present in person or by proxy at an annual or special meeting of the members to alter or repeal the Bylaws;"

(d) award the Members their reasonable costs in bringing this action; and

(e) grant such additional relief as the Commission deems just and proper.

Dated: July 26, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Evan D. Johns, hereby certify that, on July 26, 2018, I sent a true copy of the attached Verified Petition for Declaratory and Injunctive Relief, together with nine exhibits, by United States mail to:

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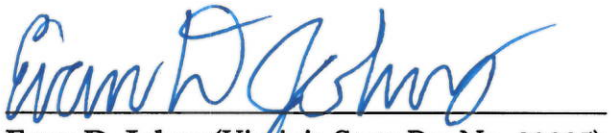

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