

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

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

Plaintiffs,

v.

**CITY OF RICHMOND, RICHMOND
POLICE DEPARTMENT, WILLIAM
“JODY” BLACKWELL, 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,**

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. _____

COMPLAINT

JURY TRIAL DEMANDED

COMPLAINT

1. Plaintiffs file this action seeking an order restraining the City of Richmond, the Richmond Police Department, William “Jody” Blackwell, in his official capacity as Interim Chief of the Richmond Police Department, the Virginia State Police, and Gary T. Settle, in his official capacity as Superintendent of the Virginia Department of State Police, from violating protestors’ protected rights to free speech and assembly under the Virginia Constitution. Plaintiffs seek injunctive relief and a declaratory judgment.

NATURE OF THE ACTION

2. This case is about the City of Richmond, the Richmond Police Department (“RPD”), and the Virginia State Police (“VSP”) using unnecessary and life-threatening force against peaceful demonstrators outside of 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 protestors 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.

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>.

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.

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. A horrified nation watched as a Minneapolis police officer pinned Mr. Floyd’s neck under his knee for over eight 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 to protest police brutality and racial inequality, including acknowledging Virginia’s own historic role in perpetuating these inequities. As the state’s capital, Richmond continues to be a singularly appropriate location for Virginians to peaceably assemble to petition their government for the redress of grievances.

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 protestors.³ Subsequently, on June 19, 2020,

² 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>.

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->

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

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 community members. 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 to restrict, frustrate, and deter protestors 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,

chief-says-richmond-needs-to-take-our-community/article_e706c6c0-4a91-58e2-9c5a-21c517db8257.html.

⁴ ABC News, *RPD Issues Reminder About "Unlawful Assemblies" Following Violent Gatherings*, available at <https://www.nbc12.com/2020/06/19/rpd-issues-reminder-about-unlawful-assemblies-following-violent-gatherings/>.

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

and VSP from continuing to respond to peaceful protests with unconstitutional and indiscriminate violence.

13. Plaintiffs seek injunctive and declaratory relief because, despite apologies and admissions that they have violated protestors' rights, Defendants continue to violate Plaintiffs' constitutional rights through the use of overwhelming and unnecessary force.

PARTIES

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.

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 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.

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 bruised and swollen at the time of filing. 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 will hurt him if he continues to exercise his rights.

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 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.

18. Plaintiff organizations have 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, including the rights of free speech and assembly. Those rights were violated by Defendants on or around June 22, 2020, and there is an imminent risk of their being violated again at upcoming demonstrations absent immediate intervention by this Court.

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, including the right to assemble with others and the right to freedom of speech. Those rights were trampled by Defendants on or around June 22-23, 2020 and risk being violated again at upcoming demonstrations absent immediate intervention by this Court.

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.

21. Plaintiffs bring this action to restrain the City of Richmond, RPD, and VSP from continuing to respond to peaceful protests with unconstitutional force by abusing Virginia's unlawful assembly statute. The Virginia Constitution grants 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.

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 which will recur unless enjoined by the Court.

23. Defendant William "Jody" Blackwell ("Chief Blackwell") is an adult citizen and resident of the City of Richmond and Interim Chief of the RPD. He is sued in his official capacity for the planned, unconstitutional use of force against peaceful demonstrators on or around June 22-23, 2020, which will recur unless enjoined by the Court.

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, which will recur unless enjoined by the Court.

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, which will recur unless enjoined by the Court.

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, which will recur unless enjoined by the Court.

JURISDICTION AND VENUE

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.

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

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."

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.

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.

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 Virginia's constitution.

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.

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.

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.”⁶

36. These apologies and promises proved empty. Brutal police tactics against protesters in Richmond continued and the mistakes were not fixed. With public pressure mounting, on June 17, 2020, Mayor Stoney announced that he had requested that then-Chief Smith tender his resignation. Chief Blackwell was announced as the interim chief of RPD.⁷

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.⁸

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 § 18.2-406.⁹ 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

⁶ Manzanares, *supra* note 1.

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>.

⁸ Richmond, *supra* note 3.

⁹ 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>.

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.

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

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.¹⁰

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.

¹⁰ 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.

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).

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.

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

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.

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.”¹¹ More generally, tear gas exposure can have more severe effects on those with asthma such that it can trigger a fatal asthma attack.¹² 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.¹³ Breathing in tear gas can cause irritation of the nose, throat, and lungs; individuals typically experience choking, trouble breathing, nausea, vomiting, and other symptoms.¹⁴

¹¹ Centers for Disease Control and Prevention, *Toxic Syndrome Description*, available at <https://emergency.cdc.gov/agent/riotcontrol/agentpoisoning.asp>.

¹² 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>.

¹³ 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>.

¹⁴ See Healthline, *supra* note 12.

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.¹⁵

48. Pepper spray can be lethal. Between 1990 and 1995, at least 61 in-custody deaths followed police use of pepper spray on suspects.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹

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

¹⁵ 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>.

¹⁶ 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>.

¹⁷ 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>.

¹⁸ Medical News Today, *What Is Pepper Spray, and Why Is It Dangerous?*, available at <https://www.medicalnewstoday.com/articles/238262>.

¹⁹ 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>.

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.²⁰ 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.”

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.²¹ 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.

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.

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

²⁰ 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>.

²¹ Centers for Disease Control and Prevention, *Facts About Riot Control Agents Interim Document*, available at <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>.

54. The Plaintiffs, as member organizations 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.

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 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.

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.

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.²²

²² 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>.

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.

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.

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.”²³

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.

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.

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

²³ 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.

removed COVID-19-protective masks in desperation. This panic was captured on video by protestors at the scene.

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.

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.

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 Virginia Constitution.

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.

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 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.

COUNT I – VIOLATION OF RIGHT TO PEACEABLY ASSEMBLE

Virginia Constitution Article I, Section 12

69. All prior paragraphs are incorporated herein by reference.

70. Plaintiffs have a fundamental right to assemble under Article I, Section 12 of the Virginia Constitution.

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.

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.

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.

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.

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

76. All prior paragraphs are incorporated herein by reference.

77. Plaintiffs have a fundamental right to freedom of speech under Article I, Section 12 of the Virginia Constitution.

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.

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.

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.

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

82. All prior paragraphs are incorporated herein by reference.

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.

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.

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.*

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.

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.

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 was unlawful and violated Plaintiffs' freedom of speech and assembly rights under the Virginia Constitution.

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.

90. Given that Defendants have repeatedly issued unlawful assembly declarations against lawful protests against police brutality and are likely to do so again, Plaintiffs are entitled to a court order enjoining the manner and method of issuing and communicating 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.

PRAYER FOR RELIEF

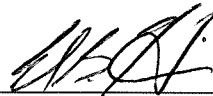
Plaintiffs respectfully request that the Court order the following relief:

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

TRIAL BY JURY IS DEMANDED

Dated: June 26, 2020

Respectfully submitted,



Eden B. Heilman (VSB No. 93554)
Nicole Gloria Tortoriello (VSB No. 91129)
Vishal Agraharkar (VSB No. 93265)
Jennifer Safstrom (VSB No. 93746)
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
jsafstrom@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 Johnson (VSB No. 88696)
Andrew Chang (pro hac motion to be filed)
Kayvan Farchadi (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