V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

VIRGINIA STUDENT POWER NETWORK, et al,	)	
Plaintiffs,	)	
v.	)	Case No. CL20002916-00
CITY OF RICHMOND, et al.,	)	
Defendants.	)	

DEMURRER

I. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiffs filed the original complaint in this matter on June 26, 2020, alleging that Defendants violated their rights under the Virginia Constitution and seeking injunctive relief. Specifically, Plaintiffs claimed that Defendants violated their right to freedom of speech and to peaceably assemble under Article I, Section 12 of the Virginia Constitution, and they sought a declaratory judgment pursuant to Va. Code § 8.01-184. Simultaneously with the Complaint, Plaintiffs filed an Emergency Motion for Temporary Injunction.

On June 29, 2020, the City Defendants filed an opposition to the temporary injunction request, and the Commonwealth Defendants demurred to the Complaint. The Court heard oral argument on the pleadings, and on the following day entered an Order denying the request for a temporary injunction. The Court concluded that Article I, Section 12 of the Virginia Constitution was not self-executing, such that Plaintiffs had no private cause of action as a matter of Virginia law. The Court further held that Plaintiffs were unlikely to succeed on the merits of their claim

because the facts pleaded in the Complaint established a legal basis for law enforcement to declare an unlawful assembly and disperse the crowd.

Plaintiffs moved for leave to file an amended Complaint on July 10, 2020, and the Court granted that request on July 20, 2020. Rather than alleging additional facts in support of their claims, however, the First Amended Complaint omits several facts that had been included in the original Complaint. The first three counts of the First Amended Complaint (FAC) purport to state the same claims arising under Virginia law that the Court indicated would necessarily fail in its Order denying Plaintiffs' request for a temporary restraining order. Plaintiffs included two additional claims pursuant to 42 U.S.C. § 1983 in their First Amended Complaint: Count IV alleges a violation of the First Amendment, and Count V claims a violation of the Fourth Amendment. The First Amended Complaint also added the Virginia Division of Capitol Police ("VCP") and Colonel Anthony S. Pike, Chief of VCP, as Defendants. The Commonwealth Defendants filed a Demurrer to the Complaint on August 10, 2020, and now respectfully submit this Brief in Support of the Demurrer.

II. LEGAL STANDARD

Virginia law is clear: "the motion must state a cause of action." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011) (citation and internal quotation marks omitted). Without such a cause, a complaint must be dismissed. *Id.* "A demurrer admits that all material facts which are well pleaded are true, '[but] the demurrer does not admit the correctness of the conclusions of law stated by the pleader, or that the inferences of fact drawn by the pleader from facts alleged may be fairly and justly drawn therefrom.'" *Koch v. Seventh St. Realty Corp.*, 205 Va. 65, 71, 135 S.E.2d 131, 135 (1964) (quoting *Ames* v. *American Nat. Bank,* 163 Va. 1, 38, 176 S.E. 204, 216 (1934)).

III. ARGUMENT

A. VCP and VSP are state agencies that have sovereign immunity

The Plaintiffs have improperly named both the Virginia Capitol Police (VSP) and the Virginia State Police (VSP) as defendants. "The immunity of the Commonwealth and its agencies from suit . . . is absolute unless waived." *Baumgardner v. Southwestern Va. Mental Health Inst.*, 247 Va. 486, 490 (1994). "As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action." *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). "The doctrine of sovereign immunity serves a multitude of purposes including but not limited to . . . preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation." *Id.* (alteration in the original; internal quotation omitted.)

Plaintiffs in the case at bar bring suit pursuant to alleged violations of state and federal constitutional rights. Counts I and II alleged violations of the Virginia Constitution with no statutory right of action that would waive sovereign immunity for state agencies. Count III is simply a request for declaratory judgment. The Supreme Court of Virginia has expressly held that the rule in *Afzall* applies to declaratory judgment actions seeking to enjoin criminal prosecution. *Daniels v. Mobley*, 285 Va. 402, 411–12. Counts IV and V are both brought pursuant to 42 U.S.C. § 1983. The Supreme Court specifically held in *Will v. Mich. Dep't of State Police* a plaintiff could not bring a claim against a department of the state police pursuant to 42 U.S.C. § 1983. 491 U.S. 58, 64 (1989).

Therefore, the VCP and the VSP, as state agencies, have immunity from all of the counts asserted by Plaintiffs in the First Amended Complaint. Accordingly, they should be dismissed as parties with prejudice.

B. Defendants cannot be sued in their official capacities under 42 U.S.C. § 1983

Plaintiffs have named the Virginia State Police, Gary Settle in his official capacity as Superintendent of the Virginia State Police, the Virginia Division of Capitol Police, and Anthony S. Pike in his official capacity as Chief of the Virginia Division of Capitol Police as defendants. The VSP and VCP are both state agencies. Settle and Pike are state officials sue din their official capacity as heads of state agencies. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), the U.S. Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *See Quern v. Jordan*, 440 U.S. 332, 345 (1979) ("§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States."). Based on the statute's clear language, § 1983 "does not provide a [ ] forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Will v. Michigan Dep't of State Police*, 491 U.S. at 66.

The Plaintiffs in the case at bar added the 42 U.S.C. § 1983 count in an attempt to obtain redress against a state agency and state officials when one was not permitted under state law. Yet they have selected a federal statute with well-settled law prohibiting recovery from the class of defendants Plaintiffs named in this suit. Accordingly, the 42 U.S.C. § 1983 claims, set forth in Counts IV and V, should be dismissed.

C. Article 1, Section 12 of the Virginia Constitution is not self-executing as to State law enforcement agencies

In the First Amended Complaint, the Plaintiffs re-assert their claims brought pursuant to the Virginia Constitution. As this Court already held in its June 30, 2020 Order denying the Plaintiffs' motion for an emergency injunction, "Plaintiffs cannot sustain a cause of action under the Virginia Constitution unless the section of the Constitution at issue is self-executing," citing

to *Gray v. Va. Secy. of Transp.*, 276 Va. 93, 106 (2008). The provision cited by Plaintiffs, Article I, Section 12, is in Virginia's Bill of Rights, which is normally presumed to be self-executing. *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 681 (1985). But a constitutional provision must do more than simply be in the Virginia Bill of Rights to be self-executing. It must also

> suppl[y] a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

Id. at 682 (internal quotation omitted). The only rule or conduct proscribed by Article I, Section 12 is directed at the General Assembly, prohibiting it from "pass[ing] any law abridging freedom of speech or of the press, nor the right of the people to peaceably to assemble, and to petition the government for the redress of grievances."

This Virginia Constitutional provision is self-executing with regard to the General Assembly, in that it needs no additional implementing statute to clarify what conduct by the General Assembly is prohibited or for the courts to impose a remedy. *Gray*, 276 Va. at 103. But nothing in the language of Article I, Section 12 prohibits conduct by law enforcement agencies or specifies what the remedy would be. Therefore, Virginia Constitution Article I, Section 12 does not create a private right of action against law enforcement agencies and both Counts I and II should be struck for failing to state a private right of action against law enforcement agencies.

D. Declaratory judgment is only appropriate to declare the rights and duties of parties with a present case or controversy.

This Court also held that there was no likelihood of success on the Plaintiffs' Count III for Declaratory Judgment. Count III has not changed in the FAC, therefore, the Court's

conclusion is just as valid as applied to the FAC as it did to the Complaint as it was pleaded at the emergency preliminary injunction stage.

The Plaintiffs have failed to assert an actual case or controversy of the type that would give rise to a cause of action for a declaratory judgment. *See* Va. Code § 8.01-184. To assert a justiciable controversy, the Plaintiff must assert "specific adverse claims based upon present rather than future or speculative facts, [that] are ripe for judicial assessment." *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)).

Plaintiffs seek a declaration that the June 22-23 incident did not pose a "clear and present danger of violent conduct" but this Court already held that the protesters' act of "set[ting] up an encampment, block[ing] the city st4reets, and interfere[ing] with traffic." Jun. 30, 2020 Order, p. 3. The act of blocking the streets is a threat to public safety, even if it is not "violent conduct." The use of barricades to block the streets and people to stop traffic is a use of force within the meaning of Virginia's unlawful assembly Code section, Virginia Code § 18.2-406. *See Owens v. Commonwealth*, 211 Va. 633 (1971) (interpreting an earlier version of the Code but recognizing blocking vehicular traffic on city streets would be an unlawful assembly); *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282, 289 (E.D. Va. 1982).

In *United Steelworkers*, the Eastern District analyzed Virginia's unlawful assembly statute after a plaintiff challenged it as unconstitutionally vague and overbroad, because it could be applied to lawful and peaceable conduct. *Id.* at 287. The court held that the statute was constitutional because it "requires the existence of circumstances evidencing a present threat of violence *or breach of public order.*" *Id.* (emphasis added). Plaintiffs attempt to reform the holding of *United Steelworkers* to require this Court to find that an unlawful assembly can only

apply to circumstances posing a threat of imminent violence, omitting the additional criterion for an unlawful assembly: breaching public order. As a result, the first two requests for declarations run contrary to the case law interpreting Virginia's unlawful assembly statute and this Court's prior ruling on the issue, finding that blocking a public street was an unlawful threat to public safety and order.

The Plaintiffs' third declaration request is to declare that the unlawful assembly order was merely pretextual. FAC, ¶ 89(c). This Court already observed, however, that because the Plaintiffs posed a legitimate threat to public safety and violated Virginia's unlawful assembly statute, "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 declaring an unlawful assembly was pretextual. Jun. 30, 2020 Order, p. 3. For the same reason, this Court could not and would not declare that the use of force to disburse the unlawful assembly violated the Plaintiffs' constitutional rights. Plaintiffs have not cured this defect in their FAC.

Finally, this Court correctly held in its June thirtieth Order that Plaintiffs cannot seek a declaratory judgment as to speculation regarding future protests, because of the requirement that a declaratory judgment arise out of present facts, not future speculation. June 30, 2020 Order, p. 4 (citing *Bd. of Supervisors of James City County*, 216 Va. at 132). A declaratory judgment should also not be used to impede the enforcement of criminal statutes in the future and is outside this Court's jurisdiction. *Daniels v. Mobley*, 285 Va. 402, 410 (2013).

This Court carefully and thoughtfully applied the precedent discussed above to find that Plaintiffs were not likely to succeed on their declaratory judgment count in its Order denying Plaintiffs request for an emergency injunction. They did not amend Count III in light of this

Court's ruling and as a consequence, they have still failed to state a claim upon which relief may be granted in Count III. Accordingly, Count III should be struck with prejudice.

E. Facts alleged by Plaintiffs admit they were engaged in an unlawful assembly

a. There is no constitutional right to unlawful assemblies that threaten public safety.

Plaintiffs claim their rights of free speech, free assembly, and the freedom to petition the government were violated when their assembly on June 22 was declared an unlawful assembly and disbursed by law enforcement. The FAC, however, admits the necessary facts to conclude that the assembly was an unlawful threat to public safety and order because protesters barricaded the public streets. As discussed above, barricading streets and impeding traffic is an unlawful threat to public order and safety and is not protected by the Virginia Constitution nor the U.S. Constitution.

Plaintiffs admit that the RPD declared the event an unlawful assembly because it was blocking traffic and the entrances and exits of public buildings, which impacted "public safety or infrastructure." FAC, ¶ 61. Nor do Plaintiffs deny this characterization of their protest. Instead, they admit they "blocked the intersections between 8th Street and 9th Street with traffic cones and set up bike marshals to protect participants from traffic." FAC, ¶ 58. They admit there was a barricade controlled by the "bike marshals" posted by the protest organizers and anyone seeking to leave the area by vehicle had to obtain help to move the barricade. FAC, ¶ 59. Plaintiffs cite to a news article describing their block-long protest zone as an "encampment" with multiple tents set up on East Marshall Street. FAC, ¶ 34 (citing Richmond Times-Dispatch, *UPDATED: Overnight Police Declare Reclamation Square Encampment an Unlawful Assembly, Disburse Crowd with Chemical Agents*, available at https://richmond.com/news/local/updated-overnight-police-declare-reclamation-square-encampment-an-unlawful-assembly-disperse-crowd-with-

chemical-agents/article_d9827a4c-1008-5bad-8327-9ca0b00745e5.html.). They admit there were tents in the street Plaintiffs even admit that the protesters set up "tents in the square and on the street" along with a "large screen for movie viewing." FAC, ¶¶ 57-58. They were intending "to stay overnight." Plaintiffs admit that RPD announced the unlawful assembly before they used force to disburse the protest from continuing to block the street. FAC, ¶ 62. Plaintiffs then claim that protesters were trapped by law enforcement, buildings, and their own barricades. FAC, ¶ 64. These facts, alleged by the Plaintiffs themselves, concede that the protest, with its barricaded street and encampment inside the barriers, was a threat to public safety.

Quite simply, there is no constitutional right to free speech, assembly, or petition that violates the public safety by barricading a city street. *United Steelworkers of Am.*, 544 F. Supp. at 289. The Supreme Court held that when there is "interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish it is obvious." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Plaintiffs cannot admit they barricaded a street and at the same time allege a constitutional right to free speech, free assembly, and freedom to petition the government grants them the right to do so. It is well settled Supreme Court precedent that refutes their claim.

Therefore, Counts I, II, and IV of the FAC should be dismissed with prejudice for failure to state a claim. Facts admitted by the Plaintiffs preclude any valid constitutional challenge to the declaration of unlawful assembly.

b. Defendants were justified in using non-lethal force as a matter of law.

Plaintiffs have also brought a claim for violation of their Fourth Amendment rights to be free of unreasonable seizure, which they allege occurred when the law enforcement officers used allegedly excessive force on Plaintiffs when they were protesting. FAC, Count V. As discussed

above, however, facts alleged by Plaintiffs make it clear as a matter of law that the protests were unlawful assemblies under Virginia law. In interpreting Virginia's unlawful assembly statute, the Eastern District held that it was constitutional for police to "clear the streets" of an unlawful assembly, including even those people who are not engaged in an unlawful activity other than simply being present at an unlawful assembly. *United Steelworkers of America*, 544 F. Supp. at 289. The court held that

> at the time of a disturbance [of the public peace], or when there is a clear and present danger of an immediate disturbance, the commonwealth requires that the police be able to take quick action. To require the individual determinations of who is acting lawfully and who unlawfully would prove unduly burdensome. The ability of the police to restore order would be impaired; the restoration of order, unnecessarily slowed.

Id. Therefore, it is constitutional for police to clear *all* protesters off a public street, even when only some of them are engaging in activities that are a threat to public safety, such as barricading the street and erecting a camp in the roadway.

Plaintiffs argue that the use of non-lethal force violated their Fourth Amendment rights. Virginia Code § 18.2-411 specifically authorizes law enforcement to "command them in the name of the Commonwealth to immediately disburse. If upon such command the persons unlawfully assembled to not disburse immediately" the law enforcement officers present "may use such force as is reasonably necessary to disburse them." Virginia state law also confers immunity from both civil and criminal liability upon "any person authorized to disburse or assist in dispersing a riot or unlawful assembly." Va. Code § 18.2-412.

Therefore, Defendants were authorized in the use of non-lethal force to disburse the crowed after warning them of the unlawful assembly. Plaintiffs admit to receiving such warnings. FAC, ¶ 62. Even if Plaintiffs attempt to argue that Virginia's law regarding the use of non-lethal force to disburse an unlawful assembly is somehow unconstitutional, the statutory

scheme defeats a claim of excessive force. "[T]he question [in an excessive force case] is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Conner*, 490 U.S. 386, 397 (1989) (citations omitted). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable police officer on the scene." *Anderson v. Russell*, 247 F.3d 125, 129 (4th Cir.), cert denied, 534 U.S. 949 (2001). A reasonable police officer in the state of Virginia would have correctly believed his use of force was authorized to disburse a crowd after the declaration of an unlawful assembly. Furthermore, the supervisors of those officers and the heads of their respective law enforcement agencies would have also believed the use of force was lawful and reasonable under Virginia's statutory scheme. Accordingly, there can be no valid Fourth Amendment violation by the plaintiffs. The defendants were expressly and explicitly authorized to use non-lethal force under the facts as alleged by the plaintiffs.

IV. CONCLUSION

Plaintiffs have once again failed to state a claim for which leave may be granted. The facts simply preclude a valid claim for relief. Therefore, their case against the Commonwealth Defendants should be dismissed with prejudice because the defects were not cured and cannot be cured by amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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