

**VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF RICHMOND**

**VIRGINIA STUDENT POWER
NETWORK, NOAH SMITH, DIAMANTE
PATTERSON, AND DEVIN CAINES,**

Plaintiffs,

v.

**CITY OF RICHMOND, RICHMOND
POLICE DEPARTMENT, WILLIAM
“JODY” BLACKWELL, in his official
capacity as Interim Chief of Richmond
Police Department, VIRGINIA
DEPARTMENT OF STATE POLICE, and
GARY T. SETTLE, in his official capacity
as Superintendent of Virginia Department
of State Police,**

Defendants.

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Case No. _____

**EMERGENCY MOTION FOR A
TEMPORARY INJUNCTION**

JURY TRIAL DEMANDED

I. INTRODUCTION

Plaintiffs bring this Emergency Application to seek immediate relief from Defendants' practice of brutally suppressing Plaintiffs' well-established rights of free speech and assembly under the Virginia Constitution. Without an immediate injunction from this Court, Defendants will continue to use the pretext of a false declaration of "unlawful assembly" to batter, gas, and otherwise injure and harass Plaintiffs and others from exercising their constitutional rights to peaceful assembly and free speech.

The death of George Floyd on May 25, 2020, captured on video by a bystander's cellphone, sparked an unprecedented swell of political activism across the United States. By June 13, just three weeks after that evening in Minneapolis, over 2,000 cities and towns across the country had organized some form of protest or demonstration. Over 50 cities in Virginia took part; many have continued to this day. This case concerns one of those cities, Richmond, and the long-held right of its citizens to assemble, speak, and protest in the wake of a national tragedy.

The Virginia Student Power Network ("VSPN") is a grassroots network of young organizers and activists operating across eight campuses in Virginia. On June 22, the VSPN planned an overnight "teach-in" outside City Hall in Richmond in order to raise awareness of inequities in the criminal legal system and to advocate for an end to violence, particularly against communities of color. The event involved a number of educational workshops, speakers from different organizations, and a movie—*Do the Right Thing*—to be shown at the end of the night.

About half an hour after midnight, the Richmond Police Department ("RPD") arrived in full riot gear at what the VSPN dubbed "Reclamation Square." Ten minutes later, the RPD declared without warning that pursuant to Va. Code §18.2-406, the event was an "unlawful assembly." According to a Twitter post by the RPD, the VSPN's "teach-in" was an unlawful assembly because of "conditions of activity such as sit-ins, sit-downs, blocking traffic, blocking

entrances or exits of buildings that impact public safety or infrastructure.” Richmond Police Department, <https://twitter.com/RichmondPolice/status/1275288727737294848>. The RPD also announced over a megaphone that the students should leave the premises immediately. The VSPN did not escalate the situation, but did not leave.

Shortly thereafter, RPD officers advanced and used tear gas, pepper bullets, and flash grenades against the crowd of students. They barricaded the area from all sides while the student protestors, trapped in the middle, gasped for air. Many of the protestors removed their COVID-19 protective masks in the ensuing panic. Even when the protestors eventually found a path to retreat, the RPD continued to fire tear gas canisters in their direction.

Consistent across every version of the Virginia Constitution dating back to 1776 is the foundational right to free speech and assembly. The state constitution provides that “the freedoms of speech and of the press are among the great bulwarks of liberty,” and that accordingly, the state shall not “abridg[e] the freedom of speech or of the press, nor the right of the people to peaceably assemble, and to petition the government for the redress of grievances.” Va. Const. art. I, § 12. When people exercise this right in Virginia, they bring with them a basic expectation: that they should be able to speak and be heard without fear of bodily injury or legal sanction. This case is about vindicating that constitutional promise.

II. ARGUMENT

Injunctive relief is necessary to protect Plaintiffs’ rights to peaceably assemble and protest without being subjected to the risk of serious injury or legal reprobation. Plaintiffs meet all of the requirements for a temporary injunction because “(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.” *McEachin v. Bolling*,

84 Va. Cir. 76, at *1 (2011). Because “there are no Virginia Supreme Court cases directly setting forth the standard for an injunction,” Virginia circuit courts have consistently applied federal preliminary injunction law when analyzing Virginia temporary injunctions. *Id.* (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)); *see also Freemason Street Area Assoc., Inc. v. City of Norfolk*, 100 Va. Cir. 172, at *8 (2018).

A. Plaintiffs Are Likely to Succeed on the Merits of Their State Constitutional Claim.

There is no question that the exercise of robust public assembly to protest what Plaintiffs believe to be an unjust criminal justice system constitutes the core of what Article I, Section 12 of the Virginia Constitution was intended to protect. Defendants’ actions, as alleged in the Complaint, violate this provision for two reasons.

First, Defendants’ use of Virginia’s “unlawful assembly” statute to break up a peaceful protest was plainly improper, even taking Defendants’ explanations as given. The statute provides that “[w]henver three or more persons assembled share the common intent to advance some lawful or unlawful purpose *by the commission of an act or acts of unlawful force or violence and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order*, then such assembly is an unlawful assembly.” Va. Code §18.2-406 (emphasis added). By RPD’s own admission, it invoked the statute on June 22 because of “conditions of activity such as sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety or infrastructure.” These “conditions of activity” do not even gesture at the “acts of unlawful force or violence,” nor could they inspire reasonable fear of serious and immediate breaches of public safety, peace or order, both of which must be present to trigger application of Virginia’s “unlawful assembly” statute. This is not an isolated incident of Defendants’ over-expansive interpretation of § 18.2-406; from

the night of the June 22, 2020 incident onwards, Defendants invoked the “unlawful assembly” statute *every consecutive night* up to the time of this writing.

Defendants’ employment of the “unlawful assembly” statute was also improper because the language of § 18.2-406 requires that “three or more people . . . *share the common intent*” to commit acts of unlawful force or violence. Even if Defendants could show isolated threats of violence, Defendants’ invocation of the statute improperly imputes the intent to commit acts of unlawful force or violence onto every person assembling in a public area. This scattershot application of a criminal statute to everyone in the vicinity—including those protesting lawfully—contravenes both the letter and spirit of Virginia law.

To the extent that Defendants suggest that the statute is somehow open to interpretation on either of these fronts, the Supreme Court’s decision in *NAACP v. Button*, 371 U.S. 415, 430-33 (1963), plainly instructs that this Court should nevertheless find Defendants’ application of the statute to be problematic. There, the NAACP challenged a Virginia statute which was unconstitutionally applied to prohibit certain of the NAACP’s protected speech. *Id.* at 430. *Button* held that the “objectionable quality of vagueness and overbreadth” rendered the statute problematic as applied by the defendants in that case, and that because free speech protections “need breathing space to survive, the government may regulate in the area only with narrow specificity.” *Id.* at 433.

Second, Defendants’ use of riot weapons such as tear gas, flash grenades, and rubber bullets violated Plaintiffs’ Section 12 rights to free speech and assembly. Plaintiffs have standing for this type of injury under *Stanley v. City of Norfolk*, 218 Va. 504, 508 (1977), and a cause of action to enforce their state constitutional rights under *DiGiancinto v. Rector and Visitors of George Mason University*, 281 Va. 127, 137-38 (2011). Plaintiffs protested lawfully in a public forum,

and video evidence establishes that Plaintiffs' protest was in fact peaceful.¹ The sworn statements of several plaintiffs establish the intuitively uncontroversial fact that the risk of serious bodily injury deters participation in such speech and assembly. *See* Han Decl. ¶ 14a (fear of participating in future protests due to risk of violent confrontation with police); Han Decl. ¶ 14b (feeling of limitation in ability to plan future events in fear of retaliation); Diamante Decl. ¶ 11 (fear of tactics of escalation making it unsafe to protest in Richmond); Smith Decl. ¶ 10 (fear of getting hurt by weapons).

Plaintiffs' likelihood of success on this claim is demonstrated by the success of similar actions by courts across the country. *See, e.g., Abay v. City of Denver*, 2020 WL 3034161, at *9 (D. Colo. 2020) (granting preliminary injunction enjoining Denver police from using "less-lethal" projectiles in violation of First Amendment); *Black Lives Matter Seattle-King Cty. v. City of Seattle*, 2020 WL 3128299, at *5 (W.D. Wash. 2020) (granting TRO to enjoin Seattle police from employing "projectiles of any kind [including h-bang grenades, "pepper balls," "blast balls," rubber bullets, and foam-tip projectiles] against persons peacefully engaging in protests or demonstrations"); Temporary Restraining Order, *NAACP v. City of Charlotte*, 20-cvs-8563, at 4 (enjoining use of chemical munitions) (June 19, 2020); App. 30, *Anti Police-Terror Project, et al. v. City of Oakland, et al.*, No. 3:20-cv-03866-JCS (N.D. Cal. June 18, 2020) (enjoining firing rubber bullets or similar projectiles at protestors).

¹ Plaintiffs have attached to the Complaint several videos documenting the June 22-23 protest under separate cover. This documentary evidence is also available at <https://www.dropbox.com/sh/uc9amikm42nwkxj/AACoOSN4LFOwDRfnXpLLr-HRa?dl=0>.

B. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

Plaintiffs have adequately established “irreparable harm and the lack of an adequate remedy at law.” *Preferred Sys. Solns., Inc. v. GP Consulting*, 284 Va. 382, 401 (2012) (quoting *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 431 (1994)). The deprivation of a person’s constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *cf. Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (finding money damages “inadequate to compensate for the loss of First Amendment freedoms”). The injury that arises when a defendant’s actions deter or chill free speech is not merely speculative; to the contrary, courts have found it to be immediate and entirely impermissible. *Babler v. Futhey*, 618 F.3d 514, 523-24 (6th Cir. 2010) (threat of retribution for free speech sufficient to establish irreparable injury through chilling effect); *Elam Const., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347-48 (10th Cir. 1997) (same); *Savage v. Gorski*, 850 F.2d 64, 67-68 (2d Cir. 1988) (same); *O’Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) (same); *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981) (same). Here, any suggestion by Defendants that Plaintiffs have not yet been subjected to violence ignores the well-worn rule that forcing a person to endure significant personal risk in order to exercise their rights *is* irreparable harm itself.

Severe bodily injury also constitutes irreparable harm. *See, e.g., Columbia Gas Transmission Corp. v. Burke*, 768 F. Supp. 1167, 1171-72 (N.D.W.V. 1990). Under Chief Blackwell’s command, the Richmond Police Department consistently deployed against protestors tear gas, pepper spray, other chemical irritants, kinetic impact projectiles, and weapons intended to stun with light and sound. The effects of tear gas, which include “permanent eye injury” and “systemic toxic effects,” Compl. ¶ 24, led five doctors from Virginia Commonwealth University to issue a letter to the Richmond Police Department stating that they were “horrified to see the use

of pepper spray and other chemical irritants against protestors,” Compl. ¶ 45. Critically, “deployment of chemical pain weapons is non-discriminatory, in the sense that *anyone* in range of the dispersed weapon may suffer consequences.” Daniell. Decl. ¶ 25 (emphasis added). Thus, even assuming the *worst-case* scenario of a violent protest by one individual—which by video evidence was not the case on the night of June 22, 2020—Defendants’ ongoing practice of deploying tear gas is “as likely to affect a peaceful protester as an alleged vandal or looter immersed within the crowd.” *Id.* This cannot be right.

This harm manifests not only in the threat of physical violence, but also Defendants’ pretextual use of Virginia’s unlawful assembly statute to effect unlawful arrests of peaceful protestors. As the Supreme Court aptly recognized in *Button*, the “existence of a penal statute susceptible of sweeping and improper application” can easily erode the “delicate and vulnerable” freedoms of the rights to speak and assemble freely. 371 U.S. at 433. And, the “threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.” *Id.* Here, Defendants’ use of VA Code § 18.2-406 to designate unlawful assemblies as a pretext to criminalize lawful and protected speech *directly* contravenes this principle. Defendants’ illegal gamesmanship begets irreparable harm that can only be ameliorated through immediate injunctive relief.

C. The Balance of Equities and Public Interest Weigh in Favor of Injunctive Relief.

In deciding whether to grant a temporary injunction, this Court must also “balance the competing claims of injury and must consider the effect on each part of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. Where the government is a party to the suit, this weighing analysis includes whether an injunction would be in the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, because “the harm [Plaintiffs] would suffer without a

temporary injunction outweighs the harm to [Defendants],” *Freemason Street Area Assoc.*, 100 Va. Cir. at *12, these considerations weigh heavily in Plaintiffs’ favor.

The harm to Plaintiffs without the requested relief flows from the deprivation of their rights under the Virginia Constitution. Without this Court’s intervention, Richmond citizens looking to speak out on police brutality face a constitutionally indefensible Hobson’s choice: stay home, or risk bodily injury by asserting their right to be heard collectively and publicly. As discussed in Part II.B, *supra*, chemical-pain weapons such as tear gas are “capable of causing death or serious and possibly permanent morbidity, either as a direct or proximate consequence of exposure to the device or its components.” Daniell Decl. ¶ 11. Explosive weapons such as stun guns can cause “permanent effects on health,” *id.* ¶ 34, and physical-impact weapons such as rubber bullets can cause “serious, critical, or fatal” head trauma, *id.* ¶ 40. Courts across the country have recognized the chilling effects of public violence against protestors as warranting immediate injunctive relief. *See, e.g.*, Temporary Restraining Order, *NAACP v. City of Charlotte*, 20-cvs-8563, at ¶ 25 (June 19, 2020) (“A balancing of the equities, however, favors the entry of a temporary restraining order. The harm to the freedom to assemble and speak peacefully that results from unreasonable violence from the government is irreparable.”).

By contrast, the relief Plaintiffs seek does little harm to Defendants. As Richmond Mayor Levar Stoney stated publicly just three weeks before the June 22 incident, regarding the *very same tactics used against Plaintiffs*: “I apologize, we violated your rights.” Compl. ¶ 28. There is no cognizable injury in compelling state entities to adhere to their state constitutional mandates; the City of Richmond and the police forces patrolling the city can and should be restricted from chilling free speech through the application of brutal and indiscriminate force. Nor would the safety of the police and the public be jeopardized by an injunction. Certainly, Defendants have an

interest in managing protests—particularly protests aimed at their practices. But Plaintiffs request only that Defendants use the force in question not as they have, but only where they face a clear and present danger of violent conduct to themselves or other identifiable persons, and to target that force only to those committing or clearly threatening acts of violence that cannot be controlled by singling out and removing individual perpetrators.

Similarly, enjoining the Richmond Police Department’s overbroad invocations of Virginia’s unlawful assembly statute would protect Plaintiffs’ constitutional rights without interfering with any articulable governmental interest. As discussed in Part II.A, *supra*, the statutory requirement that an “unlawful assembly” be defined by reference to “acts of unlawful force or violence” straightforwardly precludes Defendants’ justification for invoking VA Code § 18.2-406 to silence Plaintiffs’ peaceful student protest on June 22, 2020.

III. RELIEF REQUESTED

Pursuant to VA Code § 8.01-624, Plaintiffs respectfully request that the Court enter a temporary injunction to preserve their rights under the Virginia State Constitution until a permanent injunction may be granted after a hearing on the merits. Specifically, Plaintiffs pray that the Court order as follows:

1. That the use of chemical munitions, irritants, explosives, stun weapons, and physical-impact weapons against peaceful protestors be enjoined. And that such force may be used, pursuant to an order of unlawful assembly or riot, *if and only if*:
 - a. Officers are faced with a clear and present danger of imminent violent conduct, by three or more people, to themselves or other identifiable persons;
 - b. Protestors are committing or clearly threatening acts of violence that cannot be controlled by singling out and removing individual perpetrators;
 - c. Efforts to subdue a clear and present danger of violent conduct through the use of alternative crowd control measures have been exhausted and were ineffective; and

- d. That the Chief of the Richmond Police Department, the Superintendent of the Virginia Department of State Police, or their specified designee, has determined that the use of such chemical agents is the only reasonable alternative to safeguard persons' bodies and lives.
2. That clear, loud, continuous, and provable orders are issued before any munitions are threatened and demonstrators are given a reasonable opportunity to disperse.
3. That exits must be made available for voluntary dispersal of a crowd before any munitions or other force are used, and that the intentional containment or corralling of protestors be enjoined.
4. That any such dispersal orders be reasonably limited in temporal and geographic scope.
5. That VA Code § 18.2-406 may not be used to designate gatherings of three or more people as an unlawful assembly, unless it is shown that: the persons assembled shared the common intent to advance some lawful or unlawful purpose through "the commission of an act or acts of unlawful force or violence"; "the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order"; *and*, "there is a clear and present danger of violent conduct."

CONCLUSION

Plaintiffs respectfully request that this Court immediately enjoin Defendants from using the threat of physical and legal harm to prevent Plaintiffs from exercising their protected constitutional rights.

Dated: June 26, 2020

Respectfully submitted,



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