

# EDVA Dismisses Challenge to Virginia Statute on Broadband Access

## Virginia Rocket Docket Blog

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Litigation challenging government economic regulation has become more common, as courts appear increasingly less deferential to legislative and executive action. Most of this type of litigation focuses on federal regulation, but states have also taken a more active role in business regulation, prompting more frequent challenges to state laws in federal courts.

Suits targeting state legislation in federal courts must navigate a labyrinthine series of procedural obstacles before the court even reaches the merits. Specifically, a plaintiff must establish that it has suffered an injury giving it standing to challenge the suit, and sovereign immunity will bar many claims against state government defendants.

An April 15 decision by EDVA Judge David Novak provides a good example of the complex constitutional and statutory issues such litigation presents. In [Association of Am. Railroads v. Hudson](#), Civil Action No. 1:23cv815 (DJC), 2024 U.S. Dist. LEXIS 68806 (E.D. Va. April 15, 2024), an industry trade group, the Association of American Railroads (AAR), sought to enjoin a 2023 Virginia statute giving internet broadband service providers access rights to railroad property. The defendants moved to dismiss, and Judge Novak whittled down AAR's claims based on lack of standing and sovereign immunity before dismissing the few remaining claims on the merits. The lengthy ruling illustrates the many hurdles faced by a challenge to a state statute in federal court and the narrow grounds available for such a challenge.

### **Background**

In 2023, the Virginia General Assembly enacted legislation requiring railroads to approve applications by broadband service providers for easements across railroad property and establishing default fees the railroads can charge for such easements. The statute allowed a railroad to petition the Virginia State Corporation Commission (SCC) for relief if the license fee for a proposed crossing did not provide adequate compensation or the proposed crossing imposed undue hardship or an imminent likelihood of danger to public health or safety. The SCC's decision is appealable to the Virginia Supreme Court.

AAR asserted (i) that the statute was preempted by federal law (the Interstate Commerce Commission Termination Act of 1995 or ICCTA); (ii) that it violated the Takings Clause of the Fifth Amendment by restricting the availability of just compensation; (iii) that it violated the Takings Clause by allowing for the taking of private property for private use; (iv) that it deprived AAR's members of a protected property interest without due process;

(v) that it tortiously interfered with existing contracts between AAR members and Virginia in violation of the Virginia Constitution; and (vi) that it tortiously interfered with the business expectancy of AAR members.

### **Representative Standing for a Trade Association**

AAR's first hurdle was to show that its claims were ripe for federal review and that it had standing to challenge the statute on behalf of its railroad members. Judge Novak easily found that the case was fit for judicial review because the AAR brought a facial challenge to the statute that raised purely legal issues.

Standing requires that a plaintiff show an injury in fact traceable to the defendant's actions that can be redressed by a favorable decision. AAR asserted standing as the representative of its members, requiring that it show that its members would otherwise have standing, that the interests the organization seeks to protect are germane to the organization's purpose and that the claim does not require the participation of individual members in the action.

Judge Novak's analysis focused on the third requirement of representational standing — the necessity for participation by individual members. Applying the Supreme Court's 2023 decision in *United States v. Hansen*, 599 U.S. 762, 769 (2023), Judge Novak held that AAR's facial challenge required that it show that no set of circumstances existed under which the statute would be valid.

Thus, AAR's facial challenge that ICCTA preempts the Virginia statute could go forward only if ICCTA preempted the Virginia statute in any circumstance. After a lengthy analysis, Judge Novak concluded that ICCTA did not categorically preempt the Virginia statute in all circumstances and so AAR could not sustain a facial challenge to the statute.

Similarly, AAR's facial challenge that the statute violated the Takings Clause by restricting the availability of just compensation failed because AAR could not show that the value of the property crossed by an easement would exceed the statutory default fee in all circumstances. Individual railroads would thus have to demonstrate the unavailability of just compensation for particular crossings, fatally undermining AAR's assertion of representational standing.

The court agreed, however, that AAR had standing to bring its second Takings Clause claim because AAR alleged that the statute permits broadband providers to take railroad property for private use in all applications. The allegation that the statute deprived the railroads of the right to exclude broadband providers from their property constituted a present injury that was fairly traceable to the challenged statute and was redressable through injunctive relief. Likewise, the court found that AAR had standing to assert a due process violation because the allegations alleged a present injury that was the same for all railroads.

### **Sovereign Immunity**

Having dismissed AAR's first two claims, Judge Novak turned to sovereign immunity. Under the Eleventh Amendment, states are immune from suit, except for suits for injunctive and declaratory relief alleging violations of federal law against individual state officials acting in their official capacity, as permitted by *Ex Parte Young*, 209 U.S. 123 (1908).

Turning first to AAR's two state-law tort claims, Judge Novak noted that *Ex Parte Young* does not apply to actions to compel compliance with *state* law, including state tort law. AAR did not dispute this but argued that its tort claims named the state defendants in their individual, not official, capacities. The court rejected this argument, finding that the alleged conduct arose solely out of the defendants' official duties and not to serve private interests. Moreover, there could be no claim that the defendants had acted *ultra vires* where there was only an allegation of the violation of duties created by the challenged statute.

The dismissal of AAR's tort claims left only the two federal constitutional claims that had survived the defendants' challenge to standing. As to these claims, Judge Novak first ruled that sovereign immunity barred the claims against two defendants whose agencies were merely responsible for issuing construction permits for railroad crossings. The incidental roles of these two defendants did not have sufficient proximity to the challenged government action for the *Ex Parte Young* exception to sovereign immunity to apply.

That left one remaining defendant, a commissioner of the SCC, the agency responsible for administering the Virginia statute. That defendant argued that *Ex Parte Young* does not apply to state courts or state judges and that he plays such a role under the challenged statute. Judge Novak ultimately rejected this argument, finding that the SCC was a hybrid agency with both administrative and judicial functions. In this case, the SCC was the key administrative agency that implemented the challenged statutory regime and did not play a judicial function in this context.

### **The Merits of the Few Remaining Claims**

After Judge Novak's decisions on standing and sovereign immunity, the SCC was the sole remaining defendant and only one of the two Takings Clause claims and the due process claim had survived. Judge Novak thus turned to whether these claims adequately stated a claim under Fed. R. Civ. P. 12(b)(6).

As to the claim that the statute permits the taking of private property for private use, AAR argued that under Virginia law, "public use" was limited to the taking of private property for six specified purposes, none of which encompassed broadband access. Judge Novak rejected this argument, holding that Virginia's more restrictive public use doctrine did not apply to a Takings Clause claim under the U.S. Constitution's Fifth Amendment. Under the federal standard, a taking need only be rationally related to a conceivable public purpose. This permissive standard required that there be no set of circumstances under which broadband expansion falls outside the bounds of a conceivable public purpose, a high hurdle which Judge Novak held AAR failed to surmount.

AAR's final remaining claim was for a deprivation of due process under the Fourteenth Amendment based on an implied contract created by the takings clause of Virginia's Constitution. Judge Novak described this argument as creative but unsupported. AAR, Judge Novak held, could not refashion a state constitutional provision into a contract that would support a federal constitutional violation. Further, procedural due process is satisfied by meaningful post-deprivation procedures for just compensation, which the challenge statute authorized.

### **Takeaways**

The AAR decision teaches that challenges to state laws in federal court face a narrow and difficult path. Moreover, that path is governed by federal constitutional doctrines that are anything but straightforward.

In particular, it is difficult for an industry group or trade association to establish representational standing, requiring more direct participation by the businesses directly affected by the challenged legislation.

Second, potential plaintiffs must carefully craft their claims to focus on forward-looking injunctive relief for violations of federal law against individual state officials directly involved in administering the statute at issue.

Finally, a plaintiff must state a viable claim that the state statute at issue violates some federal statutory or constitutional provision that can provide jurisdiction in the federal courts. *AAR* demonstrates that claims of regulatory taking without just compensation must allege both a physical taking of a property interest without any procedure for obtaining compensation.

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