THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JOHN R. GRANO, JR.	)	
	)	
and	)	
	)	
CYNTHIA TAFT GRANO,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 3:20CV0065
	)	
RAPPAHANNOCK ELECTRIC COOPERATIVE,	)	
	)	
Defendant.	)	

REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO DISMISS

Defendant, Rappahannock Electric Cooperative ("REC"), by counsel, hereby submits the following in reply to Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss (Doc. No. 17) (the "Opposition Brief"), filed by John R. Grano, Jr. and Cynthia Taft Grano (the "Granos").

PRELIMINARY STATEMENT

The evidence and authorities set forth in REC's Brief in Support of its Motion to Dismiss ("Opening Brief") establish that the Complaint should be dismissed because the Court lacks subject matter jurisdiction over this action—as the Granos have no standing, their claims are not ripe, and there is no justiciable controversy for this Court to resolve—and because the allegations in the Complaint fail to state plausible claims under 42 U.S.C § 1983. Nothing in the Granos' Opposition Brief alters this conclusion—either as a matter of fact or law.

The Granos do not contest the fundamental facts, which are now undisputed: (1) there is no (and never has been any) fiber optic cable on the Granos' property; and (2) REC has no future plan or intention to place fiber optic cable on the Granos' property, having already invested in an

alternate route. Indeed, the Complaint fails to point to a single action that REC has taken that would constitute a cognizable injury to them or that would meet the "under color of state law" requirement of Section 1983. In apparent recognition that their Complaint fails to allege—and the facts fail to establish—any action by REC that would give rise to a ripe, justiciable claim, the Granos' Opposition Brief inserts irrelevant, unpled allegations regarding REC's alleged support for the General Assembly's passage of Virginia Code § 55.1-306.1. The Granos' cannot amend their faulty Complaint through their Opposition Brief, and even these new unpled allegations fail to establish any claim against REC. For the reasons explained below and in the Opening Brief, this Court should grant REC's motion to dismiss.

ARGUMENT

I. This Complaint Should Be Dismissed Because This Court Lacks Subject Matter Jurisdiction Over The Granos' Claims.

For the reasons set forth in the Opening Brief, the Court should dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) because the Granos have suffered no injury, their claims are not ripe for adjudication, and there is no case or controversy for this Court to resolve by declaratory judgment. Nothing in the Granos' Opposition Brief alters the undisputed facts that REC has taken no action—and made no threats to take any imminent action—to place fiber optic cable on the Granos' property pursuant to Virginia Code § 55.1-306.1 or otherwise.

A. The Granos provide no evidence of any action or imminent threat to act by REC under Virginia Code § 55.1-306.1.

Neither the face of the Complaint nor the evidence in the record establish that the Granos have suffered any injury or that their claims are ripe or justiciable. Indeed, the Complaint does not posit a single action taken or imminently threatened by REC under the statute at issue—Va. Code § 55.1-306.1. By contrast, REC has presented evidence by declaration that it has placed no fiber

on the Granos' property and has no intention to enter the Granos' property for the purposes of installing fiber cable in the future. The Granos have not proffered any evidence to contradict REC's evidence, which is now undisputed. The Granos therefore lack standing to bring their claims. *See, e.g.*, *Barfield v. Sho-Me Power Elec. Coop*., 2012 U.S. Dist. LEXIS 86036, *33-34 (W.D. Mo. June 21, 2012) ("Plaintiffs have not alleged that Sho-Me plans to install and operate additional fiber optic cables on their land and thus lack standing to seek declaratory or injunctive relief for future trespasses due to installations on the land of unidentified putative class members.").

The Granos instead contend—incorrectly and without evidence—that they "have already been subject to a deprivation of their property rights by physical invasion, including REC's placement of fiber optic structures in anticipation of the rights conveyed by the statute." Opp. Br. 3. To support this assertion, Granos cite to a footnote in the Complaint, which explains that REC installed appurtenances to fiber optic the Granos' property, but that "REC later removed this equipment." Compl. at 3, n.1. Not only do Granos' own pleadings establish that there is no ongoing physical invasion because the appurtenances were removed, but the uncontested evidence before this Court is that the appurtenances were originally placed on the Granos' property with their express permission. *See* Declaration of John Arp ("Decl.") ¶ 6, Ex. 1 to REC's Opening Brief. There has been no actionable physical invasion by REC as to the Granos' property.

B. The Granos' allegation that their injuries occurred when Virginia Code § 55.1-306.1 was passed does not establish their standing to bring the claims at issue against REC.

Throughout the Opposition Brief, the Granos argue that their injury occurred when Virginia Code § 55.1-306 went into effect on July 1, 2020. *See, e.g.*, Opp. Br. 2 (noting that "it does not matter that REC claims that it has not yet physically invaded the Granos' property; what matters

is that the Statute has effectively rewritten and expanded REC's existing easement…"); *Id.* at 3 ("On [July 1, 2020], Virginia Code § 55.1-306 became effective, and . . . deprived the Granos of constitutionally-protected property interests…"); *Id.* at 6 ("The Granos Were Deprived of Their Rights on July 1, 2020").

To establish standing and invoke the subject matter jurisdiction of this Court, however, the Granos bear the burden of proving not only "an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest)," but also "causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant)." *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017). Not only have the Granos failed to show any injury-in-fact, but the sole injury they do allege—the enacting of Virginia Code § 55.1-306.1—is not traceable in any way to any action taken by REC. As the record reflects, REC has taken absolutely no action under Virginia Code § 55.1-306.1 with regard to the Granos' property or the easement at issue, nor does REC have any intention to do so in the future. *See* Decl. ¶¶ 18-19. The Granos' alleged injury—the passage of Virginia Code § 55.1-306.1—was self-evidently caused only by the Virginia General Assembly, not any action by REC.

C. REC's mere possession of a power under Virginia Code § 55.1-306.1 is insufficient to establish an injury to the Granos.

The Granos also wrongly contend that REC's possession of the power to enter their property for the purposes allowed by Virginia Code § 55.1-306.1 constitutes an injury-in-fact, regardless of whether REC actually uses that power. *See, e.g.*, Opp. Br. at 6 ("REC's assertions to its present intent ignore the fact that REC now possesses the new rights [under the statute] . . . it is that fact which gives the Granos' standing…"). The Granos tellingly cite no authority to support their contention that the mere possession of a statutory power, absent any attempt or threat to use it, can itself create an injury-in-fact. Furthermore, the Granos fail to distinguish the

authorities cited by REC on this point, other than to note without explanation that, because the cases do not relate to easements, they should be disregarded by the Court. *See* Opp. Br. 5, n.5. While the cases of *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) and *Maryland v. United States*, 360 F. Supp. 3d 288, 316-17 (D. Md. 2019) do not involve easements, that is of no consequence. REC cites those cases to illustrate the fundamental principle that a defendant's mere possession of a power or authority to commit an action does not mean that the plaintiff has suffered an injury as a result of that power or authority where it has not been exercised.

In *Clapper*, the plaintiffs argued that a statute allowing the federal government to conduct surveillance of certain persons was unconstitutional. 568 U.S. at 401. However, they did not assert that the government had exercised that power and wiretapped them—only that it was "reasonably likely" that the government would do so. *Id.* The Supreme Court found that, even though the federal government had authority to act under the statute, the plaintiffs had no standing to contest the law because their theory of "*future* injury [was] too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* (emphasis in original). Similarly, in *Falwell v City of Lynchburg*, the plaintiffs challenged several statutes and sued the Attorney General, who had not yet enforced or attempted to enforce the laws, arguing that the "Attorney General may, at some future time, via some hypothetical mechanism, enforce [the statutes] against them." 198 F. Supp. 2d 765, 776 (W.D. Va. 2002). While the plaintiffs in that case did not sufficiently allege that the Attorney General had the power to enforce the laws against them, this Court held that "even if the Attorney General were empowered to enforce these provisions," the plaintiffs still failed to show any injury, actual or imminent, traceable to the Attorney General. *Id.* at 775-776. The Attorney General's power to enforce the law alone was not sufficient to establish injury absent a showing of some harm that was actual or imminent. *See*

also Maryland, 360 F. Supp. 3d at 316-17 (Plaintiffs argued that the Government had the ability to stop enforcing the Affordable Care Act, and they would be injured by this failure to enforce the act, but the Court held that there was no injury for purposes of standing because they could not establish a substantial risk of the harm actually occurring.); *Young v. Frosh*, 2020 U.S. Dist. LEXIS 193396, *1 (D. Md. Oct. 20, 2020) (Plaintiff's challenge to state mask mandate was dismissed for lack of subject matter jurisdiction; although the state had the power to require mask-wearing, Plaintiff still had to show that there was imminent danger that the law would be enforced against her, which she failed to do).

The Granos' lack of standing is also illustrated by a recent challenge in this Court to another piece of legislation that came into effect on the same day as Virginia Code § 55.1-306.1. On July 1, 2020, a number of statutes came into effect that granted the Commonwealth the right, but not the obligation, to deprive persons of their right to possess a firearm, without separate conviction for a crime, pursuant to an emergency substantial risk order or substantial risk order. *See* Va. Code §§ 19.2-152.13; 19.2-152.14; & 18.2-308.1:6 (2020). In *Draego v. Brackney*, the plaintiff sought to overturn these laws on a variety of Constitutional grounds because he feared that the statutes would be enforced against him and that he would lose his right to possess a firearm. *Draego v. Brackney*, 2020 U.S. Dist. LEXIS 212585, *2-8 (W.D. Va. Nov. 13, 2020). This Court, however, found that the plaintiff lacked standing to bring the case, even under the "somewhat relaxed" injury requirement for claims implicating the First Amendment, because he did not allege that the legislation had been "utilized against him or anyone else" or that any officials had "threatened" to petition to deprive him of his rights to own a firearm. *Id.* at *13, 16. Just as in *Draego*, REC has not exercised any rights under Virginia Code § 55.1-306.1, nor has REC expressed any intent to

exercise those rights as to the Granos' property in the future. By contrast, REC has expressly stated that it has no intent to exercise its rights under the statute as to the Granos' property.

The Granos have the burden to prove that they face an injury that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). As illustrated above, the mere fact that REC has the power to act under Virginia Code § 55.1-306.1 is not sufficient in and of itself to establish an injury.[1] For the Granos to have standing, they must prove that REC has actually acted under its statutory authority or that there is an imminent threat that REC will do so—neither of which can be established under the undisputed factual record.[2]

D. The Granos' own arguments make clear that this case is not ripe.

The Granos acknowledge that "REC's representative has declared that it *currently* has no intent 'to place fiber optic cable on the Granos' property," but argues that "REC's statements about its 'present' or 'current' intentions are only good until the moment when those intentions change."

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[1] The Granos attempt to avoid the consequences of the undisputed lack of any action on the part of REC taken under Virginia Code § 55.1-306.1 by contending that the harm to them is complete "without any further action by REC." Opp. Br. at 9. The Granos' argument fails because they cannot allege any action *at all* taken by REC under its statutory authority. The Granos also contend that "[i]f REC had used eminent domain to acquire these same rights from the Granos, REC's just compensation obligation would not be deferred or reduced if REC claimed it has no intention to use the rights it had condemned." Opp. Br. at 10. This analogy also falls short and, instead, proves REC's point. If REC has condemned the Granos' property, that would at least represent an *action* taken by REC pursuant to a statutory authority—a key fact not present here. The cases cited by the Granos involving constitutional takings—*See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l. Prot.*, 560 U.S. 702, 715 (2010), *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *Maniere v. United States*, 31 Fed. Cl. 410, 420 (1994)—are therefore inapposite for purposes of evaluating standing in this case.

[2] Of course, the merits of whether placement of fiber optic cable on the Granos' property would actually invade or usurp any of their property rights or injure any of their property interests are contested, but need not—and indeed should not—be reached to resolve REC's motion to dismiss. *See, e.g.*, *Falwell*, 198 F. Supp.2d at 786-87 (declining to reach the constitutionality of the statutes due in part to the lack of a justiciable controversy between the plaintiff and the named defendants).

Opp. Br. at 10-11 (emphasis in original). Ripeness "concerns the appropriate timing of judicial intervention." *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (quoting *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 389 (4th Cir. 2001)). A claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scoggins,* 718 F.3d at 270 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). REC's present or current intention is thus the only intention that matters for the purposes of the ripeness analysis. The Granos' claims would be ripe if, and only if, REC actually changes its intentions and decides to invoke its powers under Virginia Code § 55.1-306.1, but there is no allegation or evidence that that has occurred or will occur in the future.[3]

II. Granos Misstate The Nature Of REC's Motion Regarding Their Contracts Clause Claim.

The Granos mistakenly assert that REC's motion did not "claim that the Contracts Clause claim is not ripe, or lacks standing." Opp. Br. 12. REC's motion plainly states, however, that REC has moved to dismiss the Complaint (in its entirety) for lack of subject matter jurisdiction and that the grounds for the motion were set forth in REC's Brief. Motion at 1. REC's Opening Brief, in turn, explicitly states that the Court lacks subject jurisdiction over the claims in the Complaint—as a whole—because the Granos have suffered no injury and because their claims are not ripe or justiciable. *See, e.g.*, Opening Brief at 7.

[3] The Granos also incorrectly assert that, if their claims are not deemed ripe now, they could face statute of limitations issues later. A statute of limitations, however, does not start running until the underlying claim accrues, which requires injury. *Caudill v. Wise Rambler, Inc*., 210 Va. 11, 13 (1969) ("In the absence of injury or damage to a plaintiff or his property, he has no cause of action and no right of action can accrue to him."). Furthermore, the statute at issue contains several statutes of limitations, all of which are triggered by the accrual of a cause of action, which has not occurred on the facts plead in the Complaint. Va. Code § 55.1-306.1(R)-(T).

The Granos also contend that they have standing under their Contracts Clause claim because the passage of Virginia Code 55.1-306.1 impaired their rights and obligations under the easement at issue. As noted above, an allegation that the mere passage of the statute caused the injury, or was the injury, is insufficient to claim standing in a case against REC, absent any action taken by REC pursuant to the statute. The Granos wrongly contend that the fact "[t]hat REC did not enact the Statute itself is of no relevance." Opp. Br. 13, n.19. Standing requires both an injury and a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." *Beck*, 848 F. 3d at 269. As the passage of the statute is not fairly traceable to REC, the Granos cannot plead or prove the causation element. Because the Granos have failed to allege standing to pursue their Contracts Clause claim, or any of their remaining claims, the Court should dismiss the Complaint for lack of subject matter jurisdiction.

III. The Granos Have Not Stated A Plausible Claim That REC Acted Under Color Of State Law For Purposes Of Section 1983.

A. The Granos have not set forth sufficient facts to support the allegation that REC acted under color of state law.

All three counts of the Complaint require that the Granos sufficiently allege that REC was acting "under color of state law" pursuant to 42 U.S.C. § 1983. To establish a claim under section 1983, "the *conduct* at issue must have occurred 'under color of' state law; thus, liability attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they *act* in accordance with their authority or misuse it.'" *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)) (emphasis added). To act under color of state law "requires that the defendant in a § 1983 action have *exercised power* 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 49

(1988) (emphasis added); *see also Conner v. Donnelly*, 42 F.3d 220, (4th Cir. 1994) ("To prevail under 42 U.S.C. § 1983, a plaintiff must show, first, that he was deprived of a right secured by the constitution of laws of the United States, and second *that the defendant acted* under color of state law.") (citing *West*, 487 U.S. at 48) (emphasis added).

It is therefore axiomatic that a plaintiff asserting that a party acted under color of state law must allege some *action* or *conduct* by that party. The Granos have failed to do so. The Granos consistently argue that they were injured when Virginia Code 55.1-306.1 was passed, granting REC and other utilities certain rights related the use of their easement for broadband purposes, but this is an action by the Virginia General Assembly, not REC. The Granos claim that "REC's act of receiving and possessing rights 'as a matter of law'" is an action under color of law. Opp. Br. 15. The law is settled, however, that action under color of state law involves the *exercise* of a power, and REC did nothing to "receive" any rights from the state, they were merely ostensibly given to REC by virtue of the statute. *See, e.g.*, *West*, 487 U.S. at 49.[4] There is no allegation that REC exercised any powers under the statute, and REC thus could not act "under color of state law."

The Granos also conflate the concept of "acting under color of state law" with acting pursuant to authority provided under a state law. *See, e.g.,* Opp. Br. at 15. Acting under color of state law requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

[4] The Granos point to *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) in an unfounded effort to tie REC to the Commonwealth for purposes of establishing state action. Opp. Br. 18. *Burton*, however, is of no help to the Granos because the defendant private actor in that case actually took an action—engaging in racial discrimination against a customer of its restaurant operated through a lease with a state agency. *Id*. at 716. Here, there is no action alleged to have been taken by REC.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (internal citations omitted). Merely acting pursuant to a statutory authority is not acting "under color of state law" absent a "close nexus" between the State and the challenged action. Myriad statutes provide individuals and entities with the right to do certain activities, but there is no authority to support the position that exercising that authority makes the action "under color of state law."

The Granos have alleged no action by REC, or any use of power by REC, that would constitute an action under color of state law. As a result, they have failed to state a claim under Section 1983.

B. The Granos improperly attempt to introduce new, meritless arguments in their Opposition Brief.

The Granos, having failed to state a claim under Section 1983, improperly attempt to rehabilitate their deficient Complaint through their Opposition Brief. However, "[i]t is well-established that parties cannot amend their complaints through briefing." *S. Walk at Broadlands Homeowner's Ass'n v. Openband at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). The Granos' new allegations that the statute created a "symbiotic relationship" between the Commonwealth and REC, or that the Commonwealth and REC are "inextricably intertwined" appear nowhere in the Complaint, and the Court cannot consider them. Opp. Br. 18-19.

Even if the Court were to consider these new allegations, they still do not establish a claim that REC acted "under color of state law" in a way that injured the Granos. The Opposition Brief argues that REC was a "coconspirator" with the Commonwealth to deprive them of rights because REC "sought and authored the legislation which would allow them to install broadband and communications equipment in their existing easements." Opp. Br. at 16.[5] As an initial matter, this

[5] The Granos' unpled allegations regarding REC's alleged support of the statute at issue are a far cry from the conspiracy alleged in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), cited in the

foreboding picture of the transparent process through which legislation is written is not supported by *any* evidence in the record, nor is any new infusion of evidence appropriate at this stage. The Granos attempt to introduce evidence of REC's involvement with the passage of the statute by alleging that Sam Brumberg, "Association Counsel at the Virginia, Maryland, & Delaware Association of Electric Cooperatives," testified at a committee hearing before the Virginia General Assembly. Opp. Br. at 16. By the Granos' own admission, however, the referenced statements, which do not mention REC, were made by Mr. Brumberg, a representative of the Association, not REC itself.[6]

The Granos have simply failed to allege any action taken by REC. Furthermore, the Granos have cited no authority that would support their apparent position that lobbying for or speaking on behalf of a bill, or—yet further removed—being a member of an association that lobbied for or spoke on behalf of a particular bill, somehow amounts to acting under "color of state law." The Court should reject this notion out of hand.

The Court should disregard the Granos' attempt to revise their Complaint through their Opposition Brief. The Complaint sets forth only two facts in support of the assertion that REC

Opposition Brief. In *Adickes*, the plaintiff was deprived of her ability to engage in commerce on the basis of the race of her students, who had accompanied her to a restaurant, and was subsequently arrested. *Id.* at 146. Plaintiff alleged that the waitress that refused her service conspired with a police offer that arrested her. *Id.* at 149. The Court ultimately found that plaintiff could set out a claim that the waitress was a state actor, if she could prove a conspiracy between the waitress and the police officer. By contrast, the Granos' strained assertion in their Opposition Brief is that REC somehow "conspired" with the Commonwealth of Virginia because a trade association to which it belongs testified at a committee hearing before the General Assembly. *Adickes* is plainly inapposite.

[6] REC respectfully notes that laws are drafted and enacted by the General Assembly, not the lawyers or lobbyists who may appear in front of that body. Furthermore, Mr. Brumberg's testimony cited in the Opposition Brief, which was plainly spoken in a spirit of jocular debate during a committee hearing, should not be used to impugn him or the interests of a party which is not presently before the Court.

acted under color of state law—(1) that REC has a limited power of eminent domain and (2) that REC is regulated by the Virginia State Corporation Commission—and, as laid out fully in REC's Opening Brief, neither of these assertions are sufficient to establish state action. This Court should dismiss the Complaint for failure to state a claim under Section 1983.

CONCLUSION

For all of the foregoing reasons and the reasons set out in REC's Opening Brief, the Court lacks subject matter jurisdiction over the Complaint, and the Complaint fails to state claims under Section 1983 upon which this Court can grant relief against REC. The Complaint should be dismissed with prejudice.

Respectfully submitted,

Dated: February 2, 2021

RAPPAHANNOCK ELECTRIC COOPERATIVE

By: /s/ Andrew P. Sherrod

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CERTIFICATE OF SERVICE

I hereby certify that, on February 2, 2021, I electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record for the parties.

By: /s/ Andrew P. Sherrod

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