

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

VIRGINIA STUDENT POWER )  
NETWORK, et al., )

Plaintiffs, )

v. )

CITY OF RICHMOND, et al., )

Defendants. )

Case No.: CL20-2916

**ORDER**

On June 29, 2020, came the parties, by counsel, to be heard on Plaintiffs' Emergency Motion for a Temporary Injunction.

The Court took the matter under advisement and now, upon consideration of the pleadings, briefs and argument of counsel, the Court hereby **DENIES** Plaintiffs' Emergency Motion for a Temporary Injunction for the following reasons.

Plaintiffs filed their Complaint on June 26, 2020 seeking injunctive relief enjoining Defendants' alleged misuse of crowd control weapons and equipment and a declaratory judgment declaring that the manner and method employed by Defendants on June 22-23, 2020 in

implementing Virginia Code § 18.2-406 was unlawful and violated Plaintiffs' freedom of speech and assembly rights under the Virginia Constitution.

### **I. Factual Background**

Plaintiffs allege that on the night of June 22 into the early morning of June 23, Defendants employed unnecessary force against peaceful demonstrators outside of Richmond City Hall. Plaintiffs are the Virginia Student Power Network, a non-profit organization, and three individual protestors. On the evening of June 22, Plaintiffs blockaded Marshall Street between 8th and 9th Streets in the City of Richmond to protest police brutality in the wake of George Floyd's death in Minneapolis, Minnesota on May 25, 2020. After midnight, City police declared the Marshall Street protest an unlawful assembly. City police announced, via megaphone, to protestors that the blockade was an unlawful assembly. City police made this announcement multiple times. Plaintiffs allege that City police then used tear gas, flash bang explosives, rubber bullets, and pepper spray to disperse the crowd. Although Plaintiffs allege that the protest was peaceful, they admit that there was some unlawful conduct within the crowd of protestors, and in fact, several people were arrested.

### **II. Temporary Injunction Standard**

The Virginia Supreme Court has consistently stated "the granting of an injunction is an extraordinary remedy." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Although there are no Virginia Supreme Court cases directly setting forth the standard for an injunction, the United States Supreme Court articulated what factors must be shown in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008). The test established in *Winter* requires Plaintiffs to show (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of

preliminary relief; (3) a balance of the equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20. Plaintiffs here have not made a clear showing on any of the four factors.

**a. Likelihood of Success on the Merits**

Plaintiffs' Complaint incorporates three counts. Counts I and II collectively allege that Defendants violated Plaintiffs' rights under the Virginia Constitution to freedom of speech and assembly. Count III seeks a declaratory judgment that the police unlawfully declared Plaintiffs' actions on June 22-23 an unlawful assembly, and an order from this Court enjoining the police from issuing unlawful assembly declarations in the same manner in the future.

Plaintiffs argue under Counts I and II that they have a private cause of action under Article I, Section 12 of the Virginia Constitution. Plaintiffs have cited no Virginia case, however, that states that Article I, Section 12 of the Virginia Constitution is self-executing. Plaintiffs cannot sustain a cause of action under the Virginia Constitution unless the section of the Constitution at issue is self-executing. *Gray v. Va. Secy. of Transp.*, 276 Va. 93, 106 (2008). Although Article I, Section 12 is in the Virginia Bill of Rights, and the Bill of Rights is normally presumed to be self-executing, Section 12 does not have any of the other indicia of self-execution. For instance, Section 12 does not state how its general statement of principles should be enforced as a rule with a remedy. VA. CONST. art. I, § 12. Instead it prohibits conduct, but only by the General Assembly. *Id.*

Even if Plaintiffs have a private cause of action, there is a serious question whether Plaintiffs will be able to prove that the police action was in retaliation of Plaintiffs' expression of free assembly and speech or that declaring an unlawful assembly was pretextual. Here, Plaintiffs admitted that 150 people set up an encampment, blocked the city streets, and interfered with traffic, which provides a legal basis for a declaration of unlawful assembly. *See Owens v. Commonwealth*, 211 Va. 633 (1971); *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282 (E.D. Va. 1982)

(quoting *Cantwell v. Connecticut*, 310 U.S. 296 (1940)) (interpreting § 18.2-406 to mean that law enforcement has the right to maintain public order “[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears”).

This Court’s power to issue a declaratory judgment is limited to “cases of actual controversy.” Va. Code Ann. § 8.01-184. The actual controversy must be “one that is justiciable, that is, where specific adverse claims based upon present rather than future or speculative facts, are ripe for judicial adjustment.” *Bd. of Supervisors of James City County v. Rowe*, 216 Va. 128, 132 (1975) (citing *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964)). If there is no actual controversy, this Court is without jurisdiction to hear the case as “the rendering of advisory opinions is not a part of the function of the judiciary in Virginia.” *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 418 (1970) (citing *Criterion Ins. Co. v. Grange Mut. Cas. Co.*, 210 Va. 446, 449 (1970)).

Count III seeks an order from this Court enjoining the police from declaring that protests in the future are unlawful assemblies under Virginia Code § 18.2-406. The existence or nature of any and all future protests is speculative. Additionally, declaratory relief is inappropriate to restrain or impede criminal matters. *Daniels v. Mobley*, 285 Va. 402 (2013). Because the declaratory action claim asserted by Plaintiffs does not present a justiciable controversy, this Court does not have authority to control the future acts of law enforcement and control the manner in which law enforcement enforces a criminal statute.

Plaintiffs cite to a few recent preliminary injunctions issued mostly by federal courts around the country dealing with police munitions used to disperse protestors, in support of their argument that their claims are likely to succeed. Plaintiffs at no point, however, argue that any one

of these cases is legally or factually similar or persuasive. Plaintiffs' claims deal specifically with police enforcement of a Virginia statute. By contrast, the federal cases address the U.S. Constitution and federal laws. Additionally, a few of the cited cases were resolved by agreement.

**b. Irreparable Harm**

Plaintiffs argue that they will be irreparably harmed because Defendants' actions operate to chill Plaintiffs' rights to freedom of speech and assembly under the Virginia Constitution. There can be no showing of irreparable harm when Plaintiffs cannot even show that they will be harmed by an event that has not occurred, and may never occur.

Plaintiffs argue that Defendants have employed the same tactics used on June 22-23 on other occasions, and cite in their Complaint to Defendant Richmond Police Chief Blackwell's "ominous promise" to declare certain protests unlawful assemblies. However, Chief Blackwell has since been replaced by a new Richmond police chief, making any allegation that Defendant Richmond Police will employ unlawful force in the future even more speculative. Finally, no evidence was produced that Defendants have employed such methods sought to be enjoined since June 23.

Plaintiffs have not established that harm is certain or of such imminence that there is a clear and present need for such equitable relief. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

**c. Balance of the Equities**

The Court must also "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

Defendants point to the need to uphold public safety. Plaintiffs point to potential infringement of their Constitutional rights and bodily harm.

If Defendants are enjoined, limitations on future acts of law enforcement and the manner in which Defendants enforce the law may impede public safety and their own safety. Plaintiffs ask this Court to: dictate the specific type of crowd control measures used by police in the future; require preapproval from the Chief of Police prior to using certain measures; require police to identify within the crowd those who are acting lawfully and those who are acting unlawfully; require police to give a series of commands before munitions are used; and require that any dispersal orders to the crowd be limited in time and geographic scope. Placing these restrictions on Defendants in the form of a preliminary injunction unnecessarily burdens the police and puts them and the public at risk.

On the other hand, Plaintiffs have the option in the future to protest without unlawful force, without blocking roadways, and without disrupting or jeopardizing public peace and order. Plaintiffs admit that they barricaded a city block and set up bike marshals to keep the police out. They allowed one city worker to leave the area at 5:30 P.M., at a time when many downtown employees were presumably leaving work. The public should not be required to request access to a city street. Plaintiffs are unable to show that a balance of equities weighs in their favor.

**d. Public Interest**

This Court acknowledges the importance of citizens' rights to freedom of speech and assembly as guaranteed by Article I, Section 12 of the Virginia Constitution. The citizens of the Commonwealth have exercised this right frequently, and publicly, in recent weeks to protest George Floyd's death and police brutality. This Court, also recognizes, however, the strong public interest in promoting public safety. An injunction would constitute an unwarranted intrusion into

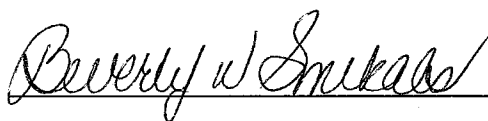
and interference with the ability of law enforcement to do its job during an unprecedented period of civil unrest.

Since Plaintiffs have not made a clear showing on any of the four factors under *Winter*, the Court **DENIES** Plaintiffs' Emergency Motion for a Temporary Injunction.

Pursuant to Rule 1:13, the Court dispenses with the Parties' endorsement of this Order.

The Clerk is directed to forward a copy of this Order to all Parties.

ENTER: 6, 30, 2020

A handwritten signature in cursive script, reading "Beverly W. Smukas", written over a horizontal line.

Judge