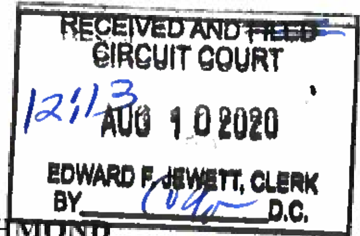

VIRGINIA:

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

VIRGINIA STUDENT POWER NETWORK, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. CL20002916-00**
VIRGINIA STATE POLICE, et al.,	)	
Defendants.	)	

MOTION TO DISMISS THE RICHMOND POLICE DEPARTMENT AND DEMURRER OF CITY OF RICHMOND AND GERALD SMITH TO AMENDED COMPLAINT

The City of Richmond (the "City") and Gerald Smith ("Chief Smith") demur to the Amended Complaint ("Compl."), and request dismissal of the Richmond Police Department, as follows:

A. Introduction

1. The Plaintiffs recite a series of alleged facts that occurred on or about the vicinity of City Hall and Marshall, 9th and 10th Streets in the City of Richmond on June 22nd and 23rd, 2020. *See generally* Complaint ("Compl."). They assert that the City of Richmond and its police Department, along with the Virginia State Police and the Virginia Division of Capital Police, engaged in allegedly unconstitutional action during the evening of the 22nd and into the morning of the 23rd of June, 2020. *Id.* The facts as alleged are similar in nature to the facts that were alleged in the original complaint filed in this action.

2. The Defendants in the Amended Complaint are the City, Chief Smith, along with the Richmond Police Department, The Virginia State Police ("VSP"), Gary T. Settle

("Settle") (Superintendent of the VSP), the Virginia Division of Capital Police ("Capital Police"), and Colonel Anthony S. Pike ("Pike")(Chief of the Capital Police)(collectively the "Defendants"). Compl. ¶¶ 8-10.

3. The Plaintiffs' claims in this case are limited to requests for injunctive and declaratory relief, and for attorney's fees. They base their claims on provisions of both the Virginia and United States Constitutions.

4. According to the Complaint and the factual declarations submitted by the Plaintiffs in support of their request for an emergency injunction, the Plaintiffs have collectively engaged in "ongoing protests" throughout the City of Richmond. Compl. ¶ 55. They assert that they along with other "demonstrators" also planned to "gather all night in the block of Marshall Street between 8th and 9th Streets," in an area that the protestors named "Reclamation Square." *Id.* ¶ 56.

5. According to the Complaint, the participants in Reclamation Square "blocked the intersections between 8th and 9th Street with traffic cones and set up bike marshals to protect participants from traffic..." *Id.* ¶ 58. The Plaintiffs state that "protestors ensured that people could exit and enter the space safely," and recount an incident at around 5:30 p.m. on June 22nd in which the "bike marshals" allowed a City employee to move "his car out of the space within the barricade." *Id.* ¶ 59.

6. After midnight, Richmond Police Department ("RPD") declared that the gathering as it continued constituted an unlawful assembly because "conditions of activity such as sit-ins, sit-downs, blocking traffic, blocking entrances or exits of buildings that impact public safety and infrastructure." *Id.* ¶ 61. Based upon this determination, RPD officers announced that

the assembly was unlawful and provided multiple warnings before beginning action to clear the gathering. *Id.* ¶ 62-63.

7. The Plaintiffs complain about the tactics used by the RPD, the Virginia State Police ("VSP"), and the Virginia Division of Capital Police to clear the gathering.

8. The Plaintiffs also asserts generally that "Defendants declared an unlawful assembly every night and continued their policy of using disproportionate force against peaceful protestors." Compl. ¶ 70. The Complaint contains no factual allegations to support this statement.

9. The Complaint seeks declaratory and injunctive relief under Virginia's Declaratory Judgment Statute, Virginia Code § 8.01-184. They seek a declaration from this Court 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 Constitution." Compl. ¶ 90. The claim pursuant to Va. Code § 8.01-184 focuses exclusively on the events of June 22-23 and seeks a post hoc declaration that the Defendants' actions were unlawful. Compl. ¶ 91. The declaratory judgment claim also seeks an order from this Court enjoining "the Defendants' manner and method of issuing, communicating and enforcing the dispersal order that RPD issued on June 22, 2020." *Id.*

10. The Plaintiffs also bring claims under the First, Fourth and Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983.

11. With respect to the §1983 claims, the Plaintiffs seek "injunctive and declaratory relief from this Court to ensure that Plaintiffs and persons similarly situated will not suffer violations of their First [and Fourth] Amendment rights from Defendants' illegal and

unconstitutional policies, customs, and practices, which are likely to recur absent relief." Compl. ¶¶ 97, 101.

B. Motion to Dismiss

1. This Court should dismiss the "Richmond Police Department" as a separate defendant in this case.

2. There is no separate entity known as the "Richmond Police Department" that has been created by the laws of this Commonwealth and that is subject to suit as an entity separate from the City of Richmond. "In Virginia, an operating division of a governmental entity cannot be sued unless the legislature has vested the operating division with the capacity to be sued." *Burnley v. Norwood*, 2010 U.S. Dist. LEXIS 78666, at *15-16 (E.D. Va. Aug. 4, 2010) ((quoting *Muniz v. Fairfax County Police Dep't*, No. 1:05CV466 (JCC), 2005 WL 1838326, at *2 (E.D. Va. Aug. 2, 2005) (citing *Davis v. City of Portsmouth*, 579 F.Supp. 1205, 1210 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984)).

3. The Commonwealth of Virginia has not created a "Richmond City Police Department" as a separate entity that is subject to suit. The City of Richmond has been named as a defendant in this lawsuit.

C. Demurrer

I. The Plaintiffs do not state a viable claim for a declaratory judgment under Virginia Code § 8.01-184.

1. The Plaintiffs have not set forth a sufficient basis to establish their standing. "The Purpose of a declaratory judgment proceeding is the adjudication of rights; an actual controversy is a prerequisite to a court having authority." *Charlottesville Area Fitness Club Operators Ass't v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 98 (2013). The plaintiffs have not asserted an "actual controversy," because the assertion of right is not based upon specific

adverse claims based upon "present rather than future or speculative facts." *Id.* (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964)).

2. Furthermore, this case is a request by the Plaintiffs for a declaration that "a generalized activity does not violate a particular statute." *Daniels v. Mobley*, 285 Va. 402, 408 (2013). Such a request "concerns a determination of a disputed issue rather than a request for an adjudication of rights, and thus does not present a justiciable controversy." *Id.* at 408-09.

a. As the Virginia Supreme Court noted in *Daniels*, "Declaratory relief with respect to criminal matters has" only been allowed "under limited circumstances." *Id.* at 410. Here, as in *Daniels*, this Court's resolution of the matter would amount to a mere "advisory opinion." *Id.* at 411.

3. Most significantly, however, even if the Plaintiffs were requesting "a declaration of [their] rights, such a declaration would be barred by sovereign immunity." *Id.* at 411-12 (citing *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007)). "As a general rule, the Commonwealth is immune from actions at law for damages and from suits at equity to restrain governmental action or to compel such action." *Afzall*, 273 Va. at 231 (internal citation omitted). The City of Richmond, and the Chief of Police acting in his official capacity, enjoy the same sovereign immunity for this purpose as does the Commonwealth, because there is no evidence that the general assembly or the City have abrogated that immunity. *Seaboldt v. County of Albemarle*, 283 Va. 717, 721-22 (2012).

4. Nothing in the Amended Complaint cures the deficiencies identified in the previous complaint with respect to standing. Even though the Plaintiffs now assert claims under the U.S. Constitution, they still seek a declaration that the Defendants' conduct violated their rights

in the past. That does not present an actual case or controversy. As this Court has already noted, all alleged future harms are speculative. *See* Order CL20-2916, June 30, 2020 at 4.

5. Additionally, in the Amended Complaint the Plaintiffs still do not assert a facial challenge to Virginia Code § 18.2-406, so the challenge remains non-justiciable for the reasons set forth in *Daniels*, 285 Va. 402, above. Even if they were making a facial challenge, this Court would still lack jurisdiction over the Virginia Constitutional claims because the rights asserted by the Plaintiffs through Article I, Section 12 are not self-executing and, therefore, not justiciable through a declaratory judgment. *Id.* at 412. But the Plaintiffs do not challenge the statute's facial constitutionality. Instead, they seek a declaration by this Court regarding the Defendants' application of this statute to them in the past, as well as a declaration as to the Defendants' prospective hypothetical application of the statute to them in the future based upon events that have yet to occur and may never occur.

6. This Court should grant the demurrer and dismiss all claims because the Plaintiffs have failed to establish standing to bring this suit.

7. There is also a significant question as to whether "Virginia Student Power Network ("VSPN")" has standing to bring this case separate and apart from the named individual plaintiffs. The Complaint only assets generally that VSPN is a "non-profit organization," that it "organizes protests and rallies," and that it "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." Compl. ¶ 9, 14. This is insufficient to establish a basis for organizational standing under either Virginia Law or longstanding practice with respect to claims under 42 U.S.C. § 1983, and this Court should grant the demurrer and dismiss VSPN as a Plaintiff on that basis.

a. "An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so." *Casey v. Merck & Co.*, 283 Va. 411, 418, 722 S.E.2d 842, 846 (2012)(citing *W.S. Carnes, Inc. v. Bd. of Supervisors*, 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996). "To establish associational standing, an organization must show: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Md. Shall Issue, Inc. v. Hogan*, No. 19-1469, 2020 U.S. App. LEXIS 24370, at *10 n.4 (4th Cir. Aug. 3, 2020)(quoting *Lane v. Holder*, 703 F.3d 668, 674 n.6 (4th Cir. 2012)).

b. Should this Court determine at this stage that the Plaintiffs have set forth sufficient facts to establish organizational standing, the City and Chief Smith reserve the right to renew the objection to organizational standing based on additional discovery or information – or the lack thereof – that may come to light if this case moves forward.

II. The assembly was unlawful when the Richmond Police Department declared it an unlawful assembly.

1. Assuming, arguendo, that the Plaintiffs are able to establish standing and a justiciable controversy, the Complaint on its face (and coupled with the declarations) establishes that the gathering between 9th and 10th streets on Marshall Street on the night of June 22nd and 23rd was an unlawful assembly under Virginia Law at the time that the RPD declared it so.

2. It is undisputed based upon the Plaintiffs own assertions that the crowd that assembled between 9th and 10th Streets on Marshall Street on the night of June 22nd and 23rd had created barricades and blocked traffic on Marshall Street.

3. The Virginia Supreme Court in *Owens v. Commonwealth*, 211 Va. 633, 636-37 (1971), found the previous version of the unlawful assembly statute unconstitutional but

in so doing cited favorably to the common law definition of an unlawful assembly. It also suggested that "interference with traffic upon the public streets" can constitute a valid basis for declaring an unlawful assembly. *Id.* at 637 (citing *Cantwell* v. *Connecticut,* 310 U.S. 296, 308 (1940)). The United States District Court for the Eastern District of Virginia in *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282 (E.D. Va. 1982), found the current version of the statute constitutional. That Court found that "[t]he language of § 18.2-406, the current statute, closely follows the common law definition of unlawful assembly. That definition requires the existence of circumstances evidencing a present threat of violence or breach of public order." *Id.* at 289. The Court stated that "[t]here is no doubt that the states retain the right to maintain public order," and quoting *Cantwell* found that "'[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is obvious.'" *Id.* (citing *Cantwell*, 310 U.S. at 308) (emphasis added).

4. Thus, both the Virginia Supreme Court and the United States District Court for the Eastern District of Virginia have determined that it is lawful and constitutional to declare a gathering that interferes with traffic upon the public streets, as this one unquestionably did, an unlawful assembly.

5. Accordingly, the underlying premise behind the Plaintiff's entire argument lacks factual or legal support.

6. This Court should grant the Demurrer as to all claims that seek an order from this Court preventing the defendants from enforcing Virginia Code §18.2-406.

III. The Plaintiffs fail to state a claim under 42 U.S.C. § 1983 against the City or Chief Smith.

1. The Plaintiffs also generally assert claims against all defendants under 42 U.S.C. § 1983. Compl. ¶¶ 92-101.

2. The Plaintiffs fail to state a claim in support of the §1983 claims against the City and the official capacity claims against Chief Smith. All claims brought against Chief Smith in his Official-capacity are redundant with claims brought against the City. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Liability against the City under §1983 cannot be based on vicarious liability. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

a. To establish a "*Monell* claim," a plaintiff must show a custom or practice either through (1) an express policy, such as an ordinance or regulation, (2) the affirmative decisions of policy makers, (3) omissions by such policy makers showing "manifest deliberate indifference to the rights of citizens," or (4) a custom that is "'so 'persistent and widespread' and 'so permanent and well settled as to constitute "custom or usage" with the force of law.'" *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)(internal citations omitted); see also *Lytle v. Doyle*, 197 F. Supp. 2d 481 (E.D. Va. 2001). The Amended Complaint does not set forth a basis to establish the existence of a policy or custom by the City of Richmond that caused the alleged constitutional violation.

b. The Plaintiffs have made conclusory statements, and asserted specific facts that were alleged to have occurred during one incident on June 22-23, 2020. They have not pled any specific facts showing that the City undertook an official custom or policy with respect to any of the claims. "[P]roof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom." *Semple v. City of Moundsville*, 195 F.3d 708, 713-14 (4th Cir. 1999)(citing *Spell v. McDaniel*, 824 F.2d 1380, 1387-88 (4th Cir. 1987)); *see also* *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011).

c. A plaintiff must also plead that a municipality's policy or custom actually caused the constitutional violation. *Monell*, 436 U.S. at 658. Merely pleading "the magic words of causation" is not enough. *Brown v. Mitchell*, 308 F. Supp.2d 682, 694 (E.D. Va. 2004). A court need not accept conclusory statements about the legal effect of alleged facts. *Id.* Listing a myriad of wrongs with a person or department is insufficient: there must be a precise causal-link between them and a plaintiff's injury. *Carter*, 164 F.3d at 216, 218.

d. The "policy or custom" requirement of *Monell* also applies in cases where litigants do not seek monetary damages but instead "seek prospective relief, such as an injunction or a declaratory judgment." *L.A. Cty. v. Humphries*, 562 U.S. 29, 31 (2010). A municipality can only be found liable "for its own violations of federal law." *Id. at* 36 (citing *Monell*, 436 U.S. at 694). This is particularly important in this case because there are multiple defendants, including two other law enforcement agencies which are part of the Commonwealth of Virginia and not part of the City. The Plaintiffs have not set forth any factual basis under *Monell* for their claim that a City of Richmond policy or custom – as opposed to some other policy or custom; or as opposed to no policy or custom – was responsible for the alleged constitutional violations. The Plaintiffs have also not identified the alleged policy or custom and the source of that policy or custom. *See, e.g, Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *see also Lytle*, 197 F. Supp. 2d at 493-94.

e. The City and Chief Smith reserve the right to also argue on demurrer that the Plaintiffs have not set forth sufficient facts to establish the alleged underlying First, Fourth or Fourteenth Amendment violation.

f. Therefore, this Court should grant the demurrer as to all claims under 42 U.S.C. § 1983 against the City and Chief Smith.

D. CONCLUSION

The City and Chief Smith reserve the right to supplement this filing with a Memorandum filed in advance of any hearing on this demurrer and motion to dismiss. This Court should dismiss the Richmond Police Department as a defendant in this case. This Court should also grant the City and Chief Smith's demurrer, and dismiss the amended complaint, for the reasons set forth herein.

Date: August 10, 2020 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, a true and accurate copy of the foregoing Demurrer and Opposition to Request for a Temporary Injunction was transmitted by email to all counsel of record:

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