VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF RICHMOND

VIRGINIA STUDENT POWER NETWORK, NOAH SMITH, DIAMANTE PATTERSON, 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' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' DEMURRERS

JURY TRIAL DEMANDED

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Plaintiffs submit this Consolidated Memorandum of Law[1] in Opposition to the Demurrers filed by (1) the City of Richmond, Richmond Police Department, and Gerald Smith (the "City Defendants"); and (2) the Virginia Department of State Police, Gary T. Settle, the Virginia Division of Capitol Police, and Anthony S. Pike (the "State Defendants") on August 10, 2020, as well as the City and State Defendants' Memoranda of Law in Support of Their Demurrers (the "City Brief" and "State Brief"), served on Plaintiffs on October 23, 2020.

INTRODUCTION

The well-pled facts in Plaintiffs' First Amended Complaint ("FAC"), which must be taken as true at this demurrer stage, make several things clear. They demonstrate that in response to protests arising from the killing of George Floyd, Defendants repeatedly and indiscriminately used weapons carrying a significant risk of serious or lethal injury to shut down public demonstrations. FAC ¶¶ 41–50. They also demonstrate that these were not isolated incidents; rather, they were the result of an ongoing policy and custom that Defendants themselves admit was perpetuated by "the supervisors of those officers [at the protests] and the heads of their respective law enforcement agencies." FAC ¶¶ 7, 8, 70, 97, 101; State Br. at 11. Perhaps most crucially, they demonstrate that Defendants employed their policy of brutal and overwhelming force against Plaintiffs and other peaceful protesters: demonstrators that were "fleeing," FAC ¶ 11; photographers "at point blank range," FAC ¶ 13; "community medics who were tending to injured protesters," *id.*; a student reporter "who loudly and continuously identified himself as a journalist covering the protests as

[1] Pursuant to Va. R. Sup. Ct. 3:18(e), this consolidated brief opposes both the City's and the Commonwealth's Demurrers to Plaintiffs' FAC. In the interest of avoiding repetitive and redundant briefs, and with Defendants' consent, this consolidated brief combines the individual page limits accorded to briefs in Virginia and exceeds the default page limit in Va. R. Sup. Ct. 4:15(c) by 2 pages.

he was being pepper sprayed," FAC ¶ 40; and a crowd of students penned in a street, trying to retreat, FAC ¶¶ 62–66.

Taken as true, these allegations—which cite video evidence (FAC ¶ 99 n.36), contemporaneous news evidence (FAC nn. 1–35), and testimonial evidence (FAC ¶¶ 9–14) attesting to Defendants' pattern of unreasonable force against protesters—state claims for the violations of the Virginia and U.S. Constitutions pled in the FAC. Defendants, recognizing this, challenge the sufficiency of the FAC largely on procedural grounds. They assert various standing and immunity arguments, none of which have any support in relevant law. They also attempt to frame Plaintiffs' constitutional causes of action as dependent on Defendants' use of Virginia's unlawful assembly statute, ignoring that the allegations in the FAC state constitutional claims regardless of whether the unlawful assembly statute was properly invoked.

The City and State's Demurrers fundamentally mischaracterize the allegations in the FAC as though they are the same claims brought in Plaintiffs' original Complaint. They are not. Defendants' Demurrers, which fail to address the well-pled evidentiary facts in the FAC that Defendants' use of force was unreasonable and retaliatory, should thus be denied in their entirety.

LEGAL STANDARD

A demurrer "admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from alleged facts." *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991). In evaluating a demurrer, "every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Webb v. Virginian-Pilot Media Comps., LLC*, 287 Va. 84, 89–90 (2014); *see also Welding v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 226 (2001) (factual allegations to be considered "in the light most favorable to the plaintiff"). Against this backdrop, the sole question before this Court is "whether

the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant." *Pendleton v. Newsome*, 290 Va. 162, 171 (2015).

ARGUMENT

I. DEFENDANTS' PROCEDURAL ARGUMENTS DO NOT BAR PLAINTIFFS' CLAIMS.

Because standing and sovereign immunity present threshold questions, Plaintiffs address those issues first. Defendants' procedural arguments largely fall into three categories: (1) that the injury pled was too speculative to confer standing; (2) that certain Plaintiffs lack standing; and (3) that certain defendants are immune from suit. These arguments, addressed below in turn, misconstrue both the FAC and applicable law.

A. The FAC alleges a present injury which is neither hypothetical nor speculative.

Defendants assert that Plaintiffs do not have standing to bring constitutional claims because Plaintiffs "merely request declaratory and injunctive relief with respect to hypothetical and speculative future conduct." City Br. at 1–3. Defendants offer two arguments in support of that contention: (i) that Plaintiffs cannot bring a "pre-enforcement suit in this case . . . based upon a fear of criminal prosecution" under the unlawful assembly statute, *id.* at 2; and (ii) that any assertion that Defendants violated their state and federal constitutional rights would necessarily depend on Defendants' future conduct, *id.* at 2–3. Neither argument has merit.

First, Defendants incorrectly treat Plaintiffs' claims as though they are predominantly based on Defendants' use of Virginia's unlawful assembly statute. *See* State Br. at 9–10; City Br. at 7. They are not. The FAC alleges a series of facts completely independent of the unlawful assembly statute that Defendants subjected Plaintiffs to "unreasonable, indiscriminate, and disproportionate force" with the "intention and effect" of "suppress[ing] Plaintiffs' demonstrations

and the viewpoints they represented," all of which are sufficient to state the claims presented. FAC ¶¶ 93, 99.

While the FAC also asserts that Defendants used Virginia's unlawful assembly statute as a pretext to violate their rights under the Virginia and U.S. Constitutions, FAC ¶¶ 68, 70, 91, the only claim in the FAC that relies on whether Defendants' declarations of unlawful assemblies were proper is Count III. The other four counts, and the allegations underlying them, assert that Defendants' use of force was disproportionate and impermissibly targeted at Plaintiffs' speech—which give rise to claims under the Virginia and U.S. Constitutions *even if* Defendants' unlawful assembly declarations were proper. While Plaintiffs allege facts showing that Defendants improperly declared an unlawful assembly, *see* Section III.C, *infra*, Defendants' attempt to frame this case as hinging on those declarations misapprehends the nature of the case and the claims pled. FAC ¶¶ 75, 81, 96, 100.

Second, Defendants contend that Plaintiffs "have asserted no factual support for their claim that they face a current or actual injury," City Br. at 2, and that the "underlying basis for liability in this case is a single incident," *id.* at 5. This assertion mischaracterizes the FAC and contradicts well-established standing doctrine. The facts alleged describe more than a single past event; they describe a pervasive pattern and policy of unconstitutional behavior which directly threatens Plaintiffs' ability to exercise their rights to protest. *See* FAC ¶¶ 6, 7, 10–16, 18, 70, 97, 101.

To show an actual controversy for injunctive relief in this case, Plaintiffs need only allege that "the City ordered or authorized police officers to act in such manner." *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983). While Defendants correctly identify that singular events typically do not confer standing for injunctive relief where there is no indication that those events would be likely to recur, *see id.*, courts have consistently concluded that allegations of a policy condoning

the allegedly unconstitutional conduct establish a likelihood and immediacy of future injury sufficient to confer standing. *See, e.g.*, *Kenny v. Wilson*, 885 F.3d 280, 289–90 (4th Cir. 2018) (interpreting *Lyons* to permit standing where policies "authorize defendants to violate [the plaintiffs'] rights"); *see also Deshawn E. v. Safir*, 156 F.3d 340, 344–45 (2d Cir. 1998) (same); *Bell v. Keating*, 697 F.3d 445, 451–52 (7th Cir. 2012) (same); *Hawkins v. Comparet-Cassani*, 251 F.2d 1230, 1237 (9th Cir. 2001) (same); *Church v. City of Huntsville*, 30 F.3d 1332, 1339 (11th Cir. 1994) (same); *N.B. ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 85 (D.C. Cir. 2012) (same). This makes sense: as one court put it, when challenged conduct moves from the "sporadic, random practice of an officer gone rogue" in *Lyons*, to a consistent practice affirmatively attributed to and defended by a government entity, the "real and immediate threat of repeated injury" becomes manifest. *See Creedle v. Miami-Dade Cty.*, 349 F. Supp. 1276, 1290 (S.D. Fla. 2018).

An official policy can take various forms, such as an administrative policy or even a pervasive pattern of behavior. Plaintiffs allege both, and Defendants—who end their brief by arguing that they were "expressly and explicitly authorized" under law to use the force alleged in the FAC, State Br. at 11—cannot realistically contest this point. The allegations in the FAC meet this pleading burden: "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 . . . ." FAC ¶ 7 (emphasis added). The FAC later repeats that the "acts, edicts, and practices of [the police officers] represent[ed] the *official policies and practices of the Defendant City*." FAC ¶ 18 (emphasis added). For the avoidance of any doubt whether the constitutional violations are alleged to have arisen from an official policy or practice, the FAC opens by describing the pervasive "*pattern* of unnecessary, disproportionate, and life-threatening force"

giving rise to this lawsuit (FAC ¶ 2), emphasizes repeatedly that Defendants acted pursuant to a "*policy* of using disproportionate force against peaceful protesters" (FAC ¶ 70), and ends by alleging that Plaintiffs deserve injunctive relief from "Defendants' illegal and unconstitutional *policies, customs, and practices*" (FAC ¶¶ 97, 101).

These are not "conclusory" statements. City Br. at 3. These are consistent, specific allegations of fact that, despite two changes in leadership of the Richmond Police Department, Defendants have continued to use disproportionate and indiscriminate force against peaceful protesters across multiple protests. FAC ¶ 11, 13, 40, 62–66, 70. These factual allegations, and the favorable inferences that must be drawn from those allegations, are more than sufficient to plead the existence of an official policy or pattern of behavior. *Webb*, 287 Va. at 89 ("[E]very fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor.").

Defendants have also raised the possibility that a new police chief or a period of relative quiet might defeat standing. *See* City Br. at 5–6. This argument is best characterized as a claim that the case is moot. Courts have consistently declined to credit such arguments because "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). *Lyons* itself rejected the argument that voluntary cessation could defeat standing, noting that "[i]ntervening events have not irrevocably eradicated the effects of the alleged violation." *Lyons*, 461 U.S. at 1665. Lower courts have followed the same path. *See, e.g.*, *Hernandez v. Cremer*, 913 F.2d 230, 235 (5th Cir. 1990).

Moreover, Virginia courts have found that "*even where parties no longer have a cognizable interest in the outcome of the litigation*, a court may proceed to adjudicate a controversy under the 'capable of repetition, but evading review' exception to the requirements of standing or

justiciability." *Commonwealth ex rel. State Water Control Bd. v. Appalachian Power Co.*, 12 Va. App. 73, 75 (1991) (emphasis added) (citing *Murphy v. Hunt*, 455 U.S. 478, 481–82 (1991)). The court in *Appalachian Power Co.* recognized that if an agency facing a lawsuit were to be able to render "moot the question of validity of the permanent regulation, every challenged regulation . . . would be placed beyond review." Thus, "[t]he validity of all such regulations as they may apply to [the challenging party] and to others similarly situated is likely to arise again unless the questions raised by this litigation and the shadow which has been cast over the regulations are addressed and resolved." *Id.* at 76. *See also Harrisonburg Rockingham Soc. Servs. Dist. v. Shifflett*, 2005 WL 1667805, at *4 (Va. Ct. App. 2005) ("[C]ases that are 'capable of repetition, yet evading review' remain justiciable."); *Forbes v. Commonwealth*, 2005 WL 388060, at *7 (Va. Ct. App. 2005) (same). Similarly, Defendants' use of less-lethal force against Plaintiffs and similarly situated protesters "are likely to arise again" unless this Court hears and decides upon Plaintiffs' claims. The need for a ruling on this conduct is especially present in this case, where protests against police brutality have continued to arise in Richmond and across the Commonwealth.

In similar cases, courts across the country have found that protesters have standing to bring excessive force and First Amendment retaliation claims like those Plaintiffs assert here. *See, e.g.*, *Index Newspapers, LLC v. City of Portland*, 2020 WL 4220820, at *5 (D. Or. July 23, 2020) (documented incidents of violence and defendants' statement of intention to continue using force sufficient to find "pattern of officially sanctioned conduct"); *Breathe v. City of Detroit*, 2020 WL 5269789, at *5 (E.D. Mich. Sept. 4, 2020) (finding official policy on the basis that the force was used on "more than one occasion"). Given the significant and ongoing issues Plaintiffs pled in the

FAC, this Court should similarly find that Plaintiffs have standing in this case and that the case is not moot.

B. The FAC adequately alleges organizational standing for Plaintiff VSPN.

The City Defendants erroneously contend that Plaintiff VSPN did not adequately plead organizational standing to bring suit in its own right. This position breaks from a consistent line of cases holding that a plaintiff organization's allegations that defendants have caused the plaintiff to divert resources is sufficient to establish organizational standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (defendant's racial steering practices caused a "drain on the organization's resources," conferring organizational standing); *Moseke v. Miller and Smith, Inc.*, 202 F. Supp. 2d 492, 494 (E.D. Va. 2002) ("ERC has adequately alleged a substantial diversion of its limited resources to address the Defendants' alleged discriminatory practices."). Some courts have interpreted organizational standing to require further allegations that the diversion of resources was caused by the defendant's actions, *see, e.g.*, *Democracy N.C. v. N.C. Bd. of Elec.*, 2020 WL 4484063, at *10 (M.D.N.C. Aug. 4, 2020) (interpreting *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), to require showing of causality), and the FAC pleads facts specifically directed at that nexus, *see* FAC ¶ 9 ("*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." (emphasis added)). The City Defendants' bald assertion that the FAC needs to provide "additional factual support" finds no support in law. City Br. at 3.

C. Sovereign immunity does not bar Plaintiffs' claims.

The State Defendants contend that they are immune from Plaintiffs' claims under the Virginia Constitution (Counts I, II, and III) because "the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel

such action." State Br. at 3. Not so. The Virginia Supreme Court has repeatedly and consistently held that sovereign immunity does not bar claims brought under self-executing provisions of the Virginia State Constitution. *See Gray v. Sec. of Transp.*, 276 Va. 93, 97 (2008); *Bell Atlantic-Virginia, Inc. v. Arlington Cty.*, 254 Va. 60, 62 (1997). Thus, for the reasons discussed in Section III.A, *infra*, Plaintiffs' state constitutional claims may proceed.

State Defendants also assert that they cannot be sued in their official capacities under 42 U.S.C. § 1983. State Br. at 4. This argument misstates the law. The case on which the State Defendants rely, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), pertained only to a state official's immunity from "liability for damages." The Supreme Court stated explicitly in *Will* that "[o]f course a state official in his or her official capacity, when sued for *injunctive* relief, would be a person under § 1983 because official-capacity actions for *prospective* relief are not treated as actions against the State" for purposes of sovereign immunity. *Id.* at 71 n.10 (emphasis added). *Will* re-affirmed an unbroken line of Supreme Court precedent holding the same. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Ex Parte Young*, 209 U.S. 123, 159–60 (1908). State Defendants' assertion misapprehends a distinction "commonplace in sovereign immunity doctrine," *id.*, and does not provide a legitimate ground for dismissing claims against the Virginia State Police, Virginia Capitol Police, or their officers in their official capacities.

II. PLAINTIFFS ADEQUATELY ALLEGE A VIOLATION OF THEIR FEDERAL CONSTITUTIONAL RIGHTS IN COUNTS IV AND V.

A. Plaintiffs adequately allege liability under *Monell*.

The City Defendants argue incorrectly at Pages 5–6 of their brief that Plaintiffs have failed to allege liability under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Municipal liability attaches to decisions by officials "whose acts or edicts may fairly be said to represent official policy." *Id.* at 690. Even absent a formal municipal rule, *Monell* applies to practices that are "so

persistent and widespread" and "so permanent and well-settled as to constitute a custom or usage with the force of law." *Id.* at 691. Even a "single action taken by a municipality is sufficient to expose it to liability." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (noting that "a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations" and finding that "[i]f the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government policy."). The FAC pleads a *Monell* claim for several reasons.

1. The FAC sufficiently alleges a municipal policy.

Plaintiffs have alleged an unconstitutional policy decision by a municipal policymaker. *See* FAC ¶¶ 6, 7, 18, 70, 97, 101. Whether an action constitutes municipal policy depends on whether the official alleged in the complaint "possesses final authority to establish municipal policy with respect to the particular act or edict ordered." *Jones v. Wellham*, 104 F.3d 620, 625 (4th Cir. 1997). It is beyond dispute that the Richmond Chief of Police is a final policymaker for the police actions of the City. *See Johnson v. City of Richmond, VA*, 2005 WL 1793778, at *4 (E.D. Va. June 24, 2005) ("In this case, the record is clear that the Chief of Police for the City [of Richmond] is the policymaker to, and through, whom liability for the conduct of police activity may be attributed to the City."). Here, Defendants do not even attempt to contest Plaintiffs' allegations that the use of less-lethal weapons was executed pursuant to the Chief's final authority; instead, they argue only that it was justified. *See* State Br. at 9 (characterizing the actions as legitimate exercises of the "power of the state to prevent or punish" Plaintiffs' protesting); *id.* at 11 ("The defendants were expressly and explicitly authorized to use non-lethal force under the facts as alleged by the plaintiffs."); City Br. at 7 ("The City associates itself with the Commonwealth's excellent brief and joins the argument on this point in full.").

The FAC sets forth numerous factual allegations that the police's unconstitutional actions were attributable to City policy. For example, when Defendant Chief Gerald Smith took leadership over the RPD, he indicated to the press that RPD would continue to use tear gas where it saw appropriate. FAC ¶ 70. Chief Smith was not alone in attesting that the use of less-lethal weapons in the manner alleged in the FAC was conducted pursuant to City policy. After the first wave of protests and the police's use of force at those protests, Mayor Stoney admitted that "*we* violated your rights." FAC ¶ 5 (emphasis added). Given the City's uncontested, public adoption of the violence alleged in the FAC, this Court should not credit Defendants' sudden about-face claiming that the misconduct was outside the purview of the City.[2]

2. The FAC alleges a persistent custom with the force of law.

Plaintiffs have also alleged a practice so persistent and widespread as to constitute a permanent, well-settled custom with the force of law. "[W]here a municipal policymaker has actual or constructive knowledge of such a course of customary practices among employees subject to the policymaker's delegated responsibility for oversight and supervision, the custom or usage may fairly be attributed to the municipality as its own." *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987). Courts evaluating these claims—even when they have expressed skepticism of whether there was an affirmative municipal policy—have at least found that a failure to condemn the widespread and consistent use of indiscriminate crowd-control weapons gives rise to a finding of a "well-settled custom" under *Monell*. *See, e.g.*, *Breathe*, 2020 WL 5269789, at *5.

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[2] Moreover, the City's General Order setting forth its "Use of Force" policy is a judicially noticeable document permitting as City policy the use of force alleged in the Complaint. *See* Richmond Police Department General Order, Use of Force at 3 ("In the event that a situation escalates beyond the effective use of verbal diffusion techniques, officers are authorized to employ Department-approved compliance techniques, chemical agents (*See* General Order 1-8, Oleoresin Capsicum (O.C.) Spray and Fogger) and other issued defensive weapons (*See* General Order 1-7, Police Weapons)."), http://www.richmondgov.com/police/documents/UseofForceGO.pdf; *see also Ryan v. Commonwealth*, 219 Va. 439, 445 (1978) (courts may take judicial notice of "generally known or easily ascertainable facts").

The FAC alleges at least seven separate instances of such use over the course of two months. *See* FAC ¶¶ 32, 34, 35–36, 39, 40, 55–70. Defendants cannot suggest that they did not know of, and accede to, this pattern of force, given the City's numerous public statements defending that use of force as appropriate, and its clear attestations that it would continue to use such force where it saw fit. FAC ¶¶ 33, 70.

3. Defendants' arguments concerning the FAC's "lack of specificity" are unavailing.

Rather than contesting that the actions of the individual police officers in the events alleged were attributable to a City policy or practice, Defendants attempt to obfuscate the issue by claiming broadly that the FAC does not address the issue of "which policy, practice, or custom was at issue: the City's, the Commonwealth's, a combination of both or neither." City Br. at 5–6. Defendants' attempt to impose an elevated pleading burden by arguing that "lack of specificity is a fatal flaw," has no support in applicable law. None of the cases cited by Defendants stand for this proposition; the language misquoted by the City's Demurrer was specifically directed at vicarious liability claims, which are in no way relevant to this case. *See L.A. Cty. v. Humphries*, 562 U.S. 29, 36 (2010) ("A municipality cannot be held liable . . . solely because it employs a tortfeasor."); *Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[Municipalities] are not vicariously liable under § 1983 for their employees' actions.").

In any event, Plaintiffs have identified the specific policies, practices, or customs at issue. The FAC is directed at the "unconstitutional and dangerous policies and practices of [Richmond's] police department," FAC ¶ 18, and where applicable, identifies specific incidents where the VSP and VCP were called in to aid the RPD in using force to clear the streets, FAC ¶ 70. Plaintiffs set forth extensive factual allegations that multiple Richmond protests (FAC ¶ 4) were shut down violently by the RPD (FAC ¶¶ 5, 32–40), which despite leading to multiple changes in administration in the RPD (FAC ¶¶ 6–7), did not result in a change in the City's use of less-lethal

weapons against protesters (FAC ¶ 70). These allegations, and many more (FAC ¶¶ 2, 17, 30, 32, 35, 41, 42–46, 67, 68, 70), clearly identify the City's policy and custom of violently suppressing lawful protest. Plaintiffs' additional allegations that the VSP and VCP often acted alongside the RPD does not create any ambiguity regarding what "practice" Plaintiffs are challenging.

B. The Amended Complaint alleges facts stating a claim for excessive force under the Fourth Amendment (Count V).

The numerous allegations of overwhelming force in the FAC state an excessive force claim under the Fourth Amendment. Plaintiffs allege that beginning on the evening of May 25, 2020, and continuing through the filing of the FAC, Defendants consistently engaged in a "pattern of unnecessary, disproportionate, and life-threatening force" against demonstrators. FAC ¶ 2. These allegations include "repeatedly spray[ing] whole crowds of peaceful protesters with tear gas and other chemical irritants, us[ing] flash grenades, and fir[ing] rubber bullets at demonstrators." FAC ¶ 4. The FAC explains that this use of force was *indiscriminately* applied, even against demonstrators that were "peaceful and lawful." *Id.* Indeed, Plaintiffs allege that Defendants opted to use these tactics against protesters that were "fleeing," FAC ¶ 11; "without any warning," FAC ¶ 13; against photographers "at point blank range," *id.*; against "community medics who were tending to injured protesters," *id.*; against a student reporter "who loudly and continuously identified himself as a journalist covering the protests as he was being pepper sprayed," ¶ 40; and against a crowd of students penned in a street, trying to retreat. ¶¶ 62–66.

Defendants do not contest that the FAC pleads these allegations. Instead, they make only the separate factual argument that "[a] reasonable police officer in the State of Virginia would have correctly believed [this] use of force was authorized to [disperse] a crowd after the declaration of an unlawful assembly." State Br. at 11. A police officer's use of force violates a person's Fourth Amendment rights if that force is unreasonable "from the objective perspective of a reasonable

police officer on the scene." *Cromartie v. Billings*, 298 Va. 284, 257 (2020). The Virginia Supreme Court identifies three broad factors for making such a determination—(1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of officers or others"; and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* These factors are non-exclusive; courts may consider other "objective circumstances potentially relevant to a determination of excessive force." *T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018).

Defendants suggest an alternative standard: that because they were attacking what they deemed an unlawful assembly, their actions were presumptively lawful. State Br. at 9–11; City Br. at 7. This misses the point. By its text, the unlawful assembly statute itself requires that the force be "reasonably necessary." Va. Code § 18.2-411. Even assuming an unlawful assembly, the allegation in the FAC is precisely that the overwhelming force used by Defendants' was *not* "reasonably necessary" to effectuate the police's goal of public safety. Defendants' singular focus on whether there was an unlawful assembly implicitly asks this Court to adopt a dangerous proposition: that a declaration of an unlawful assembly effectively grants the police *carte blanche* to use *any* force to effectuate their goal of "[clear]ing the streets." State Br. at 10. That cannot be right. Moreover, Defendants' assertion that officers "dis[persing] or assist[ing] in dispersing a riot or unlawful assembly" have civil and criminal immunity, *id.*, misstates Virginia law. Defendants overlook a material qualifying clause in the statute: that for immunity to apply, the actions of the officers must have been "reasonably necessary under all the circumstances." Va. Code § 18.2-412.

The allegations in the FAC are more than sufficient to state a claim that Defendants' use of indiscriminate force against Plaintiffs was *not* "reasonably necessary under the circumstances."

Video evidence cited in the FAC establishes that during the protests, the police used brutal force against protesters even as those protesters were retreating. *See* FAC ¶¶ 64, 99 n.36. Numerous allegations establish that Defendants used tear gas and rubber bullets against demonstrators that did not pose a threat sufficient to justify the use of force. *See* FAC ¶ 4 (spraying crowds with tear gas and rubber bullets), ¶ 6 (use of force against student demonstrators), ¶ 13 (use of force against medics and photographers); ¶ 40 (use of force against student journalist), ¶ 62 (use of force without warning), ¶ 64 (use of force against trapped protesters), ¶ 66 (use of force against fleeing protesters). Courts across the country have held that allegations like those in the Complaint support a claim for excessive force. *See, e.g.*, *Black Lives Matter Seattle*, 2020 WL 3128299, at *4 (testimony that plaintiffs were "peacefully protesting" sufficient to establish likelihood of success on claim for excessive force, even where many protesters were "engaging in minor property crime" and offering "passive resistance"); *Don't Shoot Portland*, 2020 WL 3078329, at *3 (evidence that protesters were attacked with tear gas while trying to follow orders, even while others "th[rew] water bottles and fireworks at the police," sufficient to establish likelihood of success on Fourth Amendment claim excessive force claim); *Anti Police-Terror Project*, 2020 WL 4584185, at *13–14 (excessive force claim likely to succeed where crowd-control weapons were used indiscriminately, and where plaintiffs were attempting to disperse but were not able to); *Breathe*, 2020 WL 5269789, at *3 (video evidence of force used against peaceful protesters sufficient to show likelihood of success on excessive force claim); *Abay*, 445 F. Supp. 3d 1286, 1291–92 (D. Colo. 2020) (excessive force claim likely to succeed where video evidence shows violence against medics and journalists).

At bottom, Defendants are merely making a jury argument—seeking to defend their actions as "reasonable" despite the contrary factual allegations in the FAC (¶¶ 98–101)—that cannot be

resolved on demurrer. *See Fidelity Nat'l Title Ins. Co. of New York v. So. Heritage Title Ins. Agency, Inc.*, 1997 WL 33575586, at *1 (Va. Cir. Ct. June 12, 1997) ("The function of a demurrer is merely to test whether the plaintiff's pleading states a cause of action upon which relief can be granted . . . . The court's ruling does not involve consideration of disputed facts but rather is confined to issues of the legal sufficiency of the allegations.").

C. The Amended Complaint alleges facts stating a claim for First Amendment retaliation (Count IV).

Plaintiffs have also pled a claim under the First Amendment. "The First Amendment right of free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suerez Corp. Industries v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). Courts around the country have evaluated "First Amendment protest claims" based on a retaliation framework requiring plaintiffs to show (1) protected speech, (2) that the retaliatory action adversely affected the speech, and (3) that the speech had a causal relationship with the defendant's retaliatory action. *See, e.g., Don't Shoot Portland v. City of Portland*, 2020 WL 3078329, at *3 (D. Or. June 9, 2020); *Abay*, 445 F. Supp. 3d at 1286. Plaintiffs have pled each of these prongs.

1. Plaintiffs' speech was protected under the First Amendment.

Plaintiffs were engaging in constitutionally protected speech under the First Amendment when they were protesting police brutality. *See* FAC ¶¶ 15–17. The First Amendment "safeguards an individual's right to participate in the public debate through political expression and political association." *McCutcheonson v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014). Starting in late May 2020, Plaintiffs "joined the nationwide protests against the death of George Floyd and other acts of violence perpetrated by police officers against the African American community." *See* FAC ¶¶ 9–16, 27–30. *See Don't Shoot Portland*, 2020 WL 3078329, at *1. Courts around the

country have found that protesters similarly situated to Plaintiffs "were engaged in constitutionally protected activity through organized political protest." *See Abay*, 445 F. Supp. 3d at 1292; *Don't Shoot Portland*, 2020 WL 3078329, at *3.

Defendants' suggestion that Plaintiffs are asserting a First Amendment right to engage in an unlawful assembly mischaracterizes the FAC. *See* State Br. at 8. It is uncontested that time, place, and manner restrictions can reasonably limit the scope of how protesters take to the streets. It is also uncontroversial that the police are permitted to use reasonable, targeted force to disperse a riot. But Plaintiffs specifically allege, through documentary and video evidence, that the police as a matter of course used *excessive* force against *peaceful* protesters specifically because of Plaintiffs' views. *See* FAC ¶¶ 93, 99 & n.36. Moreover, Defendants across the country have argued that violence at Black Lives Matter protests categorically preclude the protesters' speech from being protected under the First Amendment, but these arguments have been routinely denied. *See, e.g.*, *Black Lives Matter Seattle-King Cty. v. City of Seattle*, 2020 WL 3128299, at *3 (W.D. Wash. June 12, 2020) (protests were "clearly protected by the First Amendment" despite agreement by both parties that protesters launched objects at police); *Anti-Police Terror Project v. City of Oakland*, 2020 WL 4584185, at *5 (N.D. Cal. Aug. 10, 2020) (protests protected under First Amendment protection despite Defendants' claims concerning incidences of violence).

2. Defendants' actions adversely affected Plaintiffs' First Amendment rights.

The Complaint alleges that Defendants' use of overwhelming and indiscriminate force adversely affected Plaintiffs' First Amendment rights. As courts in similar cases have explained, "[c]itizens should never have to fear peaceful protest on the basis of police retaliation, especially not when protesting that very same police violence." *Abay*, 445 F. Supp. 3d at 1292. The FAC sets forth numerous allegations that Defendants' indiscriminate use of force has caused plaintiffs to fear for their safety when attending protests, FAC ¶¶ 10, 11, and that they suffer "severe anxiety"

due to the police violence they endured, FAC ¶ 13. Moreover, the FAC alleges that VSPN has "already diverted and will need to continue to divert resources" from its public education mission to address the issue of police brutality. FAC ¶ 9. As other courts have held, such allegations plead an adverse effect on protesters' First Amendment rights. *See, e.g.*, *Anti-Police Terror Project*, 2020 WL 4584185, at *14 (descriptions of being "terrified, traumatized, and suffering physical injuries and panic attacks" sufficient to establish adverse effect on speech); *Don't Shoot Portland*, 2020 WL 3078329, at *3 (concession that use of tear gas presumptively constituted adverse effect); *Black Lives Matter Seattle*, 2020 WL 3128299, at *3 (allegations of anxiety and worry relating to attending protests due to exposure to tear gas sufficient to show adverse impact on speech).

3. Defendants' actions were based on the content of Plaintiffs' speech.

The FAC alleges a clear causal relationship between Plaintiffs' exercise of their First Amendment rights and Defendants' unnecessary use of force. The FAC alleges that "[t]he intention and effect of Defendants' practice was to suppress Plaintiffs' demonstrations and the viewpoints they represented." FAC ¶ 93. Defendants engaged in unprovoked assaults on Plaintiffs—including indiscriminate use of tear gas and rubber bullets—*because* Plaintiffs were protesting police brutality. *See id.* That Defendants targeted not only the people they claim "barricaded" the street, but also people that posed no threat, is presumptive evidence of this causal relationship. *See* FAC ¶ 13 (photographer and community medics); 63 (indiscriminate use of force into crowd); 66 (less-lethal weapons used against retreating protesters).

Courts around the country have uniformly found that evidence of the police's indiscriminate use of force can establish a causal link between the viewpoints expressed and the brutal tactics used to stifle them. *See Black Lives Matter Seattle*, 2020 WL 3128299, at *4 ("The use of indiscriminate weapons against all protesters—not just the violent ones—supports the inference that SPD's actions were substantially motivated by Plaintiffs' protected First

Amendment activity."); *Don't Shoot Portland*, 2020 WL 3078329, at *3 (allegations that police used less-lethal weapons against people who were "calmly walking," "attempt[ing] to leave," and "trying to go home" give rise to reasonable inference of intent to interfere with constitutionally protected expression); *Anti-Police Terror Project*, 2020 WL 4584185, at *14 (use of force against journalists and protesters that were not "engaged in illegal activity or posed a threat of any kind" gives rise to inference of causation); *Breathe v. City of Detroit*, 2020 WL 5269789, at *4 (indiscriminate use of less-lethal weapons "may alone be enough to support the inference that the police officers were at least partially motivated by Plaintiffs' protected activity").

III. PLAINTIFFS ADEQUATELY ALLEGE A VIOLATION OF THEIR RIGHTS UNDER STATE LAW IN COUNTS I, II, AND III.

A. Article I, Section 12 of Virginia's Constitution confers a private right of action.

Defendants seek to dismiss Counts I, II, and III by contending that Article I, Section 12 does not confer a private right of action for two reasons: (1) because the provision is not self-executing and therefore does not confer a private right of action for Plaintiffs to bring suit; and (2) because Article I, Section 12 prohibits only conduct by the General Assembly. *See* State Br. at 4–5. This Court declined to definitively rule on these issues in its Order on Plaintiffs' Motion for a Temporary Injunction. *See* TRO Order at 3. Article I, Section 12 does provide a private right of action for Plaintiffs to bring suit, as demonstrated by its plain language, as well as other courts' interpretations of near-identical provisions.

When a Virginia constitutional provision does not expressly declare itself self-executing, the Supreme Court of Virginia directs courts to look to three indicia of self-executing provisions to determine whether plaintiffs have a private right of action: (1) whether it is in a bill of rights; (2) whether the provision is of a negative character; and (3) whether the provision supplies a

sufficient rule by means of which the right may be employed and protected. *See Gray v. Sec. of Transp.*, 662 S.E.2d at 71–74.

All three indicia are present here. First, Article I, Section 12 is in the Virginia Bill of Rights. *See* TRO Order at 3. Second, the provision is of a negative character. It provides that freedoms of speech and press "can never be restrained," and that the General Assembly "shall not pass any law" abridging those rights. Va. Const. art. 1 § 12. Third, this prohibitory language supplies a sufficient rule by which the right may be employed and protected—namely, the government is prohibited from "restrain[ing]" or "abridging" Virginian's "freedom of speech" or "assembly." *Id.* Both state and federal courts have tacitly endorsed this position and allowed plaintiffs to move forward on private claims under Article I, Section 12. *See Elliott v. Commonwealth*, 267 Va. 464, 476 (2004) (finding statute unconstitutionally overbroad in private suit brought under Article I, Section 12); *Willis v. City of Va. Beach*, 90 F. Supp. 3d 597, 607–08 (E.D. Va. 2015) (declining to dismiss claims under Article I, Section 12 of Virginia constitution on other grounds).

This reading is consistent with how the U.S. Supreme Court interprets the federal First Amendment. The First Amendment reads, near identically to Section 12, that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . ." *See* U.S. Const. amend. I (emphasis added). Like Section 12, the First Amendment only proscribes the legislature's actions in text, but is interpreted to constrain the entirety of government. *See generally, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 439 (1988) (applying First Amendment analysis to U.S. Forest Service's adoption of land management plan). Despite its similar brevity to Section 12, the First Amendment also has been interpreted to not require implementing legislation, establishing its own administrable rule.

See generally O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987). Section 12 therefore is self-executing.

B. The Amended Complaint alleges facts sufficient to state a claim under Article I, Section 12 of the Virginia Constitution (Counts I and II).

Just as Plaintiffs have alleged a First Amendment claim, *see* Part II.C, *supra*, Plaintiffs have adequately pled a claim under Article I, Section 12 of the Virginia Constitution. Courts have consistently held that the protections of Article I, Section 12 are "coextensive with the free speech provisions of the federal First Amendment," *Elliott*, 267 Va. at 473–74, and thus "the analysis is the same for both." *Willis*, 90 F. Supp. 3d at 607.

C. Plaintiffs were not engaged in an unlawful assembly.

Defendants do not contest the allegations in the FAC that Plaintiffs "did not witness any violence or threatened violence directed at any person or property" during the June 22 protest, FAC ¶ 60, and that the "'teach-in' continued peacefully into the evening," FAC ¶ 57. Instead, Defendants make the separate assertion that Plaintiffs' blockage of the streets, without more, constituted an unlawful assembly. Defendants' interpretation is untenable for at least three reasons.

First, Plaintiffs' peaceful blocking of the street, FAC ¶¶ 58–59, was not an act of "unlawful force or violence likely to jeopardize seriously public safety, peace or order" that the statute requires before police may declare an unlawful assembly. Va. Code § 18.2-406. Even at common law, an "unlawful assembly" could occur only when there was "open force or . . . conduct . . . to cause firm and courageous persons to apprehend a breach of the peace. In effect . . . conduct which constitutes a riot." *Unlawful Assembly*, Wharton's Criminal Law § 541 (15th ed. 2020).

Second, nothing indicates that any members of the public felt a "well-grounded fear of serious and immediate breaches of public safety, peace or order," which must also be present

before police may declare an unlawful assembly. Va. Code § 18.2-406. To the contrary, Plaintiffs allege that "protesters ensured that people could exit and enter the space safely." FAC ¶ 59.

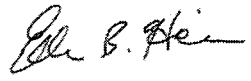
Third, the Virginia criminal code has a separate provision specifically targeted at the blockage of public streets, Va. Code § 18.2-404, which prohibits unnecessarily obstructing the free passage of others and explicitly contemplates a different classification for protesters who "fail or refuse to cease such obstruction or move on when requested to do so." *Id.* Under Defendants' interpretation, every street blockage under that code section would also be an unlawful assembly and would improperly render Va. Code § 18.2-404 mere surplusage. *Garrison v. First Federal Savings and Loan of S.C.*, 241 Va. 335, 340 (1991) ("[N]o part of an act should be treated as meaningless unless absolutely necessary."). This Court should decline to accept Defendants' attempts to distort the unlawful assembly statute well beyond its intended scope, and far outside the regulatory scheme intended by the Virginia legislature.

CONCLUSION

Plaintiffs have brought an action grounded in well-established caselaw to stop Defendants from continuing to violate Plaintiffs rights under the U.S. and Virginia Constitutions. None of Defendants' substantive or procedural grounds for demurrer have any merit, and Defendants' Demurrers should be denied in their entirety. To the extent the Court concludes that Plaintiffs have not sufficiently pled some necessary facts, Plaintiffs respectfully request leave to file a second amended pleading.

Dated: November 6, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November 2020, I served a true copy of the foregoing Consolidated Memorandum of Law in Opposition to Defendants' Demurrers via email to:

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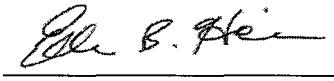
Respectfully submitted,



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