

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

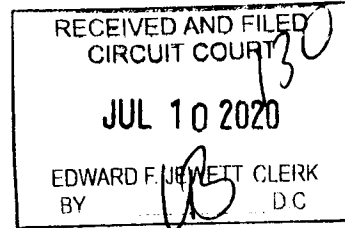
**VIRGINIA STUDENT POWER
NETWORK, NOAH SMITH, DIAMANTE
PATTERSON, DEVIN CAINES, AND
JIMMIE LEE JARVIS,**

Plaintiffs,

v.

**CITY OF RICHMOND, RICHMOND
POLICE DEPARTMENT, GERALD
SMITH, in his official capacity as Chief of
Richmond Police Department, VIRGINIA
DEPARTMENT OF STATE POLICE,
GARY T. SETTLE, in his official capacity
as Superintendent of Virginia Department
of State Police, VIRGINIA DIVISION OF
CAPITOL POLICE, AND ANTHONY S.
PIKE, in his official capacity as Chief of
Virginia Division of Capitol Police,**

Defendants.



Case No. CL20002916-00

PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO AMEND

Pursuant to Rule 1:8 of the Supreme Court of Virginia, Plaintiffs Virginia Student Power Network (“VSPN”), Noah Smith, Diamante Patterson, Devin Caines, and Jimmie Lee Jarvis (collectively, “Plaintiffs”) respectfully request leave to file a First Amended Complaint (“FAC”). This motion is accompanied by the proposed FAC, attached to this Motion as Exhibit A, and a redline comparison, Exhibit B, showing changes from the original Complaint.

Plaintiffs' proposed FAC adds Counts IV and V stating causes of action under the First, Fourth, and Fourteenth Amendments of the U.S. Constitution and 42 U.S.C. § 1983; identifies Gerald Smith as the new Chief of the Richmond Police Department who replaced William "Jody" Blackwell on July 1, 2020; adds as plaintiffs (i) Devin Caines and (ii) Jimmie Lee Jarvis; and adds as defendants (i) the Virginia Division of Capitol Police (the "VCP") and (ii) Colonel Anthony S. Pike in his capacity as the Chief of the VCP, based on the VCP's role in the events alleged in the FAC. Plaintiffs' proposed FAC also contains additional factual allegations relating to Defendants' pattern of unconstitutional conduct. For the reasons discussed below, permitting Plaintiffs to amend their timely filed Complaint would entail no prejudice to Defendants and would be in furtherance of the ends of justice.

BACKGROUND

Plaintiffs filed the original Complaint (the "Complaint") on June 26, 2020, just four days after the precipitating event alleged in the Complaint: Defendants' use of excessive force infringing Plaintiffs' constitutional rights of free speech and assembly during their peaceful student-led protest on June 22. The Complaint alleged three causes of action: two claims alleging violations of Plaintiffs' speech and assembly rights under Virginia Constitution's Article I, Section 12, and one claim for declaratory relief under Va. Code § 8.01-184.

Several hours after Plaintiffs filed the Complaint, Interim Chief of the Richmond Police Department William "Jody" Blackwell announced his resignation. Gerald Smith took Chief Blackwell's place starting July 1, 2020.

On June 29, 2020, this Court heard argument on Plaintiffs' Emergency Motion for a Temporary Injunction, which Plaintiffs filed in conjunction with the Complaint. On June 30,

2020, this Court denied Plaintiffs' Emergency Motion for a Temporary Injunction. The Court based its decision in part on the availability of a private cause of action under the Virginia Constitution and on the City's replacement of then-Chief Blackwell.

The FAC pleads additional causes of action relating to Defendants' violations of the Plaintiffs' First, Fourth, and Fourteenth Amendment rights and 42 U.S.C. § 1983. In support of these causes of action, the proposed FAC alleges additional facts in response to developing events in the City of Richmond, including the replacement of then-Chief Blackwell with Chief Smith, and the relationship between the shift in leadership within the RPD and the operative legal claims in the Complaint. The proposed FAC also alleges a pattern of unconstitutional behavior on the part of Defendants, including facts responsive to this Court's concern that the harm alleged was unduly speculative.

Plaintiffs notified Defendants of their intention to amend the complaint on July 1, 2020. Defendants Virginia Department of State Police, Gary T. Settle, Virginia Division of Capitol Police, and Anthony S. Pike consented to the filing and service of the proposed FAC on July 7, 2020, and Defendants City of Richmond, Richmond Police Department, and Gerald Smith consented to the filing and service of the proposed FAC on July 9, 2020. Plaintiffs' correspondence with Defendants is attached as Exhibit C.

ARGUMENT

Rule 1:8 of the Virginia Supreme Court states that "[l]eave to amend shall be liberally granted in furtherance of the ends of justice." *See Online Res. Corp. v. Lawlor*, 736 S.E.2d 886, 898 (Va. 2013). "Where granting a motion for leave to amend would not prejudice the other party, an amendment should be allowed." *XL Specialty Ins. Co. v. Dept. of Transp.*, 624 S.E.2d

658, 664 (Va. Ct. App. 2006). Where “[t]he amended allegations and the reasonable inferences from them support a viable legal theory of recovery,” courts have typically found leave to amend to be proper and in furtherance of the ends of justice. *AGCS Marine Ins. Co. v. Arlington Cty.*, 800 S.E.2d 159, 169 (Va. 2017).

Here, the proposed amendments “support a viable legal theory of recovery.” Defendants’ counsel stated explicitly during this Court’s June 29, 2020 hearing that “there is a cause of action for stating constitutional rights under the United States Constitution. That would be Section 1983 with which the Court is familiar.” Hearing Tr. 7:7-10. Plaintiffs’ federal causes of action establish a clear relationship between the facts alleged and a cognizable legal harm, and courts across the country have found similar claims relating to these protests to be at least sufficient to sustain a cause of action if not outright meritorious. *See, e.g.*, Order Granting in Part Motion for Temporary Restraining Order, *Black Lives Matter Seattle-King County v. City of Seattle*, No. 20-cv-00887 (W.D. Wash. June 12, 2020) (granting temporary restraining order on First and Fourth Amendment claims of excessive force based on “less-lethal” crowd control weapons). Courts evaluating other protests presenting analogous claims and factual postures have held the same. *See Jones v. Parmley*, 465 F.3d 46, 56-61 (2d Cir. 2006) (use of physical impact riot weapons violated First Amendment); *Nelson v. City of Davis*, 685 F.3d 867, 876-77 (9th Cir. 2012) (use of projectiles filled with pepper spray against protesters violated Fourth Amendment); *Fogarty v. Gallegos*, 523 F.3d 1147, 1155-56 (10th Cir. 2008) (use of tear gas and pepper balls against protesters violated Fourth Amendment); *Cox v. State of La.*, 379 U.S. 536, 557-58 (1965) (statute “allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades” violated First Amendment). Given the paramount constitutional interests


at stake, permitting Plaintiffs to vindicate their civil rights claims through the proposed FAC would further the ends of justice.

Defendants would not be prejudiced by the proposed amendment. In considering whether to grant leave to amend, courts in Virginia have typically found prejudice only where the amendment is untimely, where there is no proffer or description of the new allegations, where the proffered amendments are legally futile, or when the amending party has engaged in improper litigation tactics. *See AGCS*, 800 S.E.2d at 487. None of these factors are present here. Plaintiffs are filing the present motion less than two weeks after Plaintiffs filed the Complaint, and six days after this Court denied Plaintiffs' Emergency Motion for a Temporary Injunction. None of the Defendants have filed an answer to the Complaint. While Defendants filed a demurrer to Counts I, II and III of the original Complaint, Defendants will have the option to notice that demurrer for hearing or to withdraw or revise it in light of the FAC. Accordingly, allowing the FAC will not prejudice any of the Defendants. Further, there can be no suggestion that Plaintiffs have engaged in any improper litigation tactics.

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for leave to amend.

Dated: July 10, 2020

Respectfully submitted,



Eden B. Heilman (VSB No. 93554)
Nicole Gloria Tortoriello (VSB No. 91129)
Vishal Agraharkar (VSB No. 93265)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219

Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
ntortoriello@acluva.org
vagraharkar@acluva.org

Charles H. Schmidt, Jr. (VSB No. 84416)
Law Office of Charles H. Schmidt, Jr.
4310 Dorset Road
Richmond, VA 23234
804-402-0767
charlieschmidtrva@gmail.com

Daniel E. Johnson (VSB No. 88696)
Andrew Chang (pro hac motion to be filed)
Kayvan Farchadi (pro hac motion to be filed)
Emma Nguyen (pro hac motion to be filed)
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, D.C. 20001
(202) 662-6000
dejohnson@cov.com
achang@cov.com
kfarchadi@cov.com
enguyen@cov.com

Counsel for Plaintiffs

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**CITY OF RICHMOND, RICHMOND
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SMITH, in his official capacity as Chief of
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DEPARTMENT OF STATE POLICE,
GARY T. SETTLE, in his official capacity
as Superintendent of Virginia Department
of State Police, VIRGINIA DIVISION OF
CAPITOL POLICE, AND ANTHONY S.
PIKE, in his official capacity as Chief of
Virginia Division of Capitol Police,**

Defendants.

SERVE:

Office of the City Attorney
City of Richmond
900 E. Broad Street, Suite 400
Richmond, VA 23219

David M. Mitchell
General Counsel
Richmond Police Department
200 W. Grace Street
Richmond, VA 23220

Office of the Attorney General
202 N. Ninth Street
Richmond, VA 23219

Case No. CL20002916-00

FIRST AMENDED COMPLAINT

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

1. Plaintiffs file this action seeking an order restraining the City of Richmond, the Richmond Police Department, Gerald Smith, in his official capacity as Chief of the Richmond Police Department, the Virginia Department of State Police, Gary T. Settle, in his official capacity as Superintendent of the Virginia Department of State Police, the Virginia Division of Capitol Police, and Col. Anthony S. Pike, in his official capacity as Chief of the Virginia Division of Capitol Police, from violating protesters' rights under Article I, Section 12 of the Virginia Constitution and the First, Fourth, and Fourteenth Amendments of the U.S. Constitution. Plaintiffs seek injunctive and declaratory relief.

NATURE OF THE ACTION

2. This case is about a pattern of unnecessary, disproportionate, and life-threatening force consistently employed by the City of Richmond, the Richmond Police Department ("RPD"), the Virginia Department of State Police ("VSP"), and the Virginia Division of Capitol Police ("VCP") (collectively, "Defendants"), against demonstrators and protesters in Richmond.

3. On the evening of May 25, 2020, a horrified nation watched Derek Chauvin, a Minneapolis police officer, pin George Floyd's neck under his knee for a fatal nine minutes. Mr. Floyd's tragic killing sparked an unprecedented swell of political activism in the United States and around the world. Since that night in May, Richmond protesters have joined the nation in gathering to protest police brutality and racial inequality, including acknowledging Virginia's own historic role in perpetuating these inequities. As the state capital of Virginia, Richmond is a singularly appropriate location for Virginians to petition their government to do its part in ending the disproportionate treatment of communities of color by law enforcement.

4. Defendants' response to this movement has been to consistently shut down demonstrations and assemblies in Richmond through the use of overwhelming and disproportionate force. Defendants have repeatedly sprayed whole crowds of peaceful protesters with tear gas and other chemical irritants, used flash grenades, and fired rubber bullets at demonstrators, even when those demonstrations were peaceful and lawful.¹ Such tactics have been denounced by government entities,² human rights organizations,³ and local medical professionals⁴ as carrying an severe risk of death or permanent injury.

5. On June 2, about a week after the protests began, Mayor Levar Stoney publicly stated to the protesters: "I apologize, we violated your rights."⁵ Then-Chief William Smith added: "We have made mistakes. We are working hard to fix this."⁶ These apologies proved empty: the continued use of brutal police tactics against protesters, including driving a police car through a crowd,⁷ led then-Chief Smith to tender his resignation on June 17. Chief William "Jody" Blackwell was announced as the interim chief of RPD.

¹ Keyris Manzanares, *Protesters Call on Stoney for Answers After Being Tear-Gassed Monday*, ABC 8 News, June 2, 2020, available at <https://www.wric.com/news/local-news/richmond/mayor-stoney-wants-to-apologize-to-peaceful-protesters-tear-gassed-before-curfew>.

² See U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Department of Justice's Use of Less-Lethal Weapons* (May 2009), available at <https://oig.justice.gov/reports/plus/e0903/final.pdf>.

³ United Nations Human Rights, Office of the High Commissioner, *Guidance on Less Lethal Weapons in Law Enforcement* (2020), available at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

⁴ *Doctors Urge Richmond Police to Stop Pepper Spraying, Gassing*, NPR, available at <https://vpm.org/news/articles/14367/doctors-urge-richmond-police-to-stop-pepper-spraying-gassing>.

⁵ Manzanares, *supra* note 1.

⁶ *Id.*

⁷ John Reid Blackwell, Johanna Alonso, Ali Rockett and Lily Betts, *WATCH NOW: Police vehicle strikes protesters in Richmond*, Richmond Times-Dispatch, June 14, 2020, https://www.richmond.com/news/local/watch-now-police-vehicle-strikes-protesters-in-richmond/article_d58c42ae-1ff4-583b-913b-f22bfa6bf350.html.

6. Defendants continued to flagrantly violate Plaintiffs' constitutional rights under Chief Blackwell's command. On certain occasions, including a protest organized by Plaintiffs on June 22, entirely peaceful student-led assemblies were shut down through the use of tear gas, rubber bullets, and flash grenades.⁸ Despite the City's earlier promise to change its practices, the continued use of force on protesters and mounting public pressure led to Blackwell's resignation on June 26. Thus, for the second time in the month of June, Mayor Stoney announced that the Richmond Police Department would be led by a new Chief: this time, Gerald Smith became the Chief on or before July 1, 2020.

7. Plaintiffs, who have been consistently subject to unlawful force through multiple RPD administrations, face an imminent risk of harm when they exercise their lawful right to protest. Even with the resignation of Chief Blackwell, Defendants have made no binding commitment to end their excessive use of such force to interfere with Plaintiffs' rights. Through their refusal to follow any meaningful restriction on the use of excessive force against protesters in public forums, Defendants have authorized and continue to authorize a policy designed to restrict, frustrate, and deter citizens of Richmond from exercising their rights under the Virginia and U.S. Constitutions to free speech, petition, and peaceful assembly. Defendants' actions also violate Plaintiffs' Fourth Amendment right to be free from unwanted seizure by the government.

8. Given the severity of the harm and the likelihood of its repetition, Plaintiffs seek injunctive and declaratory relief to vindicate their constitutional rights under state and federal law.

⁸ Richmond, *UPDATED: Overnight Police Declare Reclamation Square Encampment an Unlawful Assembly, Disperse Crowd with Chemical Agents*, available at https://www.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.

PARTIES

9. Plaintiff Virginia Student Power Network (“VSPN”) is a non-profit organization operating in Richmond, Virginia. VSPN works with students from universities across Virginia to organize around social, racial, and economic justice issues. VSPN accepted forty-one fellows across eight campuses in Virginia this year who work to register voters, engage in public education, encourage other students and community members to engage in advocacy, and organize protests and rallies. In light of the recent national protests to end police brutality sparked by the police killing of George Floyd, VSPN’s fellows have prioritized organizing peaceful protests in the Richmond community. The purpose of these events has been to raise awareness of social injustices, inequities in the criminal legal system, and advocate for an end to violence, specifically against Black Americans and communities of color. Because of the threat of continued unlawful police violence directed at peaceful protests, VSPN has already diverted and will need to continue to divert resources from its public education and organizing activities to ensuring fellows and event participants can exercise their rights safely.

10. Plaintiff Diamante Patterson is a Virginia resident who attended the protest on June 22-23. Mr. Patterson is a lifelong resident of the Richmond area and obtained his Bachelor of Arts from Virginia State University in 2017. He has attended many protests against police violence over the past several years, including protests organized in response to the killings of Michael Brown and Eric Garner. His personal convictions and commitment to social justice led him to join the recent protests in Richmond sparked by the police killing of George Floyd. Mr. Patterson frequently attends protests after work and hopes to continue to do so peaceably without the threat of unprovoked police violence. After witnessing Defendants’ use of tear gas, pepper spray, rubber

bullets, and flashbang devices, Mr. Patterson fears for his safety if he continues to protest police brutality in Richmond.

11. Plaintiff Noah Smith is a Virginia resident who attended the protest on June 22-23. Mr. Smith has resided in Richmond for approximately five years and obtained his Bachelor of Science from Virginia Commonwealth University in 2018. Deeply troubled by the police killing of George Floyd and ongoing racial inequalities, Mr. Smith joined multiple protests in Richmond over the past weeks to advocate for increased government funding to areas like affordable housing, food access, and health care. Mr. Smith attended the June 22-23 protests and, while fleeing, was struck in the arm by a tear gas canister fired directly at him, causing him to lose feeling in his arm. His arm was bruised and swollen for several days afterwards. Mr. Smith also suffers from asthma, and exposure to tear gas and pepper spray at recent protests has exacerbated his symptoms. It is important to Mr. Smith to continue protesting peacefully in defense of civil liberties and human rights, but he is fearful that Defendants will hurt him if he continues to exercise his rights.

12. Plaintiff Devin Caines is a Virginia resident who attended the protest on June 22-23. He obtained his Bachelor of Arts from Virginia Commonwealth University in May 2019. Although recently unemployed due to COVID-19, Mr. Caines had been working with children with autism and currently volunteers to assist with local COVID-19 relief efforts. Inspired to take action against police violence, Mr. Caines has attended several events supporting the Black Lives Matter movement since May 25, 2020. On the day of the June 22 protest, when Mr. Caines began to see the police assembling in large numbers, he felt anxious and put on protective equipment, including a helmet and safety goggles. Mr. Caines did not threaten violence, nor did he make any physically aggressive or intimidating gestures towards the police. Nonetheless, he was shot at repeatedly with rubber and pepper bullets and was subjected to tear gas and flash bang explosions.

Mr. Caines intends to continue protesting, but since the protest on June 22-23, has become afraid of police aggression and worries about future retaliation from law enforcement, causing him trauma and anxiety.

13. Plaintiff Jimmie Lee Jarvis, a resident of Richmond, has been participating in the protests nearly every day since May 30. Mr. Jarvis has been subjected to tear gas and rubber bullets multiple times by the police but recalls one incident as being the most frightening. On May 31, 2020, the second night of protests, Mr. Jarvis joined the march at Marcus-David Peters Circle, which is the name given by protesters to the grassy area surrounding the monument of Robert E. Lee on Monument Avenue. Without any warning, police officers began to launch tear gas into the crowd of protesters. Moving east, Mr. Jarvis witnessed a police officer pepper spray a photographer at point blank range with no instruction or warning. Mr. Jarvis also witnessed projectiles being fired at community medics who were tending to injured protesters on Broad Street. Struggling from the tear gas exposure, Mr. Jarvis was finally able to reach his friend's car to retreat from the scene. Mr. Jarvis has remained committed to the cause of ending police brutality even after this incident but suffers from severe anxiety each time he attends a protest due to the police violence he has endured.

14. Plaintiff organization VSPN has a direct and immediate interest in the issues presented in recent protests and the rights of their members to participate, now and in the future, in such public demonstrations and protests against police violence. This right is enshrined in the laws and traditions of the Commonwealth and the United States, including the rights of free speech and assembly. Those rights were consistently violated by Defendants as a matter of practice, and there is an imminent risk of their being violated again at upcoming demonstrations absent immediate intervention by this Court.

15. The individual Plaintiffs all have an interest in the issues presented in recent protests and in their right to participate, now and in the future, in such public demonstrations and protests, a right enshrined in the laws and traditions of this Commonwealth and the United States, including the right to assemble with others and the right to freedom of speech. Those rights were consistently violated by Defendants as a matter of practice, and risk being violated again at upcoming demonstrations absent immediate intervention by this Court.

16. Plaintiffs remain committed to protesting police brutality and racial injustice, and to the national movement to protect Black lives. They should be free to exercise their constitutional right to protest and participate in peaceful demonstrations against police brutality in Richmond without becoming victims of police brutality themselves.

17. Plaintiffs bring this action to restrain the City of Richmond, RPD, VSP, and VCP from continuing to respond to peaceful protests with unconstitutional force by abusing Virginia's unlawful assembly statute and otherwise violating Plaintiffs' rights. The U.S. and Virginia Constitutions grant Plaintiffs the right to peaceably assemble without being subjected to crowd-control weapons such as tear gas, pepper spray, flash bang grenades, and rubber bullets, even if they are expressing their condemnation of police practices and budgets.

18. Defendant City of Richmond is a municipal corporation organized under the Code of Virginia. Pursuant to its charter, the City of Richmond "may sue or be sued." *See* City of Richmond Charter, §1.01. It maintains and operates a police force, the RPD. At all times relevant to this action, the City of Richmond acted through its managers and policy makers, including the Chief of Police and other employees of the RPD, and the acts, edicts, and practices of said persons represent the official policies and practices of the Defendant City. The City of Richmond bears legal responsibility under state law for the acts and omissions of RPD police officers in the course

of their employment. It is being sued for injunctive relief from the unconstitutional and dangerous policies and practices of its police department that occurred on and around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

19. Defendant Gerald Smith (“Chief Smith”) is the Chief of the RPD and serves as the chief executive officer of the Department. He is sued in his official capacity for the RPD’s planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

20. Defendant Colonel Gary T. Settle is the Superintendent of the VSP and serves as the chief executive officer of the Department. He is sued in his official capacity for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

21. Defendant Colonel Anthony S. Pike is the Chief of the Virginia Division of Capitol Police. He is sued in his official capacity for the planned, unconstitutional use of force against peaceful demonstrators, which will recur unless enjoined by the Court.

22. Defendant Richmond Police Department is the primary law enforcement agency for Richmond, Virginia. It is sued for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

23. Defendant Virginia Department of State Police is a state law enforcement agency acting as the state police force for the Commonwealth of Virginia. It is sued for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

24. Defendant Virginia Division of Capitol Police is a state agency responsible for providing police services to state agencies, state employees, and elected officials. It is sued for the planned, unconstitutional use of force against peaceful demonstrators, which will recur unless enjoined by the Court.

JURISDICTION AND VENUE

25. The Circuit Court has subject matter jurisdiction over this matter under §§ 8.01-184, 8.01-620, and 17.1-513 of the Code of Virginia. Plaintiffs seek injunctive and declaratory relief under the laws and Constitution of Virginia.

26. Venue in this Court is proper under Code § 8.01-261 because the actions subject to the relief requested in this lawsuit occurred in the City of Richmond.

STATEMENT OF FACTS

George Floyd's Murder and the Ensuing Demonstrations

27. On May 25, 2020, George Floyd was murdered in Minneapolis, Minnesota by the police. Mr. Floyd, a Black man, was accused of committing a non-violent offense. During his arrest, Mr. Floyd was on the ground, handcuffed and restrained. One of the police officers then placed his knee—and the weight of his body—on Mr. Floyd's neck, pinning him to the ground. For almost nine agonizing minutes, the police officer pressed his knee into Mr. Floyd's neck as Mr. Floyd gasped for breath and pleaded for both mercy and his mother. Rather than stopping this horrifying act, other officers pinned his legs or stood by, watching as Mr. Floyd began to die. Some of Mr. Floyd's last words were, "please, please, please, I can't breathe."

28. Mr. Floyd's murder was captured on video by bystanders and broadcast globally, sparking demonstrations in over 2,000 cities and towns around the country and many more around the world.

29. Despite a global pandemic, groups of protestors around the world have gathered to voice their concerns about the systemic injustices perpetrated by law enforcement against Black people.

30. In response to these protests, RPD and VSP have repeatedly exercised overwhelming and unconstitutional force to discourage protestors from exercising their constitutional rights. Based on the alleged unlawful conduct of an unidentified few, Defendants have responded to these protests with curfews, mass arrests, unlawful assembly declarations, and aggressive dispersal tactics, all designed to punish protestors for exercising their rights enshrined in the Virginia and U.S. constitutions.

31. On May 31, 2020, Governor Ralph Northam declared a state of emergency due to “civil unrest” in the City of Richmond, imposing a curfew on its residents between the hours of 8 P.M. and 6 A.M. until June 3.

32. During the first night of the curfew, police used tear gas and pepper spray on demonstrators who were marching downtown from the Robert E. Lee statue on Monument Avenue and arrested over 200 individuals. On the second night, approximately 30 minutes prior to the curfew, RPD and VSP descended on a peaceful protest at the Robert E. Lee statue, pointing assault rifles and other firearms at the assembly, deploying tear gas and pepper spray at peaceful demonstrators, using batons, and marching with tactical gear and armor through the gathering of individuals.

33. The following day, on June 2, 2020, Mayor Levar Stoney and then-RPD Police Chief William Smith apologized for these brutal use of force tactics. Mayor Stoney stated, “I

apologize, we violated your rights.” Then-Chief Smith added, “We have made mistakes. We are working hard to fix this.”⁹

34. For over a week following these apologies, Richmond’s protests went without major incident. For example, on June 4, hundreds marched peacefully from Monroe Park to the Richmond Police Department’s Fourth Precinct in North Side.¹⁰ However, Defendants’ apologies and promises proved empty on June 13, when an RPD officer drove a police SUV up a curb and through a crowd, striking multiple protesters.¹¹ Earlier in the day, large masses of protesters had marched peacefully across the city as part of a “5,000 Man March.”¹²

35. In response to the RPD officer’s unprovoked assault, hundreds of protesters gathered outside the RPD’s headquarters the next day to protest the use of unlawful deadly force by the RPD and to demand that the officer responsible be terminated.¹³ The VSP arrived at

⁹ Manzanares, *supra* note 1.

¹⁰ C. Suarez Rojas, *WATCH NOW: Protesters celebrate plans for removal of Confederate statues as they continue demonstrations*, Richmond Times-Dispatch, June 4, 2020, https://www.richmond.com/news/local/watch-now-protesters-celebrate-plans-for-removal-of-confederate-statues-as-they-continue-demonstrations/article_e53c749d-874b-5471-9206-22f6c7bbe236.html.

¹¹ See John Reid Blackwell, Richmond Times-Dispatch, *WATCH NOW: Police Vehicle Strikes Protesters in Richmond*, available at https://www.richmond.com/news/local/watch-now-police-vehicle-strikes-protesters-in-richmond/article_d58c42ae-1ff4-583b-913b-f22bfa6bf350.html; @BreRVA, Twitter, June 13, 2020, available at https://twitter.com/BreRVA/status/1271982379180138502?ref_src=twsrc%5Etfw.

¹² Tyler Thrasher, Nick Conigliaro, *Richmonders react: Virginia's 5000 Man March brings out emotions, calls for change*, ABC8 News, June 13, 2020, available at <https://www.wric.com/news/local-news/richmond/richmonders-react-virginias-5000-man-march/>.

¹³ Sean Gorman, Ali Sullivan, *UPDATED: Police, protesters square off at RPD headquarters; woman detained*, Richmond Times-Dispatch, June 14, 2020, available at https://www.richmond.com/news/updated-protesters-target-police-brutality-the-night-after-a-richmond-police-suv-struck-protesters-its/article_87aa63d6-2e6b-5a01-b008-8ea52aee9b2c.html

approximately midnight to reinforce the RPD. Once again, police deployed chemical agents against protesters and journalists.¹⁴

36. The next day, on June 15, protesters returned to the Richmond police headquarters to protest the use of unlawful force by the RPD. Police fired multiple rounds of chemical crowd-control weapons, flash grenades, and rubber bullets at protesters into the crowd of approximately 200 to 300 people.¹⁵ *Only after* most of the crowd fled from the police's use of less lethal force, police played a pre-recorded warning that the protest had been deemed an unlawful assembly.¹⁶

37. With public pressure mounting, Mayor Stoney announced on June 16 that he had requested that then-Chief Smith tender his resignation.¹⁷ William "Jody" Blackwell was announced as the interim chief of RPD.

38. At a press conference on June 18, the new Chief Blackwell conveyed his frustration with the protests, stating that he "didn't ask for any of this" and that his officers "stand judged" by the protestors. "It frustrates me to no end," Chief Blackwell stated.¹⁸

39. On or around June 19, 2020, under Chief Blackwell's new command, RPD preemptively asserted its authority to declare protests as unlawful assemblies under Va. Code

¹⁴ *Id.*

¹⁵ Gregory S. Schneider, *Police fire chemical irritant, rubber bullets at Richmond protesters outside police headquarters*, Washington Post, June 16, 2020, https://www.washingtonpost.com/local/richmond-police-fire-pepper-spray-at-protesters-in-standoff-near-police-headquarters/2020/06/14/be1ccb26-aeac-11ea-8f56-63f38c990077_story.html; Andrew Ringle, Twitter, June 15, 2020, available at https://twitter.com/aeringle/status/1272715201675223042?ref_src=twsrc%5Etfw

¹⁶ *Id.*

¹⁷ Morgan Winsor, ABC News, *Richmond Mayor Forces Police Chief to Resign Amid Citywide Protests*, available at <https://abcnews.go.com/US/richmond-mayor-forces-police-chief-resign-amid-citywide/story?id=71292146#:~:text=The%20police%20chief%20in%20Virginia's,police%20chief%20at%20Stoney's%20request>; <https://www.wvtf.org/post/richmond-police-chief-resigns-mayor-says-more-change-needed#stream/0>.

¹⁸ Richmond, *supra* note 3.

§ 18.2-406.¹⁹ Virginia law defines an unlawful assembly as “three or more persons assembled [to] share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, 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.” To comply with the First Amendment, the Supreme Court of Virginia has construed the definition of unlawful assemblies narrowly to apply to assemblies where there is “clear and present danger of violent conduct.” *Owens v. Va.*, 211 Va. 633, 636-38 (Va. 1971). It is not sufficient that there be an intention on the part of participants to “disturb the peace” or “excite public alarm” or “disorder” — there must be a clear and present danger of violent conduct. *Id.*

40. The following days were marked by a consistent pattern of overwhelming, disproportionate, and unreasonable police violence directed against peaceful protesters. For example, on June 21, police deployed chemical agents against protesters, including a reporter for VCU's student newspaper who loudly and continuously identified himself as a journalist covering the protests as he was being pepper sprayed.²⁰

Risk of Death or Serious Injury from RPD and VSP's Crowd Control Tactics

41. The weapons RPD and VSP have been using for “crowd control” purposes during demonstrations, sometimes referred to as “non-lethal” weapons, are more appropriately called

¹⁹ WRIC Newsroom, *After Riots, Richmond Police Issue Reminder of Unlawful Assembly Declaration*, available at <https://www.wric.com/news/local-news/richmond/after-riots-richmond-police-issue-reminder-of-unlawful-assembly-declaration>.

²⁰ Andrew Ringle, Twitter, June 21, 2020, <https://twitter.com/aeringle/status/1274898298923606017>.

“less-lethal” weapons, as government entities and human rights organizations have recognized their use can be fatal.²¹

42. The “less-lethal” weapons RPD and VSP have deployed at protestors over this past month include chemical irritants, kinetic impact projectiles, and weapons intended to stun with light and sound.

43. The chemical irritants released on protestors by RPD and VSP this month include tear gas (“CS gas”) and oleoresin capsicum spray (“OC” or “pepper” spray).

44. RPD and VSP have deployed chemical irritants both by targeting specific protestors with handheld devices and by launching canisters of chemical irritants into a crowd from a distance, releasing the irritants indiscriminately in every direction.

45. RPD and VSP have also hit protestors with kinetic impact projectiles such as rubber bullets or tear gas canisters aimed directly at protestors.

46. In addition, RPD and VSP have deployed flash-bang grenades against protestors. When these weapons detonate, they generate loud noise and bright light, and sometimes chemical irritants.

47. Tear gas can be lethal. It is known that high-dose exposure in an enclosed space can “lead to the development of airway edema, non-cardiogenic pulmonary edema, and possibly respiratory arrest.”²² More generally, tear gas exposure can have more severe effects on those with

²¹ See U.S. Dep’t of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Department of Justice’s Use of Less-Lethal Weapons* (May 2009), available at <https://oig.justice.gov/reports/plus/e0903/final.pdf>; United Nations Guidance on Less Lethal Weapons in Law Enforcement (2020), available at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

²² Centers for Disease Control and Prevention, *Toxic Syndrome Description*, available at <https://emergency.cdc.gov/agent/riotcontrol/agentpoisoning.asp>.

asthma such that it can trigger a fatal asthma attack.²³ The death on May 30 of a 22-year-old protestor in Ohio who passed away after being sprayed with tear gas is currently being investigated.²⁴ Breathing in tear gas can cause irritation of the nose, throat, and lungs; individuals typically experience choking, trouble breathing, nausea, vomiting, and other symptoms.²⁵

48. Even when not directly lethal, exposure to tear gas has been shown to increase the risk of developing acute respiratory illnesses. A study conducted in 2012 of 6,723 U.S. Army recruits demonstrated that those who were exposed to tear gas had a significantly higher chance of getting an acute respiratory illness such as influenza, bronchitis, and pneumonia than those recruits who were not exposed.²⁶

49. Pepper spray can be lethal. Between 1990 and 1995, at least 61 in-custody deaths followed police use of pepper spray on suspects.²⁷ The death on June 4 of a man in federal custody in New York who passed away after being sprayed with pepper spray is currently being

²³ Healthline, *How Tear Gas and Pepper Spray Affect the Body*, available at <https://www.healthline.com/health-news/how-tear-gas-and-pepper-spray-affect-the-body#Whatto-know-about-tear-gas>.

²⁴ Jim Letizia, *Columbus Investigating Claims Protester Died After Being Exposed to Tear Gas*, available at <https://www.wcbe.org/post/columbus-investigating-claims-protestor-died-after-beingexposed-tear-gas>.

²⁵ See Healthline, *supra* note 12.

²⁶ Joseph J. Hout, et al., o-Chlorobenzylidene Malonotrile (CS Riot Control Agent) *Associated Acute Respiratory Illnesses in a U.S. Army Basic Combat Training Cohort*, 179 *Military Medicine* 7:793 (2014), available at <https://academic.oup.com/milmed/article/179/7/793/4259353#101149356>.

²⁷ Mark I. Pinsky, *If Pepper Spray Isn't Lethal, Why All the Deaths?*, L.A. Times (June 18, 1995), available at <https://www.latimes.com/archives/la-xpm-1995-06-18-mn-14572-story.html>.

investigated.²⁸ Individuals exposed to pepper spray are likely to experience burning in the throat, wheezing, dry cough, shortness of breath, gagging, gasping, or the inability to breathe.²⁹

50. Flash bangs can be lethal. Flash bangs are explosives that are intended to stun and disorient people with light and sound and are designed to temporarily blind or deafen people. The use of these weapons can cause serious injuries, like blowing off appendages, or even death.³⁰

Heightened Risks of COVID-19 Transmission from Less-Lethal Weapons

51. Five doctors from Virginia Commonwealth University (“VCU”) Health sent a letter to RPD on June 23 expressing their concerns that people who have been exposed to chemical irritants are more vulnerable to COVID-19, an acute respiratory illness.³¹ In the letter, the physicians state they “are horrified to see the use of pepper spray and other chemical irritants against protestors” explaining that its use is “antithetical to the public health guidance for avoiding COVID-19.”

52. When people with COVID-19 are exposed to chemical irritants during a demonstration, this exposure may also increase the likelihood that COVID-19 will spread to other people because of the immediate effect both tear gas and pepper spray have on those who are exposed. By design, part of the incapacitating effect of tear gas and pepper spray is that both can

²⁸ Sonia Moghe, CNN, *Inmate in Federal Custody Dies After Incident Involving Pepper Spray*, available at <https://www.cnn.com/2020/06/04/us/jamel-floyd-brooklyn-prison-death-pepper-spray/index.html>.

²⁹ Medical News Today, *What Is Pepper Spray, and Why Is It Dangerous?*, available at <https://www.medicalnewstoday.com/articles/238262>.

³⁰ Alyssa Fowers et al., Wash. Post., *A Guide to the Less-Lethal Weapons that Law Enforcement Uses Against Protestors*, available at <https://www.washingtonpost.com/nation/2020/06/05/less-lethal-weapons-protests/?arc404=true>.

³¹ NPR, *Doctors Urge Richmond Police to Stop Pepper Spraying, Gassing*, available at <https://vpm.org/news/articles/14367/doctors-urge-richmond-police-to-stop-pepper-spraying-gassing>.

cause lung irritation, causing a person to cough, spit, or vomit.³² In addition, people exposed to tear gas or pepper spray suffer from eye irritation that leads them to rub their eyes. Coughing, spitting, vomiting, and rubbing eyes can all lead to the spread of viruses.

53. The use of other less-lethal weapons that cause panic and injury also create the potential for increased COVID-19 spread by compressing large groups of people as protestors and bystanders attempt to flee from the use of force.

54. Seeking medical care for injuries caused by police presents another opportunity for COVID-19 spread, as injured people and people delivering medical care come into close physical contact with one another.

Defendants' Unconstitutional Actions on the Night of June 22

55. The Plaintiffs, as a member organization and individuals, have been consistently active in the series of ongoing protests against police brutality taking place on the streets of Richmond that began in late May following the death of George Floyd.

56. On the evening of June 22, 2020, approximately 150 people gathered outside of Richmond City Hall for a “teach-in” planned by local college students. The students planned to feature speeches from local community advocates and workshops to teach participants about community demands including reallocating police budgets to social service programs. The demonstrators planned to gather all night in the block of Marshall Street between 8th and 9th Streets, which they dubbed “Reclamation Square,” outside the main entrance to City Hall. Their intent was to create a peaceful space for protestors to learn about the issues while elevating the voices of activists driving the movement against police brutality and racial inequality in Richmond.

³² Centers for Disease Control and Prevention, Facts About Riot Control Agents Interim Document, *available at* <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>.

57. The “teach-in” continued peacefully into the evening with an atmosphere resembling a friendly gathering. Protestors played music on a loudspeaker, as organizers prepared a large screen for a movie viewing. Protestors set up food, water, mask, and other supply stations.

58. Attendees set up tents in the square and on the street, planning to stay overnight. Participants blocked the intersections between 8th Street and 9th Street with traffic cones and set up bike marshals to protect participants from traffic and the potential use of police cars or violent extremists to drive at or ram them. These ramming tactics have become a disturbingly frequent response to protests against police brutality and racial injustice.³³

59. At all times, protestors ensured that people could exit and enter the space safely. For example, at approximately 5:30 p.m., a city worker needed to move his car out of the space within the barricade. The bike marshals ensured he was able to safely do so in a timely manner.

60. Plaintiffs did not witness any violence or threatened violence directed at any person or property. Plaintiffs did not witness any objects thrown in the direction of police officers or any other immediate threat to the law enforcement officers.

61. At approximately 12:42 A.M. on June 23, without sufficient cause, the RPD declared the event an unlawful assembly. According to a Twitter post by RPD, the unlawful assembly was declared due to “conditions of activity such as sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety or infrastructure.”³⁴

³³ NPR, *Vehicle Attacks Rise as Extremists Target Protesters*, available at <https://www.npr.org/2020/06/21/880963592/vehicle-attacks-rise-as-extremists-target-protesters>.

³⁴ Richmond, *UPDATED: Overnight Police Declare Reclamation Square Encampment an Unlawful Assembly, Disperse Crowd with Chemical Agents*, available at https://www.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.

62. Around the same time, RPD officers on the scene used a megaphone to declare the protest an “unlawful assembly.” This warning was repeated at least one additional time. While making these announcements, officers also flashed high-beam lights into the eyes of protestors and Plaintiffs reported hearing projectiles being fired at some protestors.

63. Soon after this announcement, law enforcement officers began advancing and escalating their use of force, including using tear gas, pepper bullets and flash bangs indiscriminately against the crowd. Police also tackled, grabbed, and shoved protestors as they advanced.

64. Trapped by tear gas, blocked by officers lining the sides of the street, and obstructed by buildings and barricades, the protestors began to scream and gasp for air in panic. Many removed COVID-19-protective masks in desperation. This panic was captured on video by protestors at the scene.

65. Following this unprovoked escalation by police, protestors and others in the area quickly retreated. Soon there were a larger number of police officers remaining than protestors.

66. As the protesters retreated, officers continued firing chemical irritants and projectiles at them, including firing canisters of tear gas directly at protestors. Plaintiff Smith was hit by a canister, leaving his arm numb, bruised and swollen. Plaintiff Smith also suffers from asthma and has experienced exacerbated symptoms caused by his exposure to chemical irritants, including severe irritation of his lungs, making it difficult for him to breathe.

67. As detailed above, on June 22-23, 2020, the RPD and VSP violently attacked persons assembling peacefully to protest police violence without provocation or legal cause, in violation of their rights under the U.S. and Virginia Constitutions.

68. No facts support a finding that the protestors on June 22-23 were engaged in an “unlawful assembly,” let alone posed a “clear and present danger of violent conduct.” Thus, the RPD had no legal basis to declare the protest in question an unlawful assembly under Virginia Code § 18.2-406, nor did the RPD and VSP have any legal basis to use indiscriminate, untargeted force to disband those gathered.

69. As a result of Defendants’ use of unlawful use of force against protestors, Plaintiffs fear their rights to free speech and assembly, as well as their right to be free of unlawful seizure, are at risk. In light of the ongoing nature of the protests in the wake of George Floyd’s death, as well as the unfortunate likelihood of additional incidents of police force against protestors, injunctive relief is necessary to prevent both bodily injury to Richmond residents and the constitutional injury of a chilling effect on speech. Plaintiffs have no adequate remedy at law.

70. In the week following the June 22 incident, Defendants declared an unlawful assembly every night and continued their policy of using disproportionate force against peaceful protestors. Defendant VCP was called in on several instances to back up Defendants VSP and RPD. Finally, on Friday, June 26, Mayor Stoney announced that Chief Blackwell would be stepping down, and for the second time in the month of June, the RPD would have a new chief. Neither Chief Smith, the RPD, nor the other Defendants have indicated any concrete shift in their policies or practices for the use of force, and Chief Smith explicitly indicated in an interview that the RPD would continue to use tear gas where it saw appropriate.³⁵

³⁵ Mallory Noe-Payne, *Heading into Month Two of Anti-Racist Protests, Will Police in Richmond Change Tactics?*, available at <https://www.wvtf.org/post/heading-month-two-anti-racist-protests-will-police-richmond-change-tactics#stream/0>.

COUNT I – VIOLATION OF RIGHT TO PEACEABLY ASSEMBLE

Virginia Constitution Article I, Section 12

71. All prior paragraphs are incorporated herein by reference.

72. Plaintiffs have a fundamental right to assemble under Article I, Section 12 of the Virginia Constitution. Courts have sustained private rights of action against Virginia police departments based on Article I, Section 12. *See, e.g., Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597, 607-08 (E.D. Va. 2015) (sustaining claim under Article I, Section 12 of Virginia Constitution and finding that the provision is “coextensive with the free speech provisions of the federal First Amendment”). Constitutional provisions in the Virginia Bill of Rights “are generally considered to be self-executing,” *Gray v. Va. Sec. of Trans.*, 662 S.E.2d 66, 72-73 (Va. 2008), as are provisions “of a negative character” which do not require “additional legislation . . . to carry into effect [their] clear mandate,” *Robb v. Shockoe Slip Foundation*, 324 S.E.2d 674, 681-82 (Va. 1985), both of which are the case here. Claims brought under self-executing provisions of the Virginia State Constitution are not barred by sovereign immunity. *See Gray*, 662 S.E.2d at 73.

73. Defendants’ violent actions were not a reasonable regulation of the time, place, or manner of Plaintiffs’ constitutionally protected activity. The actions were not justified by a compelling or even substantial government interest. Even assuming, *arguendo*, that there was a compelling government interest in dispersing peaceful protestors, Defendants’ actions on June 22-23 were not narrowly tailored to serve that government interest in a lawful manner.

74. Using crowd control weapons and equipment, including but not limited to tear gas, flash bang explosives, rubber bullets, and pepper spray indiscriminately on crowds of peaceful protestors is an astonishing assault which violates the right to assemble under the Virginia Constitution.

75. The continued threat of such violent tactics has in fact chilled Plaintiffs' and their members' ability to assemble peacefully by placing them at risk of bodily injury if they choose to assert their right to be heard collectively and publicly.

76. Given that this unlawful use of force has occurred multiple times since June 1, 2020, and is likely to occur again, Plaintiffs are entitled to a court order enjoining this misuse of force by the police. Such injunction is necessary to prevent both immediate bodily injury and the constitutional injury of a chilling effect on the right to assembly.

77. Plaintiffs seek a temporary injunction until a trial on the merits can be held.

COUNT II – VIOLATION OF RIGHT TO FREEDOM OF SPEECH

Virginia Constitution Article I, Section 12

78. All prior paragraphs are incorporated herein by reference.

79. Plaintiffs have a fundamental right to freedom of speech under Article I, Section 12 of the Virginia Constitution, and as discussed above in Paragraph 72, a private cause of action to enforce that right.

80. Defendants' practice of firing tear gas grenades, shooting rubber bullets and pepper balls, and hurling flash bang explosives at those assembled to protest police violence, is a use of unwarranted force in reaction to their protected speech and violates Article I, Section 12 of the Virginia Constitution.

81. The continued threat of such violent tactics only serves to chill protected speech and dissuade peaceful protestors from engaging in their constitutional right to express their views and has in fact chilled Plaintiffs and their members and makes them fearful to participate in future demonstrations.

82. Given that this aggressive use of force, including chemical agents, on peaceful protestors has occurred multiple times since June 1, 2020, and is likely to occur again at future

demonstrations, Plaintiffs are entitled to a court order enjoining this misuse of force by the police to punish peaceful protests.

83. Plaintiffs seek a temporary restraining order until a hearing on the merits can be held.

COUNT III – DECLARATORY JUDGMENT

Va. Code § 8.01-184

84. All prior paragraphs are incorporated herein by reference.

85. There exists a real and justiciable controversy between the parties as to the violation of Plaintiffs’ rights under Article I, Section 12 of the Virginia Constitution and the application of Va. Code § 18.2-406 regarding the declaration of an unlawful assembly.

86. The General Assembly may not pass “any law abridging the freedom of speech . . . nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.” Va. Const. art. 1, § 12. This prohibition applies equally to the actions by the Defendants.

87. Police are authorized to declare an unlawful assembly under Virginia Code only upon a finding that “three or more persons share the common intent to advance some unlawful or unlawful purpose by the commission of an act or acts of unlawful force or violence” Va. Code § 18.2-406. This requires a finding of “clear and present danger of violent conduct.” *Owens v. Va.*, 211 Va. 633, 636-38 (1971). It is not sufficient that there be an intention on the part of the participants to “disturb the peace” or “excite public alarm” or “disorder”—there must be a clear and present danger of violent conduct. *Id.*

88. Assemblies that do not meet this standard are presumptively lawful, and the government’s use of force to quell these assemblies violates Article I, Section 12 of the Virginia Constitution.

89. There was no basis for issuing an unlawful assembly declaration on June 22-23, 2020. Protestors were at all times peaceful and attending speeches, workshops, and movie viewings during the demonstration. The RPD's own official Twitter account asserted the unlawful elements of the assembly included only "sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety or infrastructure." This plainly does not constitute an unlawful assembly under the Virginia statute, let alone rise to the required "clear and present danger of violent conduct" threshold permitting the declaration of an unlawful assembly. Further, even if Defendants had grounds to declare an unlawful assembly, they used excessive force in violation of the Virginia and United States Constitutions.

90. Therefore, Plaintiffs seek a declaration from this Court pursuant to Va. Code § 8.01-184 declaring that the manner and method employed by Defendants, as alleged herein, in implementing a declaration of unlawful assembly and using excessive force against Plaintiffs, was unlawful and violated Plaintiffs' freedom of speech and assembly rights under the Virginia and United States Constitutions.

91. Specifically, Plaintiffs seek a declaration that:

- a. The June 22-23 incident did not pose a "clear and present danger of violent conduct;"
- b. The RPD's unlawful assembly declaration at the June 22-23 incident was itself unlawful;
- c. The RPD's unlawful assembly declaration was merely pretext for an unlawful use of force motivated by an attempt to suppress the Plaintiffs' message, thereby chilling their protected free speech and right to assemble;

- d. The manner in which Plaintiffs were forcibly dispersed on June 22-23 violated their rights under the Virginia and United States Constitutions.

Given that Defendants have repeatedly issued unlawful assembly declarations against lawful protests against police brutality, have used excessive force in response to peaceful protests, and are likely to do so again, Plaintiffs are entitled to a court order enjoining the Defendants' manner and method of issuing, communicating and enforcing the dispersal order that RPD issued on June 22, 2020.

**COUNT IV – VIOLATION OF FIRST AMENDMENT RIGHTS TO SPEECH,
ASSEMBLY, AND PETITION**

First and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983

92. All prior paragraphs are incorporated herein by reference.

93. Defendants engaged in repeated, widespread violations of Plaintiffs' First Amendment rights to free speech, assembly, and petition. Defendants consistently used unreasonable, indiscriminate, and disproportionate force against thousands of protesters, including chemical weapons such as tear gas, CS gas, and pepper spray; kinetic impact projectiles such as rubber bullets and tear gas canisters; physical weapons such as batons; and weapons intended to stun with light and sound such as flash grenades. The intention and effect of Defendants' practice was to suppress Plaintiffs' demonstrations and the viewpoints they represented.

94. Defendants' violent actions were not a reasonable regulation of the time, place, or manner of Plaintiffs' protected activity. The actions were not justified by a compelling or even substantial government interest. Even assuming, *arguendo*, that there was a compelling government interest in dispersing peaceful protesters, Defendants' practice of using unreasonable, indiscriminate, and disproportionate force were not narrowly tailored to serve that government interest in a lawful manner.

95. Defendants also used Virginia’s unlawful assembly statute, Va. Code § 18.2-406, to deem unlawful in their entirety protests that did not meet the statutory definition of “unlawful assemblies.” Defendants also employed a practice of declaring unlawful assemblies without providing directions, means, or opportunity to disperse before taking aggressive police action. Police are authorized to declare an unlawful assembly under Virginia Code only upon a finding that “three or more persons share the common intent to advance some unlawful or unlawful purpose by the commission of an act or acts of unlawful force or violence” Va. Code § 18.2-406. This requires a finding of “clear and present danger of violent conduct.” *Owens v. Va.*, 211 Va. 633, 636-38 (1971). It is not sufficient that there be an intention on the part of the participants to “disturb the peace” or “excite public alarm” or “disorder”—there must be a clear and present danger of violent conduct. *Id.*

96. The continued threat of Defendants’ violent and retaliatory tactics has in fact chilled Plaintiffs’ ability to exercise their rights under the First Amendment by placing them at risk of bodily injury if they choose to assert their right to be heard collectively and publicly.

97. Plaintiffs therefore seek injunctive and declaratory relief from this Court to ensure that Plaintiffs and persons similarly situated will not suffer violations of their First Amendment rights from Defendants’ illegal and unconstitutional policies, customs, and practices, which are likely to recur absent relief.

COUNT V – VIOLATION OF FOURTH AMENDMENT RIGHT TO FREEDOM FROM UNREASONABLE SEIZURE

Fourth and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983

98. All prior paragraphs are incorporated herein by reference.

99. Defendants engaged in repeated, widespread violations of Plaintiffs’ clearly established Fourth Amendment rights to be free from unreasonable seizure. Defendants subjected

Plaintiffs to excessive force by using chemical “crowd control” weapons such as tear gas, CS gas, and pepper spray; kinetic impact projectiles such as rubber bullets and tear gas canisters; physical weapons such as batons; and/or weapons intended to stun with light and sound such as flash grenades. Video footage shows Defendants employing these violent tactics against peaceful protesters whose actions did not justify the use of force, let alone the severe force applied by Defendants.³⁶

100. Defendants’ use of force was not objectively reasonable. Defendants used the riot weapons described above without any basis in individualized determinations of conduct justifying such force. The totality of the circumstances surrounding Defendants’ use of such weapons and tactics does not support a finding of objective reasonableness. Furthermore, Defendants’ conduct was wanton, performed in a culpable or grossly negligent manner, deliberately indifferent to Plaintiffs’ rights, shocks the conscience, and violates the decencies of civilized conduct.

101. Plaintiffs therefore seek injunctive and declaratory relief from this Court to ensure that Plaintiffs and persons similarly situated will not suffer violations of their Fourth Amendment rights from Defendants’ illegal and unconstitutional policies, customs, and practices, which are likely to recur absent relief.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court order the following relief:

1. Entry of temporary and permanent injunctive relief requested on a finding that Defendants have violated Plaintiffs’ rights under the Virginia Constitution, Article I, Section 12, as well as the First, Fourth, and Fourteenth Amendments of the United States Constitution;
2. Entry of a declaratory judgment as to the misuse of the declaration of unlawful assembly and subsequent dispersal orders;

³⁶ 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>.

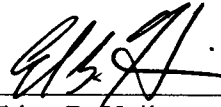
3. Award Plaintiffs their costs of suit, including reasonable attorneys' fees under 42 U.S.C. § 1988; and,

4. Award Plaintiffs such other relief as may be just and proper.

TRIAL BY JURY IS DEMANDED

Dated: July 10, 2020

Respectfully submitted,



Eden B. Heilman (VSB No. 93554)
Nicole Gloria Tortoriello (VSB No. 91129)
Vishal Agraharkar (VSB No. 93265)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
ntortoriello@acluva.org
vagraharkar@acluva.org

Charles H. Schmidt, Jr. (VSB No. 84416)
Law Office of Charles H. Schmidt, Jr.
4310 Dorset Road
Richmond, VA 23234
804-402-0767
charlieschmidtrva@gmail.com

Daniel E. Johnson (VSB No. 88696)
Andrew Chang (pro hac motion to be filed)
Kayvan Farchadi (pro hac motion to be filed)
Emma Nguyen (pro hac motion to be filed)
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, D.C. 20001
(202) 662-6000
dejohnson@cov.com
achang@cov.com
kfarchadi@cov.com

Counsel for Plaintiffs

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

**VIRGINIA STUDENT POWER
NETWORK, NOAH SMITH, DIAMANTE
PATTERSON, ~~AND~~ DEVIN CAINES,
AND JIMMIE LEE JARVIS,**

Plaintiffs,

v.

**CITY OF RICHMOND, RICHMOND
POLICE DEPARTMENT, ~~WILLIAM~~
~~“JODY” BLACKWELL~~ GERALD
SMITH, 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,
VIRGINIA DIVISION OF CAPITOL
POLICE, AND ANTHONY S. PIKE, in his
official capacity as Chief of Virginia
Division of Capitol Police,**

Defendants.

SERVE:

Office of the City Attorney
City of Richmond
900 E. Broad Street, Suite 400
Richmond, VA 23219

David M. Mitchell
General Counsel
Richmond Police Department
200 W. Grace Street
Richmond, VA 23220

Office of the Attorney General
202 N. Ninth Street
Richmond, VA 23219

Case No. _____ CL20002916-00

FIRST AMENDED COMPLAINT

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

1. Plaintiffs file this action seeking an order restraining the City of Richmond, the Richmond Police Department, ~~William “Jody” Blackwell~~ Gerald Smith, in his official capacity as ~~Interim~~ Chief of the Richmond Police Department, the Virginia Department of State Police, and Gary T. Settle, in his official capacity as Superintendent of the Virginia Department of State Police, ~~from violating protesters’ protected~~ the Virginia Division of Capitol Police, and Col. Anthony S. Pike, in his official capacity as Chief of the Virginia Division of Capitol Police, from violating protesters’ rights to free speech and assembly under Article I, Section 12 of the Virginia Constitution and the First, Fourth, and Fourteenth Amendments of the U.S. Constitution. Plaintiffs seek injunctive ~~relief~~ and a declaratory ~~judgment~~ relief.

NATURE OF THE ACTION

2. This case is about a pattern of unnecessary, disproportionate, and life-threatening force consistently employed by the City of Richmond, the Richmond Police Department (“RPD”), and the Virginia Department of State Police (“VSP”) using unnecessary and life threatening force against peaceful, and the Virginia Division of Capitol Police (“VCP”) (collectively, “Defendants”), against demonstrators outside of and protesters in Richmond City Hall on or around June 22-23, 2020.

3. ~~The RPD and VSP’s use of force on June 22-23 came just after the City of Richmond and the RPD apologized for the unjustified use of force against peaceful protesters~~

~~gathering at the Robert E. Lee Monument on June 1, 2020, and after weeks of continued use of force by these departments against peaceful demonstrators in Richmond.¹~~

~~4. Over the past several weeks, the RPD and VSP have repeatedly sprayed whole crowds of peaceful protestors with tear gas and other chemical irritants, used flash grenades, and fired rubber bullets at them. Government entities and human rights organizations have recognized that these crowd control tactics can cause death or serious injury.~~

~~5. Local medical professionals have also raised alarm in direct correspondence with the RPD that these tactics are “antithetical to the public health guidance for avoiding COVID-19” and may make protestors more vulnerable to the acute respiratory illness.²~~

~~6. By instilling in lawful protestors a credible fear of bodily harm for assembling, RPD and VSP’s tactics discourage protestors from exercising their constitutional rights to protest against police brutality and racial inequities in the American criminal legal system.~~

~~3. 7. The tragic killing of George Floyd on May 25, 2020, at the hands of the Minneapolis Police, and the ongoing and disproportionate killings of black and brown men and women by law enforcement, has sparked demonstrations in all fifty states and around the world. On the evening of May 25, 2020, a horrified nation watched as Derek Chauvin, a Minneapolis police officer pinned Mr. pin George Floyd’s neck under his knee for over eighta fatal nine minutes. Other officers stood by and watched as Mr. Floyd died at the scene. 8. In response, all across this state, Virginians have come out in large numbers Mr. Floyd’s tragic killing sparked an~~

¹ ~~Keyris Manzanares, ABC 8 News, *Protestors Call on Stoney for Answers After Being Tear Gassed Monday*, available at <https://www.wric.com/news/local-news/richmond/mayor-stoney-wants-to-apologize-to-peaceful-protestors-tear-gassed-before-curfew>.~~

² ~~NPR, *Doctors Urge Richmond Police to Stop Pepper Spraying, Gassing*, available at <https://vp.m.org/news/articles/14367/doctors-urge-richmond-police-to-stop-pepper-spraying-gassing>.~~

unprecedented swell of political activism in the United States and around the world. Since that night in May, Richmond protesters have joined the nation in gathering to protest police brutality and racial inequality, including acknowledging Virginia's own historic role in perpetuating these inequities. As the state's capital of Virginia, Richmond continues to be a singularly appropriate location for Virginians to peaceably assemble to petition their government for the redress of grievances to do its part in ending the disproportionate treatment of communities of color by law enforcement.

4. 9. Instead of recognizing the legitimate grievances of his fellow citizens, RPD's new interim police chief William "Jody" Blackwell chose instead to adopt a policy of intimidation by announcing his intention to "take the city back" from protesters.³ Subsequently, on June 19, 2020, RPD issued a preemptory announcement threatening to use Virginia's unlawful assembly statute, Virginia Code § 18.2-406, to justify arrests and the use of force, including chemical agents, to disperse crowds gathered to protest against police violence.⁴ Defendants' response to this movement has been to consistently shut down demonstrations and assemblies in Richmond through the use of overwhelming and disproportionate force. Defendants have repeatedly sprayed whole crowds of peaceful protesters with tear gas and other chemical irritants, used flash grenades, and fired rubber bullets at demonstrators, even when those demonstrations were peaceful and

³ ~~Richmond, WATCH NOW: In Frustration, New Interim Police Chief Says Richmond Needs to Take Our Community Back, available at https://www.richmond.com/news/local/crime/watch-now-in-frustration-new-interim-police-chief-says-richmond-needs-to-take-our-community/article_e706c6c0-4a91-58e2-9e5a-21e517db8257.html.~~

lawful.¹ Such tactics have been denounced by government entities,² human rights organizations,³ and local medical professionals⁴ as carrying an severe risk of death or permanent injury.

~~10. Following through on this threat, in the early morning hours of June 23, RPD declared a peaceful gathering in front of Richmond City Hall an unlawful assembly. Unprovoked, an overwhelming number of RPD and VSP officers fired tear gas, pepper spray, rubber bullets, and flash grenades into the crowd of mostly college students. Disoriented demonstrators were forced to flee the area while chemical agents burned their lungs and eyes.⁵ Many peaceful demonstrators were injured by this unprovoked and violent dispersal of the peaceful gathering.~~

~~11. The purpose and effect of RPD's use of the unlawful assembly statute and subsequent use of less lethal force has been~~

5. On June 2, about a week after the protests began, Mayor Levar Stoney publicly stated to the protesters: "I apologize, we violated your rights."⁵ Then-Chief William Smith added: "We have made mistakes. We are working hard to fix this."⁶ These apologies proved empty: the

¹ Keyris Manzanares, *Protesters Call on Stoney for Answers After Being Tear-Gassed Monday*, ABC 8 News, June 2, 2020, available at <https://www.wric.com/news/local-news/richmond/mayor-stoney-wants-to-apologize-to-peaceful-protesters-tear-gassed-before-curfew>.

² See U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Department of Justice's Use of Less-Lethal Weapons* (May 2009), available at <https://oig.justice.gov/reports/plus/e0903/final.pdf>.

⁴ ABC News, *RPD Issues Reminder About "Unlawful Assemblies" Following Violent Gatherings*³ United Nations Human Rights, Office of the High Commissioner, *Guidance on Less Lethal Weapons in Law Enforcement* (2020), available at https://www.nbc12.com/2020/06/19/rpd-issues-reminder-about-unlawful-assemblies-following-violent-gatherings/ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

⁴ Doctors Urge Richmond Police to Stop Pepper Spraying, Gassing, NPR, available at <https://vpm.org/news/articles/14367/doctors-urge-richmond-police-to-stop-pepper-spraying-gassing>.

⁵ Centers for Disease Control and Prevention, *Facts About Riot Control Agents Interim Document*, available at <https://emergency.cdc.gov/agent/riotecontrol/factsheet.asp>.

⁵ Manzanares, *supra* note 1.

⁶ *Id.*

continued use of brutal police tactics against protesters, including driving a police car through a crowd,⁷ led then-Chief Smith to tender his resignation on June 17. Chief William “Jody” Blackwell was announced as the interim chief of RPD.

6. Defendants continued to flagrantly violate Plaintiffs’ constitutional rights under Chief Blackwell’s command. On certain occasions, including a protest organized by Plaintiffs on June 22, entirely peaceful student-led assemblies were shut down through the use of tear gas, rubber bullets, and flash grenades.⁸ Despite the City’s earlier promise to change its practices, the continued use of force on protesters and mounting public pressure led to Blackwell’s resignation on June 26. Thus, for the second time in the month of June, Mayor Stoney announced that the Richmond Police Department would be led by a new Chief; this time, Gerald Smith became the Chief on or before July 1, 2020.

7. Plaintiffs, who have been consistently subject to unlawful force through multiple RPD administrations, face an imminent risk of harm when they exercise their lawful right to protest. Even with the resignation of Chief Blackwell, Defendants have made no binding commitment to end their excessive use of such force to interfere with Plaintiffs’ rights. Through their refusal to follow any meaningful restriction on the use of excessive force against protesters in public forums, Defendants have authorized and continue to authorize a policy designed to

⁷ John Reid Blackwell, Johanna Alonso, Ali Rockett and Lily Betts, *WATCH NOW: Police vehicle strikes protesters in Richmond*, Richmond Times-Dispatch, June 14, 2020, https://www.richmond.com/news/local/watch-now-police-vehicle-strikes-protesters-in-richmond/article_d58c42ae-1ff4-583b-913b-f22bfa6bf350.html.

⁸ Richmond, *UPDATED: Overnight Police Declare Reclamation Square Encampment an Unlawful Assembly. Disperse Crowd with Chemical Agents*, available at https://www.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.

restrict, frustrate, and deter ~~protestors~~citizens of Richmond from exercising their rights to ~~free speech and peacefully assembly.~~

~~12. Plaintiffs have been, and want to continue to be, part of the protest movement to protect Black lives without being subject to unprovoked police violence. They want to participate in demonstrations against police brutality in Richmond without being exposed to the chemical agents and rubber bullets regularly deployed by RPD and VSP against peaceful protestors. They want to end the pretextual use of unlawful assembly declarations as grounds for using force against otherwise peaceful protestors. Plaintiffs bring this action to restrain the City of Richmond, RPD, and VSP from continuing to respond to peaceful protests with unconstitutional and indiscriminate violence. under the Virginia and U.S. Constitutions to free speech, petition, and peaceful assembly. Defendants' actions also violate Plaintiffs' Fourth Amendment right to be free from unwanted seizure by the government.~~

~~8. 13. Given the severity of the harm and the likelihood of its repetition, Plaintiffs seek injunctive and declaratory relief ~~because, despite apologies and admissions that they have violated protestors' rights, Defendants continue to violate Plaintiffs'~~to vindicate their constitutional rights through the use of overwhelming and unnecessary forceunder state and federal law.~~

PARTIES

~~9. 14.—~~Plaintiff Virginia Student Power Network (“VSPN”) is a non-profit organization operating in Richmond, Virginia. VSPN works with students from universities across Virginia to organize around social, racial, and economic justice issues. VSPN accepted forty-one fellows across eight campuses in Virginia this year who work to register voters, engage in public

education, encourage other students and community members to engage in advocacy, and organize protests and rallies. In light of the recent national protests to end police brutality sparked by the police killing of George Floyd, VSPN's fellows have prioritized organizing peaceful protests in the Richmond community. The purpose of these events has been to raise awareness of social injustices, inequities in the criminal legal system, and advocate for an end to violence, specifically against Black Americans and communities of color. Because of the threat of continued unlawful police violence directed at peaceful protests, VSPN has already diverted and will need to continue to divert resources from its public education and organizing activities to ensuring fellows and event participants can exercise their rights safely.

10. ~~15.~~ Plaintiff Diamante Patterson is a Virginia resident who attended the protest on June 22-23. Mr. Patterson is a lifelong resident of the Richmond area and obtained his Bachelor of Arts from Virginia State University in 2017. He has attended many protests against police violence over the past several years, including protests organized in response to the killings of Michael Brown and Eric Garner. His personal convictions and commitment to social justice led him to join the recent protests in Richmond sparked by the police killing of George Floyd. Mr. Patterson frequently attends protests after work and hopes to continue to do so peaceably without the threat of unprovoked police violence. After witnessing ~~the RPD and VSP's~~ Defendants' use of tear gas, pepper spray, rubber bullets, and flashbang devices, Mr. Patterson fears for his safety if he continues to protest police brutality in Richmond.

11. ~~16.~~ Plaintiff Noah Smith is a Virginia resident who attended the protest on June 22-23. Mr. Smith has resided in Richmond for approximately five years and obtained his Bachelor of Science from Virginia Commonwealth University in 2018. Deeply troubled by the police killing of George Floyd and ongoing racial inequalities, Mr. Smith joined multiple protests in Richmond

over the past weeks to advocate for increased government funding to areas like affordable housing, food access, and health care. Mr. Smith attended the June 22-23 protests and, while fleeing, was struck in the arm by a tear gas canister fired directly at him, causing him to lose feeling in his arm. His arm is ~~still~~was bruised and swollen ~~at the time of filing~~for several days afterwards. Mr. Smith also suffers from asthma, and exposure to tear gas and pepper spray at recent protests has exacerbated his symptoms. It is important to Mr. Smith to continue protesting peacefully in defense of civil liberties and human rights, but he is fearful that ~~the RPD and VSP~~Defendants will hurt him if he continues to exercise his rights.

12. ~~17.~~ Plaintiff Devin Caines is a Virginia resident who attended the protest on June 22-23. He obtained his Bachelor of Arts from Virginia Commonwealth University in May 2019. Although recently unemployed due to COVID-19, Mr. Caines had been working with children with autism and currently volunteers to assist with local COVID-19 relief efforts. Inspired to take action against police violence, Mr. Caines has attended several events supporting the Black Lives Matter movement since May 25, 2020. On the day of the June 22 protest, when Mr. Caines began to see the police assembling in large numbers, he felt anxious and put on protective equipment, including a helmet and safety goggles. Mr. Caines did not threaten violence, nor did he make any physically aggressive or intimidating gestures towards the police. Nonetheless, he was shot at repeatedly with rubber and pepper bullets and was subjected to tear gas and flash bang explosions. Mr. Caines intends to continue protesting, but since the protest on June 22-23, has become afraid of police aggression and worries about future retaliation from law enforcement, causing him trauma and anxiety.

13. ~~18.~~ Plaintiff ~~organizations have~~Jimmie Lee Jarvis, a resident of Richmond, has been participating in the protests nearly every day since May 30. Mr. Jarvis has been subjected to tear

gas and rubber bullets multiple times by the police but recalls one incident as being the most frightening. On May 31, 2020, the second night of protests, Mr. Jarvis joined the march at Marcus-David Peters Circle, which is the name given by protesters to the grassy area surrounding the monument of Robert E. Lee on Monument Avenue. Without any warning, police officers began to launch tear gas into the crowd of protesters. Moving east, Mr. Jarvis witnessed a police officer pepper spray a photographer at point blank range with no instruction or warning. Mr. Jarvis also witnessed projectiles being fired at community medics who were tending to injured protesters on Broad Street. Struggling from the tear gas exposure, Mr. Jarvis was finally able to reach his friend's car to retreat from the scene. Mr. Jarvis has remained committed to the cause of ending police brutality even after this incident but suffers from severe anxiety each time he attends a protest due to the police violence he has endured.

14. Plaintiff organization VSPN has a direct and immediate interest in the issues presented in recent protests and the rights of their members to participate, now and in the future, in such public demonstrations and protests against police violence. This right is enshrined in the laws and traditions of the Commonwealth and the United States, including the rights of free speech and assembly. Those rights were consistently violated by Defendants ~~on or around June 22, 2020,~~ as a matter of practice, and there is an imminent risk of their being violated again at upcoming demonstrations absent immediate intervention by this Court.

15. ~~19.~~ The individual Plaintiffs all have an interest in the issues presented in recent protests and in their right to participate, now and in the future, in such public demonstrations and protests, a right enshrined in the laws and traditions of this Commonwealth and the United States, including the right to assemble with others and the right to freedom of speech. Those rights were ~~trampled~~ consistently violated by Defendants ~~on or around June 22-23, 2020~~ as a matter of practice,

and risk being violated again at upcoming demonstrations absent immediate intervention by this Court.

16. ~~20.~~ Plaintiffs remain committed to protesting police brutality and racial injustice, and to the national movement to protect Black lives. They should be free to exercise their constitutional right to protest and participate in peaceful demonstrations against police brutality in Richmond without becoming victims of police brutality themselves.

17. ~~21.~~ Plaintiffs bring this action to restrain the City of Richmond, RPD, VSP, and VSPVCP from continuing to respond to peaceful protests with unconstitutional force by abusing Virginia's unlawful assembly statute and otherwise violating Plaintiffs' rights. The U.S. and Virginia Constitution grants Constitutions grant Plaintiffs the right to peaceably assemble without being subjected to crowd-control weapons such as tear gas, pepper spray, flash bang grenades, and rubber bullets, even if they are expressing their condemnation of police practices and budgets.

18. ~~22.~~ Defendant City of Richmond is a municipal corporation organized under the Code of Virginia. Pursuant to its charter, the City of Richmond "may sue or be sued." *See* City of Richmond Charter, §1.01. It maintains and operates a police force, the RPD. At all times relevant to this action, the City of Richmond acted through its managers and policy makers, including the Chief of Police and other employees of the RPD, and the acts, edicts, and practices of said persons represent the official policies and practices of the Defendant City. The City of Richmond bears legal responsibility under state law for the acts and omissions of RPD police officers in the course of their employment. It is being sued for injunctive relief from the unconstitutional and dangerous policies and practices of its police department that occurred on and around June 22-23, ~~2020~~ and 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

19. ~~23.~~ Defendant ~~William “Jody” Blackwell~~Gerald Smith (“~~Chief Blackwell~~Smith”) is ~~an adult citizen and resident of the City of Richmond and Interim~~the Chief of the RPD and serves as the chief executive officer of the Department. He is sued in his official capacity for the RPD’s planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

20. ~~24.~~ Defendant Colonel Gary T. Settle is the Superintendent of the VSP and serves as the chief executive officer of the Department. He is sued in his official capacity for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

21. Defendant Colonel Anthony S. Pike is the Chief of the Virginia Division of Capitol Police. He is sued in his official capacity for the planned, unconstitutional use of force against peaceful demonstrators, which will recur unless enjoined by the Court.

22. ~~25.~~ Defendant Richmond Police Department is the primary law enforcement agency for Richmond, Virginia. It is sued for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

23. ~~26.~~ Defendant Virginia Department of State Police is a state law enforcement agency acting as the state police force for the Commonwealth of Virginia. It is sued for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, as well as other instances before and after that date, which will recur unless enjoined by the Court.

24. Defendant Virginia Division of Capitol Police is a state agency responsible for providing police services to state agencies, state employees, and elected officials. It is sued for the planned, unconstitutional use of force against peaceful demonstrators, which will recur unless enjoined by the Court.

JURISDICTION AND VENUE

25. ~~27.~~ The Circuit Court has subject matter jurisdiction over this matter under §§ 8.01-184, 8.01-620, and 17.1-513 of the Code of Virginia. Plaintiffs seek injunctive and declaratory relief under the laws and Constitution of Virginia.

26. ~~28.~~ Venue in this Court is proper under Code § 8.01-261 because the actions subject to the relief requested in this lawsuit occurred in the City of Richmond.

STATEMENT OF FACTS

George Floyd's Murder and the Ensuing Demonstrations

27. ~~29.~~ On May 25, 2020, George Floyd was murdered in Minneapolis, Minnesota by the police. Mr. Floyd, a Black man, was accused of committing a non-violent offense. During his arrest, Mr. Floyd was on the ground, handcuffed and restrained. One of the police officers then placed his knee—and the weight of his body—on Mr. Floyd's neck, pinning him to the ground. For almost nine agonizing minutes, the police officer pressed his knee into Mr. Floyd's neck as Mr. Floyd gasped for breath and pleaded for both mercy and his mother. Rather than stopping this horrifying act, other officers pinned his legs or stood by, watching as Mr. Floyd began to die. Some of Mr. Floyd's last words were, "please, please, please, I can't breathe."

28. ~~30.~~ Mr. Floyd's murder was captured on video by bystanders and broadcast globally, sparking demonstrations in over 2,000 cities and towns around the country and many more around the world.

29. ~~31.~~ Despite a global pandemic, groups of protestors around the world have gathered to voice their concerns about the systemic injustices perpetrated by law enforcement against Black people.

30. ~~32.~~ In response to these protests, RPD and VSP have repeatedly exercised overwhelming and unconstitutional force to discourage protestors from exercising their constitutional rights. Based on the alleged unlawful conduct of an unidentified few, Defendants have responded to these protests with curfews, mass arrests, unlawful assembly declarations, and aggressive dispersal tactics, all designed to punish protestors for exercising their rights enshrined in the Virginia's constitution and U.S. constitutions.

31. ~~33.~~ On May 31, 2020, Governor Ralph Northam declared a state of emergency due to “civil unrest” in the City of Richmond, imposing a curfew on its residents between the hours of 8 P.M. and 6 A.M. until June 3.

32. ~~34.~~ During the first night of the curfew, police used tear gas and pepper spray on demonstrators who were marching downtown from the Robert E. Lee statue on Monument Avenue, and arrested over 200 individuals. On the second night, approximately 30 minutes prior to the curfew, RPD and VSP descended on a peaceful protest at the Robert E. Lee statue, pointing assault rifles and other firearms at the assembly, deploying tear gas and pepper spray at peaceful demonstrators, using batons, and marching with tactical gear and armor through the gathering of individuals.

33. ~~35.~~ The following day, on June 2, 2020, Mayor Levar Stoney and then-RPD Police Chief William Smith apologized for these brutal use of force tactics. Mayor Stoney stated, “I

apologize, we violated your rights.” Then-Chief Smith added, “We have made mistakes. We are working hard to fix this.”⁶⁹

34. ~~36. These~~ For over a week following these apologies, Richmond’s protests went without major incident. For example, on June 4, hundreds marched peacefully from Monroe Park to the Richmond Police Department’s Fourth Precinct in North Side.¹⁰ However, Defendants’ apologies and promises proved empty. ~~Brutal police tactics against protesters in Richmond continued and the mistakes were not fixed.~~ on June 13, when an RPD officer drove a police SUV up a curb and through a crowd, striking multiple protesters.¹¹ Earlier in the day, large masses of protesters had marched peacefully across the city as part of a “5,000 Man March.”¹²

35. In response to the RPD officer’s unprovoked assault, hundreds of protesters gathered outside the RPD’s headquarters the next day to protest the use of unlawful deadly force by the RPD and to demand that the officer responsible be terminated.¹³ The VSP arrived at

⁶⁹ Manzanares, *supra* note 1.

¹⁰ C. Suarez Rojas, *WATCH NOW: Protesters celebrate plans for removal of Confederate statues as they continue demonstrations*, Richmond Times-Dispatch, June 4, 2020, https://www.richmond.com/news/local/watch-now-protesters-celebrate-plans-for-removal-of-confederate-statues-as-they-continue-demonstrations/article_e53c749d-874b-5471-9206-22f6c7bbe236.html.

¹¹ See John Reid Blackwell, *WATCH NOW: Police Vehicle Strikes Protesters in Richmond*, available at https://www.richmond.com/news/local/watch-now-police-vehicle-strikes-protesters-in-richmond/article_d58c42ae-1ff4-583b-913b-f22bfa6bf350.html; @BreRVA, Twitter, June 13, 2020, available at https://twitter.com/BreRVA/status/1271982379180138502?ref_src=twsrc%5Etfw.

¹² Tyler Thrasher, Nick Conigliaro, *Richmonders react: Virginia’s 5000 Man March brings out emotions, calls for change*, ABC8 News, June 13, 2020, available at <https://www.wric.com/news/local-news/richmond/richmonders-react-virginias-5000-man-march/>.

¹³ Sean Gorman, Ali Sullivan, *UPDATED: Police, protesters square off at RPD headquarters: woman detained*, Richmond Times-Dispatch, June 14, 2020, available at https://www.richmond.com/news/updated-protesters-target-police-brutality-the-night-after-a-richmond-police-suv-struck-protesters-its/article_87aa63d6-2e6b-5a01-b008-8ea52aee9b2c.html

approximately midnight to reinforce the RPD. Once again, police deployed chemical agents against protesters and journalists.¹⁴

36. The next day, on June 15, protesters returned to the Richmond police headquarters to protest the use of unlawful force by the RPD. Police fired multiple rounds of chemical crowd-control weapons, flash grenades, and rubber bullets at protesters into the crowd of approximately 200 to 300 people.¹⁵ Only after most of the crowd fled from the police's use of less lethal force, police played a pre-recorded warning that the protest had been deemed an unlawful assembly.¹⁶

37. With public pressure mounting, on June 17, 2020, Mayor Stoney announced on June 16 that he had requested that then-Chief Smith tender his resignation. Chief¹⁷ William "Jody" Blackwell was announced as the interim chief of RPD.⁷

¹⁴ Id.

¹⁵ Gregory S. Schneider, *Police fire chemical irritant, rubber bullets at Richmond protesters outside police headquarters*, Washington Post, June 16, 2020, https://www.washingtonpost.com/local/richmond-police-fire-pepper-spray-at-protesters-in-standoff-near-police-headquarters/2020/06/14/bel1ccb26-aeac-11ea-8f56-63f38c990077_story.html; Andrew Ringle, Twitter, June 15, 2020, available at https://twitter.com/aeringle/status/1272715201675223042?ref_src=twsrc%5Etfw

¹⁶ Id.

¹⁷ Morgan Winsor, ABC News, *Richmond Mayor Forces Police Chief to Resign Amid Citywide Protests*, available at <https://abcnews.go.com/US/richmond-mayor-forces-police-chief-resign-amid-citywide/story?id=71292146#:~:text=The%20police%20chief%20in%20Virginia's,police%20chief%20at%20Stoney's%20request> ; <https://www.wvtf.org/post/richmond-police-chief-resigns-mayor-says-more-change-needed#stream/0>.

⁷ Morgan Winsor, ABC News, *Richmond Mayor Forces Police Chief to Resign Amid Citywide Protests*, available at <https://abcnews.go.com/US/richmond-mayor-forces-police-chief-resign-amid-citywide/story?id=71292146#:~:text=The%20police%20chief%20in%20Virginia's,police%20chief%20at%20Stoney's%20request>.

38. 37.—At a press conference on June 18, the new Chief Blackwell conveyed his frustration with the protests, stating that he “didn’t ask for any of this” and that his officers “stand judged” by the protestors. “It frustrates me to no end,” Chief Blackwell stated.⁸¹⁸

39. 38.—On or around June 19, 2020, under Chief Blackwell’s new command, RPD preemptively asserted its authority to declare protests as unlawful assemblies under Va. Code § 18.2-406.⁹¹⁹ Virginia law defines an unlawful assembly as “three or more persons assembled [to] share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, 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.” To comply with the First Amendment, the Supreme Court of Virginia has construed the definition of unlawful assemblies narrowly to apply to assemblies where there is “clear and present danger of violent conduct.” *Owens v. Va.*, 211 Va. 633, 636-38 (Va. 1971). It is not sufficient that there be an intention on the part of participants to “disturb the peace” or “excite public alarm” or “disorder” — there must be a clear and present danger of violent conduct. *Id.*

~~39.— As detailed below, in keeping with Chief Blackwell’s ominous promise, Defendants have begun abusing Virginia’s unlawful assembly statute to justify aggressive dispersal tactics against peaceful demonstrators engaging in protected expressive activity in public spaces based on group guilt.~~

⁸¹⁸ Richmond, *supra* note 3.

⁹¹⁹ WRIC Newsroom, *After Riots, Richmond Police Issue Reminder of Unlawful Assembly Declaration*, available at <https://www.wric.com/news/local-news/richmond/after-riots-richmond-police-issue-reminder-of-unlawful-assembly-declaration>.

40. The following days were marked by a consistent pattern of overwhelming, disproportionate, and unreasonable police violence directed against peaceful protesters. For example, on June 21, police deployed chemical agents against protesters, including a reporter for VCU's student newspaper who loudly and continuously identified himself as a journalist covering the protests as he was being pepper sprayed.²⁰

Risk of Death or Serious Injury from RPD and VSP's Crowd Control Tactics

41. ~~40.~~ The weapons RPD and VSP have been using for “crowd control” purposes during demonstrations, sometimes referred to as “non-lethal” weapons, are more appropriately called “less-lethal” weapons, as government entities and human rights organizations have recognized their use can be fatal.⁴⁰²¹

42. ~~41.~~ The “less-lethal” weapons RPD and VSP have deployed at protestors over this past month include chemical irritants, kinetic impact projectiles, and weapons intended to stun with light and sound.

43. ~~42.~~ The chemical irritants released on protestors by RPD and VSP this month include tear gas (“CS gas”) and oleoresin capsicum spray (“OC” or “pepper” spray).

44. ~~43.~~ RPD and VSP have deployed chemical irritants both by targeting specific protestors with handheld devices and by launching canisters of chemical irritants into a crowd from a distance, releasing the irritants indiscriminately in every direction.

²⁰ Andrew Ringle, Twitter, June 21, 2020,
<https://twitter.com/aeringle/status/1274898298923606017>.

⁴⁰²¹ See U.S. Dep’t of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Department of Justice’s Use of Less-Lethal Weapons* (May 2009), available at <https://oig.justice.gov/reports/plus/e0903/final.pdf>; United Nations Guidance on Less Lethal Weapons in Law Enforcement (2020), available at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

45. ~~44.~~ RPD and VSP have also hit protestors with kinetic impact projectiles such as rubber bullets or tear gas canisters aimed directly at protestors.

46. ~~45.~~—In addition, RPD and VSP have deployed flash-bang grenades against protestors. When these weapons detonate, they generate loud noise and bright light, and sometimes chemical irritants.

47. ~~46.~~ Tear gas can be lethal. It is known that high-dose exposure in an enclosed space can “lead to the development of airway edema, non-cardiogenic pulmonary edema, and possibly respiratory arrest.”⁺²² More generally, tear gas exposure can have more severe effects on those with asthma such that it can trigger a fatal asthma attack.⁺²³ The death on May 30 of a 22-year-old protestor in Ohio who passed away after being sprayed with tear gas is currently being investigated.⁺²⁴ Breathing in tear gas can cause irritation of the nose, throat, and lungs; individuals typically experience choking, trouble breathing, nausea, vomiting, and other symptoms.⁺²⁵

48. ~~47.~~ Even when not directly lethal, exposure to tear gas has been shown to increase the risk of developing acute respiratory illnesses. A study conducted in 2012 of 6,723 U.S. Army recruits demonstrated that those who were exposed to tear gas had a significantly higher chance of getting an acute respiratory illness such as influenza, bronchitis, and pneumonia than those recruits who were not exposed.⁺²⁶

⁺²² Centers for Disease Control and Prevention, *Toxic Syndrome Description*, available at <https://emergency.cdc.gov/agent/riotcontrol/agentpoisoning.asp>.

⁺²³ Healthline, *How Tear Gas and Pepper Spray Affect the Body*, available at <https://www.healthline.com/health-news/how-tear-gas-and-pepper-spray-affect-the-body#Whatto-know-about-tear-gas>.

⁺²⁴ Jim Letizia, *Columbus Investigating Claims Protester Died After Being Exposed to Tear Gas*, available at <https://www.wcbe.org/post/columbus-investigating-claims-protestor-died-after-beingexposed-tear-gas>.

⁺²⁵ See Healthline, *supra* note 12.

⁺²⁶ Joseph J. Hout, et al., o-Chlorobenzylidene Malonitrile (CS Riot Control Agent) *Associated Acute Respiratory Illnesses in a U.S. Army Basic Combat Training Cohort*, 179

49. 48.–Pepper spray can be lethal. Between 1990 and 1995, at least 61 in-custody deaths followed police use of pepper spray on suspects.⁺⁶²⁷ The death on June 4 of a man in federal custody in New York who passed away after being sprayed with pepper spray is currently being investigated.⁺⁷²⁸ Individuals exposed to pepper spray are likely to experience burning in the throat, wheezing, dry cough, shortness of breath, gagging, gasping, or the inability to breathe.⁺⁸²⁹

50. 49.–Flash bangs can be lethal. Flash bangs are explosives that are intended to stun and disorient people with light and sound, and are designed to temporarily blind or deafen people. The use of these weapons can cause serious injuries, like blowing off appendages, or even death.⁺⁹³⁰

Heightened Risks of COVID-19 Transmission from Less-Lethal Weapons

51. 50.–Five doctors from Virginia Commonwealth University (“VCU”) Health sent a letter to RPD on June 23 expressing their concerns that people who have been exposed to chemical irritants are more vulnerable to COVID-19, an acute respiratory illness.²⁰³¹ In the letter, the physicians state they “are horrified to see the use of pepper spray and other chemical irritants

Military Medicine 7:793 (2014), available at <https://academic.oup.com/milmed/article/179/7/793/4259353#101149356>.

⁺⁶²⁷ Mark I. Pinsky, *If Pepper Spray Isn’t Lethal, Why All the Deaths?*, L.A. Times (June 18, 1995), available at <https://www.latimes.com/archives/la-xpm-1995-06-18-mn-14572-story.html>.

⁺⁷²⁸ Sonia Moghe, CNN, *Inmate in Federal Custody Dies After Incident Involving Pepper Spray*, available at <https://www.cnn.com/2020/06/04/us/jamel-floyd-brooklyn-prison-death-pepper-spray/index.html>.

⁺⁸²⁹ Medical News Today, *What Is Pepper Spray, and Why Is It Dangerous?*, available at <https://www.medicalnewstoday.com/articles/238262>.

⁺⁹³⁰ Alyssa Fowers et al., Wash. Post., *A Guide to the Less-Lethal Weapons that Law Enforcement Uses Against Protesters*, available at <https://www.washingtonpost.com/nation/2020/06/05/less-lethal-weapons-protests/?arc404=true>.

²⁰³¹ NPR, *Doctors Urge Richmond Police to Stop Pepper Spraying, Gassing*, available at <https://vp.m.org/news/articles/14367/doctors-urge-richmond-police-to-stop-pepper-spraying-gassing>.

against protestors” explaining that its use is “antithetical to the public health guidance for avoiding COVID-19.”

52. ~~51.~~ When people with COVID-19 are exposed to chemical irritants during a demonstration, this exposure may also increase the likelihood that COVID-19 will spread to other people because of the immediate effect both tear gas and pepper spray have on those who are exposed. By design, part of the incapacitating effect of tear gas and pepper spray is that both can cause lung irritation, causing a person to cough, spit, or vomit.²⁴³² In addition, people exposed to tear gas or pepper spray suffer from eye irritation that leads them to rub their eyes. Coughing, spitting, vomiting, and rubbing eyes can all lead to the spread of viruses.

53. ~~52.~~ The use of other less-lethal weapons that cause panic and injury also create the potential for increased COVID-19 spread by compressing large groups of people as protestors and bystanders attempt to flee from the use of force.

54. ~~53.~~ Seeking medical care for injuries caused by police presents another opportunity for COVID-19 spread, as injured people and people delivering medical care come into close physical contact with one another.

Defendants’ Unconstitutional Actions on the Night of June 22

55. ~~54.~~ The Plaintiffs, as a member organizationsorganization and individuals, have been consistently active in the series of ongoing protests against police brutality taking place on the streets of Richmond that began in late May following the death of George Floyd.

56. ~~55.~~ On the evening of June 22, 2020, approximately 150 people gathered outside of Richmond City Hall for a “teach-in” planned by local college students. The students planned to

²⁴³² Centers for Disease Control and Prevention, Facts About Riot Control Agents Interim Document, *available at* <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>.

feature speeches from local community advocates and workshops to teach participants about community demands including reallocating police budgets to social service programs. The demonstrators planned to gather all night in the block of Marshall Street between 8th and 9th Streets, which they dubbed “Reclamation Square,” outside the main entrance to City Hall. Their intent was to create a peaceful space for protestors to learn about the issues while elevating the voices of activists driving the movement against police brutality and racial inequality in Richmond.

57. ~~56.~~ The “teach-in” continued peacefully into the evening with an atmosphere resembling a friendly gathering. Protestors played music on a loudspeaker, as organizers prepared a large screen for a movie viewing. Protestors set up food, water, mask, and other supply stations.

58. ~~57.~~ Attendees set up tents in the square and on the street, planning to stay overnight. Participants blocked the intersections between 8th Street and 9th Street with traffic cones and set up bike marshals to protect participants from traffic and the potential use of police cars or violent extremists to drive at or ram them. These ramming tactics have become a disturbingly frequent response to protests against police brutality and racial injustice.²²³³

59. ~~58.~~ At all times, protestors ensured that people could exit and enter the space safely. For example, at approximately 5:30 p.m., a city worker needed to move his car out of the space within the barricade. The bike marshals ensured he was able to safely do so in a timely manner.

60. ~~59.~~ Plaintiffs did not witness any violence or threatened violence directed at any person or property. Plaintiffs did not witness any objects thrown in the direction of police officers or any other immediate threat to the law enforcement officers.

²²³³ NPR, *Vehicle Attacks Rise as Extremists Target Protesters*, available at <https://www.npr.org/2020/06/21/880963592/vehicle-attacks-rise-as-extremists-target-protesters>.

61. ~~60.~~ At approximately 12:42 A.M. on June 23, without sufficient cause, the RPD declared the event an unlawful assembly. According to a Twitter post by RPD, the unlawful assembly was declared due to “conditions of activity such as sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety or infrastructure.”²³³⁴

62. ~~61.~~ Around the same time, RPD officers on the scene used a megaphone to declare the protest an “unlawful assembly.” This warning was repeated at least one additional time. While making these announcements, officers also flashed high-beam lights into the eyes of protestors and Plaintiffs reported hearing projectiles being fired at some protestors.

63. ~~62.~~ Soon after this announcement, law enforcement officers began advancing and escalating their use of force, including using tear gas, pepper bullets and flash bangs indiscriminately against the crowd. Police also tackled, grabbed, and shoved protestors as they advanced.

64. ~~63.~~ Trapped by tear gas, blocked by officers lining the sides of the street, and obstructed by buildings and barricades, the protestors began to scream and gasp for air in panic. Many removed COVID-19-protective masks in desperation. This panic was captured on video by protestors at the scene.

65. ~~64.~~ Following this unprovoked escalation by police, protestors and others in the area quickly retreated. Soon there were a larger number of police officers remaining than protestors.

²³³⁴ Richmond, *UPDATED: Overnight Police Declare Reclamation Square Encampment an Unlawful Assembly, Disperse Crowd with Chemical Agents*, available at https://www.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.

66. ~~65.~~—As the protesters retreated, officers continued firing chemical irritants and projectiles at them, including firing canisters of tear gas directly at protestors. Plaintiff Smith was hit by a canister, leaving his arm numb, bruised and swollen. Plaintiff Smith also suffers from asthma and has experienced exacerbated symptoms caused by his exposure to chemical irritants, including severe irritation of his lungs, making it difficult for him to breathe.

67. ~~66.~~—As detailed above, on June 22-23, 2020, the RPD and VSP violently attacked persons assembling peacefully to protest police violence without provocation or legal cause, in violation of their rights under the U.S. and Virginia Constitution~~Constitutions~~.

68. ~~67.~~—No facts support a finding that the protestors on June 22-23 were engaged in an “unlawful assembly,” let alone posed a “clear and present danger of violent conduct.” Thus, the RPD had no legal basis to declare the protest in question an unlawful assembly under Virginia Code § 18.2-406, nor did the RPD and VSP have any legal basis to use indiscriminate, untargeted force to disband those gathered.

69. ~~68.~~—As a result of Defendants’ use of unlawful use of force against protestors, Plaintiffs fear their rights to free speech and assembly ~~in Richmond~~, as well as their right to be free of unlawful seizure, are at risk. In light of the ongoing nature of the protests in the wake of George Floyd’s death, as well as the unfortunate likelihood of additional incidents of police force against protestors, injunctive relief is necessary to prevent both bodily injury to Richmond residents and the constitutional injury of a chilling effect on speech. Plaintiffs have no adequate remedy at law.

70. In the week following the June 22 incident, Defendants declared an unlawful assembly every night and continued their policy of using disproportionate force against peaceful protestors. Defendant VCP was called in on several instances to back up Defendants VSP and

RPD. Finally, on Friday, June 26, Mayor Stoney announced that Chief Blackwell would be stepping down, and for the second time in the month of June, the RPD would have a new chief. Neither Chief Smith, the RPD, nor the other Defendants have indicated any concrete shift in their policies or practices for the use of force, and Chief Smith explicitly indicated in an interview that the RPD would continue to use tear gas where it saw appropriate.³⁵

COUNT I – VIOLATION OF RIGHT TO PEACEABLY ASSEMBLE

Virginia Constitution Article I, Section 12

71. ~~69.~~ All prior paragraphs are incorporated herein by reference.

72. ~~70.~~ Plaintiffs have a fundamental right to assemble under Article I, Section 12 of the Virginia Constitution. Courts have sustained private rights of action against Virginia police departments based on Article I, Section 12. See, e.g., Willis v. City of Virginia Beach, 90 F. Supp. 3d 597, 607-08 (E.D. Va. 2015) (sustaining claim under Article I, Section 12 of Virginia Constitution and finding that the provision is “coextensive with the free speech provisions of the federal First Amendment”). Constitutional provisions in the Virginia Bill of Rights “are generally considered to be self-executing,” Gray v. Va. Sec. of Trans., 662 S.E.2d 66, 72-73 (Va. 2008), as are provisions “of a negative character” which do not require “additional legislation . . . to carry into effect [their] clear mandate,” Robb v. Shockoe Slip Foundation, 324 S.E.2d 674, 681-82 (Va. 1985), both of which are the case here. Claims brought under self-executing provisions of the Virginia State Constitution are not barred by sovereign immunity. See Gray, 662 S.E.2d at 73.

³⁵ Mallory Noe-Payne, Heading into Month Two of Anti-Racist Protests, Will Police in Richmond Change Tactics?, available at <https://www.wvtf.org/post/heading-month-two-anti-racist-protests-will-police-richmond-change-tactics#stream/0>.

73. ~~71.~~ Defendants' violent actions were not a reasonable regulation of the time, place, or manner of Plaintiffs' constitutionally protected activity. The actions were not justified by a compelling or even substantial government interest. Even assuming, arguendo, that there was a compelling government interest in dispersing peaceful protestors, Defendants' actions on June 22-23 were not narrowly tailored to serve that government interest in a lawful manner.

74. ~~72.~~ Using crowd control weapons and equipment, including but not limited to tear gas, flash bang explosives, rubber bullets, and pepper spray indiscriminately on crowds of peaceful protestors is an astonishing assault which violates the right to assemble under the Virginia Constitution.

75. ~~73.~~ The continued threat of such violent tactics has in fact chilled Plaintiffs' and their members' ability to assemble peacefully by placing them at risk of bodily injury if they choose to assert their right to be heard collectively and publicly.

76. ~~74.~~ Given that this unlawful use of force has occurred multiple times since June 1, 2020, and is likely to occur again, Plaintiffs are entitled to a court order enjoining this misuse of force by the police. Such injunction is necessary to prevent both immediate bodily injury and the constitutional injury of a chilling effect on the right to assembly.

77. ~~75.~~ Plaintiffs seek a temporary injunction until a trial on the merits can be held.

COUNT II – VIOLATION OF RIGHT TO FREEDOM OF SPEECH

Virginia Constitution Article I, Section 12

78. ~~76.~~ All prior paragraphs are incorporated herein by reference.

79. ~~77.~~ Plaintiffs have a fundamental right to freedom of speech under Article I, Section 12 of the Virginia Constitution, and as discussed above in Paragraph 72, a private cause of action to enforce that right.

80. ~~78.~~ Defendants' practice of firing tear gas grenades, shooting rubber bullets and pepper balls, and hurling flash bang explosives at those assembled to protest police violence, is a use of unwarranted force in reaction to their protected speech and violates Article I, Section 12 of the Virginia Constitution.

81. ~~79.~~ The continued threat of such violent tactics only serves to chill protected speech and dissuade peaceful protestors from engaging in their constitutional right to express their views and has in fact chilled Plaintiffs and their members and makes them fearful to participate in future demonstrations.

82. ~~80.~~ Given that this aggressive use of force, including chemical agents, on peaceful protestors has occurred multiple times since June 1, 2020, and is likely to occur again at future demonstrations, Plaintiffs are entitled to a court order enjoining this misuse of force by the police to punish peaceful protests.

83. ~~81.~~ Plaintiffs seek a temporary restraining order until a hearing on the merits can be held.

COUNT III – DECLARATORY JUDGMENT

Va. Code § 8.01-184

84. ~~82.~~ All prior paragraphs are incorporated herein by reference.

85. ~~83.~~ There exists a real and justiciable controversy between the parties as to the violation of Plaintiffs' rights under Article I, Section 12 of the Virginia Constitution and the application of Va. Code § 18.2-406 regarding the declaration of an unlawful assembly.

86. ~~84.~~ The General Assembly may not pass "any law abridging the freedom of speech . . . nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances." Va. Const. art. 1, § 12. This prohibition applies equally to the actions by the Defendants.

87. ~~85.~~ Police are authorized to declare an unlawful assembly under Virginia Code only upon a finding that “three or more persons share the common intent to advance some unlawful or unlawful purpose by the commission of an act or acts of unlawful force or violence” Va. Code § 18.2-406. This requires a finding of “clear and present danger of violent conduct.” *Owens v. Va.*, 211 Va. 633, 636-38 (1971). It is not sufficient that there be an intention on the part of the participants to “disturb the peace” or “excite public alarm” or “disorder”—there must be a clear and present danger of violent conduct. *Id.*

88. ~~86.~~ Assemblies that do not meet this standard are presumptively lawful, and the government’s use of force to quell these assemblies violates Article I, Section 12 of the Virginia Constitution.

89. ~~87.~~ There was no basis for issuing an unlawful assembly declaration on June 22-23, 2020. Protestors were at all times peaceful and attending speeches, workshops, and movie viewings during the demonstration. The RPD’s own official Twitter account asserted the unlawful elements of the assembly included only “sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety or infrastructure.” This plainly does not constitute an unlawful assembly under the Virginia statute, let alone rise to the required “clear and present danger of violent conduct” threshold permitting the declaration of an unlawful assembly. Further, even if Defendants had grounds to declare an unlawful assembly, they used excessive force in violation of the Virginia and United States Constitutions.

90. ~~88.~~ Therefore, Plaintiffs seek a declaration from this Court pursuant to Va. Code § 8.01-184 declaring that the manner and method employed by Defendants, as alleged herein, in implementing a declaration of unlawful assembly and using excessive force against Plaintiffs, was

unlawful and violated Plaintiffs' freedom of speech and assembly rights under the Virginia ~~Constitution~~ and United States Constitutions.

91. ~~89.~~ Specifically, Plaintiffs seek a declaration that:

- a. The June 22-23 incident did not pose a "clear and present danger of violent conduct;"
- b. The RPD's unlawful assembly declaration at the June 22-23 incident was itself unlawful;
- c. The RPD's unlawful assembly declaration was merely pretext for an unlawful use of force motivated by an attempt to suppress the Plaintiffs' message, thereby chilling their protected free speech and right to assemble;
- d. The manner in which Plaintiffs were forcibly dispersed on June 22-23 violated their rights under the Virginia ~~Constitution~~ and United States Constitutions.

~~90.~~—Given that Defendants have repeatedly issued unlawful assembly declarations against lawful protests against police brutality, have used excessive force in response to peaceful protests, and are likely to do so again, Plaintiffs are entitled to a court order enjoining the Defendants' manner and method of issuing ~~and~~, communicating and enforcing the dispersal order that RPD issued on June 22, 2020.

~~91.~~—~~Plaintiffs seek a temporary restraining order until a hearing on the merits can be held.~~

**COUNT IV – VIOLATION OF FIRST AMENDMENT RIGHTS TO SPEECH,
ASSEMBLY, AND PETITION**

First and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983

92. All prior paragraphs are incorporated herein by reference.

93. Defendants engaged in repeated, widespread violations of Plaintiffs' First Amendment rights to free speech, assembly, and petition. Defendants consistently used unreasonable, indiscriminate, and disproportionate force against thousands of protesters, including chemical weapons such as tear gas, CS gas, and pepper spray; kinetic impact projectiles such as rubber bullets and tear gas canisters; physical weapons such as batons; and weapons intended to stun with light and sound such as flash grenades. The intention and effect of Defendants' practice was to suppress Plaintiffs' demonstrations and the viewpoints they represented.

94. Defendants' violent actions were not a reasonable regulation of the time, place, or manner of Plaintiffs' protected activity. The actions were not justified by a compelling or even substantial government interest. Even assuming, *arguendo*, that there was a compelling government interest in dispersing peaceful protesters, Defendants' practice of using unreasonable, indiscriminate, and disproportionate force were not narrowly tailored to serve that government interest in a lawful manner.

95. Defendants also used Virginia's unlawful assembly statute, Va. Code § 18.2-406, to deem unlawful in their entirety protests that did not meet the statutory definition of "unlawful assemblies." Defendants also employed a practice of declaring unlawful assemblies without providing directions, means, or opportunity to disperse before taking aggressive police action. Police are authorized to declare an unlawful assembly under Virginia Code only upon a finding that "three or more persons share the common intent to advance some unlawful or unlawful purpose by the commission of an act or acts of unlawful force or violence" Va. Code § 18.2-406. This requires a finding of "clear and present danger of violent conduct." *Owens v. Va.*, 211 Va. 633, 636-38 (1971). It is not sufficient that there be an intention on the part of the participants

to “disturb the peace” or “excite public alarm” or “disorder”—there must be a clear and present danger of violent conduct. *Id.*

96. The continued threat of Defendants’ violent and retaliatory tactics has in fact chilled Plaintiffs’ ability to exercise their rights under the First Amendment by placing them at risk of bodily injury if they choose to assert their right to be heard collectively and publicly.

97. Plaintiffs therefore seek injunctive and declaratory relief from this Court to ensure that Plaintiffs and persons similarly situated will not suffer violations of their First Amendment rights from Defendants’ illegal and unconstitutional policies, customs, and practices, which are likely to recur absent relief.

COUNT V – VIOLATION OF FOURTH AMENDMENT RIGHT TO FREEDOM FROM UNREASONABLE SEIZURE

Fourth and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983

98. All prior paragraphs are incorporated herein by reference.

99. Defendants engaged in repeated, widespread violations of Plaintiffs’ clearly established Fourth Amendment rights to be free from unreasonable seizure. Defendants subjected Plaintiffs to excessive force by using chemical “crowd control” weapons such as tear gas, CS gas, and pepper spray; kinetic impact projectiles such as rubber bullets and tear gas canisters; physical weapons such as batons; and/or weapons intended to stun with light and sound such as flash grenades. Video footage shows Defendants employing these violent tactics against peaceful protesters whose actions did not justify the use of force, let alone the severe force applied by Defendants.³⁶

³⁶ 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/uc9amikm42nwqxj/AACoOSN4LFOWDRfnXpLLr-HRa?dl=0>.

100. Defendants' use of force was not objectively reasonable. Defendants used the riot weapons described above without any basis in individualized determinations of conduct justifying such force. The totality of the circumstances surrounding Defendants' use of such weapons and tactics does not support a finding of objective reasonableness. Furthermore, Defendants' conduct was wanton, performed in a culpable or grossly negligent manner, deliberately indifferent to Plaintiffs' rights, shocks the conscience, and violates the decencies of civilized conduct.

101. Plaintiffs therefore seek injunctive and declaratory relief from this Court to ensure that Plaintiffs and persons similarly situated will not suffer violations of their Fourth Amendment rights from Defendants' illegal and unconstitutional policies, customs, and practices, which are likely to recur absent relief.

PRAYER FOR RELIEF

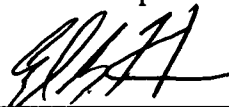
Plaintiffs respectfully request that the Court order the following relief:

1. Entry of temporary and permanent injunctive relief requested on a finding that Defendants have violated Plaintiffs' rights under the Virginia Constitution, Article I, Section 1212, as well as the First, Fourth, and Fourteenth Amendments of the United States Constitution;
2. Entry of a declaratory judgment as to the misuse of the declaration of unlawful assembly and subsequent dispersal orders;
3. Award Plaintiffs their costs of suit, including reasonable attorneys' fees under 42 U.S.C. § 1988; and,
4. Award Plaintiffs such other relief as may be just and proper.

TRIAL BY JURY IS DEMANDED

Dated: ~~June 26,~~ July 10, 2020

Respectfully submitted,



Eden B. Heilman (VSB No. 93554)
Nicole Gloria Tortoriello (VSB No. 91129)

Vishal Agraharkar (VSB No. 93265)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
ntortoriello@acluva.org
vagraharkar@acluva.org

Charles H. Schmidt, Jr. (VSB No. 84416)
Law Office of Charles H. Schmidt, Jr.
4310 Dorset Road
Richmond, VA 23234
804-402-0767
charlieschmidtrva@gmail.com

~~Dan~~ Daniel E. Johnson (VSB No. 88696)
Andrew Chang (pro hac motion to be filed)
Kayvan Farchadi (pro hac motion to be filed)
Emma Nguyen (pro hac motion to be filed)

COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, D.C. 20001
(202) 662-6000
dejohnson@cov.com
achang@cov.com
kfarchadi@cov.com

Counsel for Plaintiffs

Document comparison by Workshare 9.5 on Thursday, July 9, 2020 4:10:15 PM

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Document 1 ID	file://C:\Users\changaw\Desktop\Finals\Finals\Complaint - Final.docx
Description	Complaint - Final
Document 2 ID	file://C:\Users\changaw\Desktop\July 9 Filing\Ex. A - Proposed Amended Complaint.DOCX
Description	Ex. A - Proposed Amended Complaint
Rendering set	Standard

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	279
Deletions	195
Moved from	3
Moved to	3
Style change	0
Format changed	0
Total changes	480

From: [Hill Jr., Richard E. - City Attorney](#)
To: [Chang, Andrew](#); [O'Brien, Blaire](#); [Eden Heilman](#)
Cc: [Wood, Holli R.](#); [Pearson, Victoria N.](#); [Nicole Tortoriello](#); [McNeill, Erin R.](#)
Subject: RE: Emergency Hearing Request
Date: Thursday, July 9, 2020 2:28:18 PM

[EXTERNAL]

Andrew:

Yes, this accurately confirms our conversation and understanding. Thank you.

Richard E. Hill, Jr.
Senior Assistant City Attorney
Office of the City Attorney, City of Richmond
(804) 646-7946

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From: Chang, Andrew [mailto:AChang@cov.com]
Sent: Thursday, July 9, 2020 12:34 PM
To: Hill Jr., Richard E. - City Attorney <Richard.HillJr@richmondgov.com>; O'Brien, Blaire <BO'Brien@oag.state.va.us>; Eden Heilman <eheilman@acluva.org>
Cc: Wood, Holli R. <HWood@oag.state.va.us>; Pearson, Victoria N. <VPearson@oag.state.va.us>; Nicole Tortoriello <ntortoriello@acluva.org>; McNeill, Erin R. <EMcneill@oag.state.va.us>
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Hi Richard, just wanted to follow up on our conversation over the phone yesterday evening. Could I confirm that the City Attorney's office on the position for Plaintiffs' motion for leave to amend is that it won't be opposing, but reserves the right to file a responsive pleading (including a demurrer or otherwise) to the Amended Complaint, and that it's prepared to waive service for Chief Gerald Smith? Thanks very much.

[REDACTED]

From: [Chang, Andrew](#)
To: ["O'Brien, Blaire"; Eden Heilman](#)
Cc: [Wood, Holli R.](#); [Pearson, Victoria N.](#); [Nicole Tortoriello](#); [Hill Jr., Richard E. - City Attorney](#); [McNeill, Erin R.](#); [Johnson, Dan](#)
Subject: RE: Emergency Hearing Request
Date: Wednesday, July 8, 2020 9:26:00 AM

Hi Blaire,

It was a pleasure speaking with you as well. The below accurately reflects our conversation yesterday afternoon.

Thanks very much, and we're wishing you all well.

Best,
Andrew

From: O'Brien, Blaire <BO'Brien@oag.state.va.us>
Sent: Wednesday, July 8, 2020 8:49 AM
To: Chang, Andrew <AChang@cov.com>; Eden Heilman <eheilman@acluva.org>
Cc: Wood, Holli R. <HWood@oag.state.va.us>; Pearson, Victoria N. <VPearson@oag.state.va.us>; Nicole Tortoriello <ntortoriello@acluva.org>; Hill Jr., Richard E. - City Attorney <Richard.HillJr@richmondgov.com>; McNeill, Erin R. <EMcneill@oag.state.va.us>
Subject: RE: Emergency Hearing Request

[EXTERNAL]

Good morning, Andrew –

It was a pleasure speaking with you yesterday afternoon. I write to confirm our conversation. The Virginia State Police and Col. Settle will not be objecting to the filing of an amended complaint, but we are reserving our ability to file any type of responsive pleading—including another demurrer—that might be appropriate. We are also not agreeing to set any kind of hearing at this time, although I understand that you do not intend to pursue another emergency hearing. Finally, the Office of the Attorney General is prepared to waive service, as we discussed, for the Division of Capitol Police and Colonel Pike.

If I have misstated anything, please let me know.

Thank you, and I hope you're well.

Blaire

Blaire H O'Brien
Assistant Attorney General
Office of the Attorney General
202 North 9th Street