

**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.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL20002916-00
	)	
CITY OF RICHMOND, et al.,	)	
	)	
Defendants.	)	

**DEMURRER TO FIRST AMENDED COMPLAINT**

The First Amendment right to peacefully and lawfully protest remains core to democracy and crucial to Virginia’s recognition of varying viewpoints. Defendants Virginia Department of State Police and Colonel Gary T. Settle (collectively “VSP”) and the Virginia Division of Capitol Police and Colonel Anthony S. Pike (collectively “Capitol Police”) remain committed to this core American and Virginian right while ensuring the safety of the public.

Even after amendment, Plaintiffs’ claims are primarily against the Richmond Police Department (“RPD”) and involve allegations that arose under its former police chief. Although Plaintiffs’ amendment added the Capitol Police as a defendant, Plaintiffs did not actually add any factual allegations against them. Instead, oddly, Plaintiffs attempt to shore up their claims by alleging fewer facts rather than adding allegations that would state a claim upon which relief could be granted.

Plaintiffs also add federal counts to their complaint, ignoring this Court’s prior ruling on their original complaint: namely, that Virginia’s unlawful assembly law is constitutional and that Plaintiffs actually did violate it by barricading a city street for hours during their protest, which

justified the dispersal of the crowd following the unlawful assembly declaration. Plaintiffs cannot claim to have had their speech unlawfully chilled, or to have been unlawfully seized, when the Court has already found the underlying actions of law enforcement to be lawful.

The VSP and Capitol Police hereby demur to the First Amended Complaint on the following grounds stated below. They will file a supporting memorandum of law in accordance with the Rules of the Supreme Court of Virginia and any briefing schedule set by the Court or agreed to by the parties.

1. Plaintiffs have failed to state a claim against the Capitol Police. They have not alleged any acts or omissions that caused or contributed to any of their alleged theories of liability.

2. As in the original complaint, Plaintiffs admit the true fact that they blocked two city intersections between 8th and 9th Street on Marshall Street. First Amended Complaint (“FAC”), ¶¶ 56-57.

3. Plaintiffs admit the true fact that RPD warned protestors at least twice that the assembly was unlawful and the protestors should disburse or force would be used. FAC, ¶ 62. Interestingly, they simply omitted their admissions in their prior complaint that the warnings were given for at least twenty minutes and Plaintiffs’ admission that they heard and understood those warnings, but had no intention of obeying the lawful order to disburse.

4. Virginia Code § 18.2-406 is constitutional. *United Steelworkers of America v. Dalton*, 544 F. Supp. 282, 289 (1982).

5. This Court has already held that Plaintiffs must plead and prove that the declaration of unlawful assembly by the defendants “was in retaliation of Plaintiffs’ expression of free assembly and speech or that declaring an unlawful assembly was pretextual” in order to

state a claim upon which relief could be granted. Order, June 30, 2020 at 3. But “Plaintiffs admitted [in the original complaint] 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.” *Id.*

6. Plaintiffs have not alleged any fact that would change this analysis. They have failed to allege any fact to support the legal conclusion that their First Amendment rights were violated, rather than that the unlawful assembly was declared because Plaintiffs’ assembly unlawfully obstructed a city street.

7. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted under the federal or state constitutions.

8. Plaintiffs have once again attempted to bring a claim pursuant to Virginia Constitution Article I, Section 12 in Counts I and II of their FAC. This Court has already held that Article I, Section 12 of the Virginia Constitution is not self-executing as to state law enforcement agencies, but is only self-executing in that it prohibits specific conduct by the General Assembly. Order, June 30, 2020, at 3. Therefore, Counts I and II have failed to state a claim upon which relief may be granted.

9. Count III seeks declaratory judgment regarding the events of June 22-23, without stating a present case or controversy that this declaration would resolve. Therefore, Plaintiffs have failed to state a basis for declaratory judgment.

10. Plaintiffs admit they disobeyed repeated orders to disburse their unlawful assembly and instead donned protective gear to be able to resist the defendants’ efforts to disburse them. FAC at ¶¶ 12, 57-58, 62-63. Plaintiffs, therefore, admit to having violated Va. Code § 18.2-407.

11. Therefore, Plaintiffs failed to allege an unlawful seizure that would violate the Fourth Amendment.

12. Virginia law does not permit “courts [to] assist the participant in an illegal act who seeks to profit from the act’s commission. *Zysk v. Zysk*, 239 Va. 32, 34 (1990). Although the “crime” in *Zysk* has been repealed, the principle of law holds true. In the case at bar, Plaintiffs seek to sue law enforcement for using force to prevent Plaintiffs from continuing to break the law. Virginia will not permit people to profit from intentionally and willfully engaging in illegal activity.

Plaintiffs have failed to state a claim for which leave may be granted. Therefore, their case against the Commonwealth Defendants should be dismissed.

Respectfully submitted,

**Virginia Department of State Police**  
**Gary T. Settle**  
**Virginia Division of Capitol Police**  
**Anthony S. Pike**

By: /s/ Erin McNeill

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## CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, a true and accurate copy of the foregoing

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