FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

JUNIUS P. FULTON III
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

July 2, 2021

Stephen E. Heretick, Esq.
Stephen E. Heretick, P.C.
715 Loudoun Avenue
Portsmouth, Virginia 23707

Louis N. Joynes, II, Esq.
Joynes & Gaides, P.C.
502 Viking Drive, Suite 201
Virginia Beach, Virginia 23452

Samuel T. Towell, Esq.
Erin R. McNeill, Esq.
Calvin C. Brown, Esq.
Office of the Attorney General
209 North 9th Street
Richmond, Virginia 23219

Re: Himansu Patel, *et al.* v. The Commonwealth of Virginia
Civil Docket No.: CL21-6527

Dear Counsel,

As you recall, on July 1, 2021, the court heard argument on the Plaintiffs' Complaint for injunctive relief from the "skill game ban" premised on alleged violations of the Virginia Human Rights Act ("VHRA") by the Commonwealth of Virginia ("Commonwealth") and deferred ruling from the bench. Having given full consideration of the pleadings, argument, and applicable caselaw, the Court will deny the Plaintiffs' request for a temporary restraining order for the reasons stated below.

FACTUAL BACKGROUND

Plaintiffs Himansu Patel, Melody Weekly, Judith Hendricks, Takis Karangelen, Tommy Posilero, and Boyd Melchor "have been lawfully operating skill games upon their business premises" in Norfolk and Virginia Beach. Compl. ¶¶ 1, 9. In 2020, after due consideration by the Virginia General Assembly, the legislature found it appropriate to outlaw skill games operated by the Plaintiffs. Commonwealth's Opp'n ¶¶ 9–11. However, due to intervening circumstances brought about by the COVID-19 pandemic and the accompanying economic losses to the

Commonwealth, the legislature adopted an amendment from the Governor allowing the continued operation of skill games until July 1, 2021. *Id.* ¶ 11. In an effort to meet an anticipated state budgetary crisis, the legislature required for the first time that skill games be subjected to regulation and taxation, thus providing a source of revenue for the Covid Relief Fund. Compl. ¶¶ 4–6. Plaintiffs allege that the termination of skill games in Virginia as of July 1, 2021, will have deleterious effects on their businesses. *Id.* ¶ 13. They allege that the General Assembly's provisions enabling the continued activity of skill games "conferred upon the Plaintiffs a legitimate property interest in conducting skill games." *Id.* ¶ 10. Plaintiffs also point to what they consider to be insensitive and racially demeaning remarks attributed to members of the General Assembly during the legislative process as reflective of bias and discriminatory intention behind the repeal of skill games, in violation of the VHRA. *Id.* ¶¶ 14–15, 22. They therefore seek a temporary injunction to delay the prohibition against skill games in order to provide the Attorney General "sufficient time and opportunity to investigate their respective complaints under the Virginia Human Rights Act." *Id.* ¶ 28.

The Commonwealth argues that the Court should deny injunctive relief because "[t]he plaintiffs cannot meet any of the four *Winter* factors." Commonwealth's Opp'n 5. It contends that Plaintiffs are unlikely to succeed on the merits because they lack a cause of action, the Commonwealth "is not a proper target of an injunction," any claim is barred by sovereign immunity, and the VHRA does not provide a right of action against the Commonwealth. *Id.* at 6. It argues that Plaintiffs "have failed to allege an irreparable harm" because they only allege pecuniary harm. *Id.* at 11. Finally, the Commonwealth asserts that the balance of equities and public interest both favor the Commonwealth because the legislative enactments of the General Assembly represent the public interest and Plaintiffs have only argued that injunctive relief is in their own personal interest. *Id.* at 11–12.

Plaintiffs argue that the Commonwealth's "arguments fail to address the unique circumstances of the Plaintiffs' claims." Pls.' Reply 2. They contend that a single legislator's characterization of the skill game ban as the "anti-Ali Baba bill" demonstrates a racial animus prohibited under the VHRA. *Id.* at 4–5. They claim, among other arguments, that the Commonwealth's defense of sovereign immunity, which would bar "any recovery of monetary damages from the Commonwealth" renders their harm irreparable. *Id.* at 9–10. Finally, they argue that the equities and public interest favor injunctive relief because the harm to them "far outweighs any harm to the Commonwealth" and the government has no interest in enforcing unconstitutional restrictions. *Id.* at 10.

ANALYSIS

As acknowledged by the parties, the decision to grant an injunction is "an extraordinary remedy." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008). The parties further agree that plaintiffs seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) a likelihood that they will suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). All four of these requirements must be satisfied before injunctive relief will be granted. *Real*

Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *aff'd*, *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 607 F.3d 355 (4th Cir. 2010) (*per curiam*). Consequently, the Court may grant injunctive relief if and only if Plaintiffs can satisfy all four of the *Winter* factors.

A. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

As the Fourth Circuit held, the *Winter* factors require the plaintiff to "clearly demonstrate that it will *likely succeed* on the merits." *Real Truth About Obama*, 575 F.3d at 347. The VHRA prohibits "any person" from refusing, withholding from, or denying certain benefits of places of public accommodation "on the basis of race, color, religion, national origin, sex . . . ." *Va. Code* § 2.2-3904(B).

There are a number of threshold hurdles the Complaint must overcome to establish a likelihood of success under the VHRA. Plaintiffs seek to challenge the skill game ban through a statutory vehicle, the VHRA. However, it is not clear that the Commonwealth is a proper defendant under the VHRA. The VHRA prohibits certain discriminatory practices by "any *person*." *Va. Code* § 2.2-3904(B) (emphasis added). If the Commonwealth is to be sued under the VHRA, the Commonwealth must be a "person."

Plaintiffs argue that *Va. Code* § 1-230, which provides general rules of construction to be applied to Virginia's statutes, defines "Person" to include "any . . . government." In the Plaintiffs' view, a "person" under the VHRA includes "any . . . government," including the Commonwealth. The Commonwealth points out that the Supreme Court of Virginia has stated that "[i]t is an ancient rule of statutory construction, one consistently applied by this Court for more than a century, that the sovereign is not bound by a statute of general application, no matter how comprehensive the language, unless named expressly or included by necessary implication." *Commonwealth ex rel. Pross v. Bd. of Supervisors of Spotsylvania Cnty.*, 225 Va. 492, 494, 303 S.E.2d 887, 889 (1983).

In other contexts, Virginia courts have held that statutes applying to "persons" but that fail to expressly name the sovereign do not apply to the Commonwealth. *See*, *e.g.*, *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 722 S.E.2d 626 (2012) (holding that the Commonwealth is not a "person" under the Fraud Against Taxpayers Act)[1]; *Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983) (holding that the Commonwealth is not a "person" contemplated for arbitration statutes); *Pross*, 225 Va. 492, 303 S.E.2d 887 (1983) (holding that the Commonwealth is not a "person" subject to the statute of limitations). In one case the Court expressly held that a previous version of this definitional section, *Va. Code* § 1-13.19, *repealed by* 2005 Acts of Assembly, ch. 839,[2] which stated that the word person "may

[1] The Court observes that the Fraud Against Taxpayers Act contains a specific definitional section defining a "person" as "any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust." *Cuccinelli*, 283 Va. at 426, 722 S.E.2d at 630. This is a more limited definition than *Va. Code* § 1-230 but demonstrates how the requirement that the Commonwealth be expressly named is applied.

[2] This also served to enact the modern version of the statute cited by Plaintiffs, *Va. Code* § 1-230.

extend and be applied to bodies politic," failed to expressly name the sovereign such that a cause of action could be brought against the Commonwealth. *Richard L. Deal & Assocs.*, 224 Va. at 620, 299 S.E.2d at 347 (quoting *Va. Code* § 1-13.19 (repealed 2005)). Thus, it is unlikely that the Plaintiffs can succeed on the merits because there is no cause of action against the Commonwealth under the VHRA as the Commonwealth is not a "person" against whom suits are authorized.

Another issue arises in the context of the Plaintiffs' right of action under the VHRA. Certain provisions enable a complainant to commence a civil action, but the authorization to commence a civil action hinges upon the completion of an administrative process by the Commonwealth, the expiration of 180 days from the date the complaint was filed, or a determination by the Commonwealth that it will be unable to complete its investigation within 180 days. *Va. Code §* 2.2-3907. Because none of these "triggers" for the accrual of a cause of action under the VHRA have occurred yet, Plaintiffs cannot establish their likelihood of success on the merits of an underlying suit because they have not established their right to file suit under the VHRA.

Finally, Plaintiffs are unlikely to succeed on the merits of any future suit due to the application of the doctrine of sovereign immunity. "As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action." *Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279, 282 (2007) (quoting *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005)). In order to sue the Commonwealth, Plaintiffs must point to a "legislative waiver by which the Commonwealth consents to be sued in its own courts" and this waiver "may not be inferred from general statutory language, but must be expressly and explicitly stated." *Doud v. Commonwealth*, 282 Va. 317, 320–21, 717 S.E.2d 124, 125–26 (2011). Given the absence of any explicit legislative waiver of sovereign immunity,[3] Plaintiffs' lawsuit, if allowed to continue under the VHRA, would be barred by sovereign immunity and they therefore cannot clearly demonstrate that they would be likely to succeed on the merits.

B. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF IRREPARABLE HARM

Plaintiffs must make "a clear showing that [they are] likely to be irreparably harmed absent preliminary relief." *Real Truth About Obama*, 575 F.3d at 347. Injuries are unlikely to be irreparable if damages can provide full compensation for the harm. *Levisa Coal Co.*, 276 Va.at 62, 662 S.E.2d at 53–54 (holding that "the legal remedy is sufficient" unless the plaintiff could demonstrate "that monetary damages would otherwise not make him whole").

Plaintiffs have not made such a "clear showing." Beyond bare assertions that they would be "irrevocably injured" in the absence of injunctive relief, Plaintiffs merely allege that the termination of skill games "will substantially affect, damage, and hinder the Plaintiffs' businesses, *potentially* to the point of insolvency and closure." Compl. ¶¶ 13, 31 (emphasis added). The injury alleged is lost profits, the remedy for which would be damages if Plaintiffs

[3] Plaintiffs have not contended that a waiver of sovereign immunity exists and have in fact argued that the doctrine of sovereign immunity applies, rendering their injury irreparable because they would be barred from recovering damages. The implications of this argument are addressed below.

could bring a successful lawsuit. Furthermore, even if, *arguendo*, insolvency and closure were considered irreparable harm, Plaintiffs have not made a "clear showing" of the likelihood of this. Instead, they suggest that there is a *possibility* of them suffering insolvency and closure, which falls below the standard dictated by *Winter*. Because the harms alleged are lost profits and a speculation of insolvency and closure, Plaintiffs have failed to demonstrate a likelihood of irreparable harm.[4]

Finally, Plaintiffs allege that the Commonwealth's defense of sovereign immunity would prevent them from recovering damages in the future, thus rendering their harm irreparable. Without deciding the question of whether sovereign immunity barring recovery of pecuniary damages renders an injury "irreparable," this line of argument relies on a concession of the first *Winter* factor, the likelihood of success on the merits. Using the applicability of a successful defense by the defendant to establish irreparable harm necessarily means that the underlying suit would in fact *not* be successful on the merits. Such a showing would, by definition, fail to establish the first *Winter* factor and therefore not be eligible for injunctive relief.

C. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR

A plaintiff must establish "that the balance of the equities tips in his favor." *Winter*, 555 U.S. at 20. In balancing the equities, courts must consider the harms faced by the plaintiff "in the absence of an injunction" as compared to "the potential harm of an injunction to" the defendant. *Mountain Valley Pipeline, LLC v. Western Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019). As a member of this Court has previously ruled, this requires demonstrating "that the harm to them before the trial on the merits *without* the requested preliminary relief is greater than the harm to the Commonwealth during the same time period *with* the requested relief." *Dillon v. Northam*, 105 Va. Cir. 402 (Virginia Beach Cir. Ct., Jul. 30, 2020) (Lannetti, J.-designate).

Plaintiffs have alleged potential pecuniary injury in the absence of an injunction and contend that an injunction would help, not harm, the Commonwealth because it could continue to recoup tax revenue from the operation of skill games. As a preliminary matter, the Commonwealth would not be able to recoup tax revenue from skill games if an injunction were granted. The Acts of Assembly enabling collection from and enforcement of skill game taxes contained a sunset provision of July 1, 2021. 2020 Acts of Assembly, ch. 1217. As of July 1,

---

[4] The Commonwealth conceded at the Hearing that violations of constitutional rights can qualify as irreparable harm for purposes of injunctive relief. However, Plaintiffs' allegations of constitutional violations are based in large part on one legislator's use of the term "Ali Baba". The Constitution requires "proof that a discriminatory purpose has been a motivating factor in the decision" to find an equal protection violation. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–266, 97 S. Ct. 555, 563 (1977). The "Ali Baba" statements reflect the view of one member of a 140-member General Assembly; it is not clear under the Supreme Court's jurisprudence that this constitutes proof of a motivating factor for the entire Legislature. Even if derogatory, the statements of one member of the General Assembly, without more, do not qualify as a "clear showing" of irreparable injury via a violation of Plaintiffs' equal protection rights. Plaintiffs also alleged that the term "gray machines" is derogatory. Both the JLARC report and legislative record provide an entirely non-derogatory meaning of the term. Joint Legislative Audit and Review Commission, *Gaming in the Commonwealth* 121 (2019) ("The term gray machine refers to the notion that these machines operate in a gray area of the law. Gray machines are not specifically permitted or prohibited in Virginia's gaming statute.").

2021, agencies of the Commonwealth are no longer authorized to collect tax revenue from skill games. Thus, in the event of an injunction, further action from the General Assembly would be required to implement both the tax and regulatory scheme which existed prior to July 1, 2021.

The Court is sympathetic to the financial uncertainty faced by the many small businesses which operate skill games, especially in light of the pandemic and its accompanying restrictions. Plaintiffs have alleged that the presence of skill games in their establishments has enabled them to remain financially viable and the loss of revenue without an injunction temporarily halting the skill game ban will certainly have a financial impact. However, as the Commonwealth noted at the hearing, the coronavirus restrictions have been largely lifted and the need for skill games to keep them afloat has been lessened, notwithstanding the previous and current financial uncertainty.

Regarding the harm to the Commonwealth, not only have Plaintiffs not established that the Commonwealth will benefit from an injunction, they have not established that the harm to the Commonwealth with an injunction is outweighed by the harm to themselves without an injunction. As discussed above, the Commonwealth will not be able to tax skill games in the event of an injunction. The Commonwealth has established that unregulated skill games can bring harm to the Commonwealth by depressing revenues (and thus taxation from) authorized gaming, such as the Virginia Lottery, which funds education expenditures. Joint Legislative Audit and Review Commission, *Gaming in the Commonwealth* 122 (2019). Furthermore, in the absence of independent regulation and oversight, businesses and customers cannot be certain of the fairness of skill machines. *Id.* at 122–23. Weighing the relative harms to Plaintiffs and the Commonwealth, Plaintiffs have not established that their harms in the absence of an injunction outweigh the harm to the Commonwealth if injunctive relief were granted.

D. PLAINTIFFS HAVE NOT ESTABLISHED THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

The *Winter* factors "emphasize[] the public interest requirement," directing courts to "pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction." *Real Truth About Obama*, 575 F.3d at 347 (quoting *Winter*, 555 U.S. at 24).

Plaintiffs have not established how an injunction is in the public interest beyond a bare assertion "[t]hat the public interest lies in the grant of temporary injunctive relief." Compl. ¶ 34. At the Hearing, Plaintiffs contended that the presence of skill games has allowed convenience stores to remain open in food deserts in the midst of the economic downturn suffered in the industry as a result of the pandemic. This may be true, however, Plaintiffs have not established that the continued operation of skill games is necessary for the continued availability of necessities in food deserts, much less that this outweighs other considerations of the public interest.

On the other hand, the "best indications of public policy are to be found in the enactments of the Legislature," *Charlottesville v. DeHaan*, 228 Va. 578, 583, 323 S.E.2d 131, 133 (1984) (quoting *Mumpower v. Hous. Auth.*, 176 Va. 426, 444, 11 S.E.2d 732, 739 (1940)), and the General Assembly has decided to enact a ban on skill games. The General Assembly "has wide

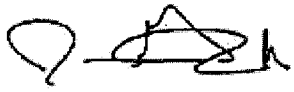
discretion in determining the best interests of the public" and "every possible presumption is to be indulged in favor of the validity of a statute." *Id.* In light of the General Assembly's determination that banning skill games is in the public interest and the lack of evidence that an injunction serves the public interest, Plaintiffs have failed to establish that an injunction delaying this ban is in the public interest.

CONCLUSION

The Court will deny the injunctive relief requested by the Plaintiffs. The *Winter* test for injunctive relief requires Plaintiffs to satisfy all four prongs before the relief can be granted. Because Plaintiffs have not established all four prongs, injunctive relief cannot be granted under *Winter*.

Counsel for the Plaintiffs should prepare and circulate an order reflecting the foregoing for entry at your earliest convenience.

Sincerely,



Junius P. Fulton, III
Judge

JPFIII/cpr