Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

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| **VIRGINIA STUDENT POWER NETWORK, NOAH SMITH, DIAMANTE PATTERSON, AND JIMMIE LEE JARVIS,** | |
| **Plaintiffs,** | |
| **v.** | **Case No.: CL20-2916** |
| **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.** | |

## ORDER SUSTAINING DEMURRER

## I. FACTUAL BACKGROUND

On June 22, 2020, in response to the death of George Floyd, 150 people gathered in Richmond, Virginia to protest against police, blocking public streets in front of Richmond City Hall. In the early hours of June 23, the event was declared an unlawful assembly pursuant to Virginia Code § 18.2-406. Protesters shouted in disapproval after unlawful assembly announcements were made, failed to immediately disperse, and otherwise stood their ground. Non-lethal crowd control weapons such as tear gas, pepper spray, rubber bullets, and flash bangs were then used to disperse the crowd.

On June 26, 2020, Virginia Student Power Network ("VSPN") and individual protesters filed a Complaint for declaratory judgment and injunctive relief. Contemporaneously, Plaintiffs filed an Emergency Motion for a Temporary Injunction. On June 30, 2020, this Court denied Plaintiffs' Motion. Thereafter, Plaintiffs filed an Amended Complaint setting forth five causes of action.

Counts I and II assert violations of Article I, Section 12 of the Virginia Constitution. Count III requests declaratory relief and alleges that Defendants violated Plaintiffs' freedom of speech and assembly rights under the Virginia and United States Constitutions. Counts IV and V are brought

pursuant to 42 U.S.C. § 1983 and allege violations Plaintiffs' First and Fourth Amendment rights. In response to Demurrers filed on behalf of all the Defendants[1] and following oral argument, the Court now rules as follows.

## II. STANDARD OF REVIEW

The purpose of a demurrer is to test whether a complaint states a cause of action. Va. Code § 8.01-273. "In reviewing the sufficiency of [the complaint] on demurrer, the trial court is required to consider as true all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the facts alleged." *Luckett v. Jennings*, 246 Va. 303, 307 (1993) (internal citations omitted).

In order to survive a demurrer, the complaint "must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122 (2006) (quoting *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440 (1967)). The facts, and all reasonable inferences flowing therefrom, are viewed in the light most favorable to the non-moving party. *See Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'rs*, 286 Va. 38, 44 (2013). In considering a demurrer, "the court may [] examine any exhibits accompanying the pleading." *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 210 (2010) (citing *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993)). In fact, a court "may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997) (citing *Fun v. Virginia Military Inst.*, 245 Va. 249, 253 (1993)).

## III. DISCUSSION

### A. Individual Plaintiffs' Standing

Defendants argue the individual Plaintiffs lack standing to bring all five causes of action. As to Counts I and II, Defendants aver that Article I, Section 12 of the Virginia Constitution is not self-executing and therefore does not create a private right of action. Regarding Counts III, IV, and V, Defendants argue that the requested relief is based wholly on future and speculative facts.

#### 1. Counts I and II – Virginia Constitution

As this Court has already held, Plaintiffs cannot sustain a cause of action under Article I, Section 12 of the Virginia Constitution unless it is self-executing. *Gray v. Virginia Sec'y of Trans.*, 276 Va. 93, 103 (2008). "If a constitutional provision is self-executing, no further legislation is required to make it operative." *Id.* "A constitutional provision is self-executing when it expressly so declares." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681 (1985) (citing VA. CONST. art. I, § 8 as *prima facie* evidence). Absent express self-execution language, constitutional provisions are generally self-executing if they (1) appear in the Bill of Rights; (2) are provisions of a negative

[1] The named Defendants are the City of Richmond, the Richmond Police Department, Gerald Smith (in his official capacity as Chief of the Richmond Police Department), the Virginia Department of State Police, Gary Settle (in his official capacity as Superintendent of the Virginia Department of State Police), the Virginia Division of Capitol Police, and Anthony Pike (in his official capacity as Chief of the Virginia Division of Capitol Police).

character; or (3) "suppl[y] a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced." *Id.* at 681-82.

It is undisputed that Article I, Section 12 appears in the Bill of Rights and contains provisions of a negative character. *See* VA. CONST. art. I, § 12 (prohibiting the General Assembly from "pass[ing] any law abridging the freedom of speech or of the press."). However, the third indicia limits the right of action to only those circumstances in which a party challenges laws enacted by the General Assembly or ordinances adopted by localities.[2] *See Adams Outdoor Advert. v. City of Newport News*, 236 Va. 370 (1988) (ordinance regulating billboards); *Elliot v. Commonwealth*, 267 Va. 464 (2004) (constitutionality of a statutory provision); *Blue Horseshoe Tattoo, V., Ltd. v. City of Norfolk*, 72 Va. Cir. 388 (2007) (ordinance banning tattoos). Plaintiffs here do not bring such a challenge. Additionally, recent authority states that Article I, Section 12 is not self-executing. *See Jackson v. Castevens*, No. 7:18CV00362, 2020 WL 1052524, at *4 n.6 (W.D. Va. Mar. 4, 2020) (dismissing a prisoner's Article I, Section 12 claim because the provision is "not self-executing and thus doe[es] not provide an independent basis for a private right of action.").

The conclusion that Article I, Section 12 is self-executing only as to the General Assembly (and other lawmaking bodies) is further evidenced by the fact it "is coextensive with the free speech provisions of the federal First Amendment." *Key v. Robertson*, 626 F. Supp. 2d 566, 583 (E.D. Va. 2009) (quoting *Elliot v. Commonwealth*, 267 Va. 464, 473-74 (2004)). If the First Amendment were self-executing as to all branches of the government, Congress would not have needed to enact a law creating a private right of action for violations of citizens' First Amendment rights. *See* 42 U.S.C. § 1983. Because the individual Plaintiffs are not challenging the constitutionality of a law or ordinance, they lack standing to bring Counts I and II. Irrespective of the self-execution issue, Plaintiffs' cause of action fails for the reasons discussed in Section III.D.1, *infra.*

### 2. Count III – Declaratory Judgment Action

Plaintiffs ask this Court to declare that the June 22-23 incident did not pose a "clear and present danger of violent conduct" and that their constitutional rights were violated and are likely to be violated again in the future. Pls. Am. Compl. ¶¶ 90-91.[3] To establish standing, they must have "a 'justiciable interest' in the subject matter of the proceeding[.]" *W.S. Carnes, Inc. v. Bd. of Sup'rs of Chesterfield Cty.*, 252 Va. 377, 383 (1996). A justiciable interest exists when there is "an actual controversy between" the parties "such that [the Plaintiffs'] rights will be affected by the outcome of the case." *Id.* The actual controversy "must be one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment."

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[2] While Article I, § 12 has been discussed in other circumstances, those cases address the scope of the rights themselves rather than whether a private right of action exists. *See, e.g., Chaves v. Johnson*, 230 Va. 112 (1985) (finding that statements of opinion are protected under Article I, § 12 and cannot form the basis of a defamation action); *Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597 (E.D. Va. 2015) (discussing whether public employees were retaliated against by their employer for exercising their free speech rights); *Lee v. York Cty. School Div.*, 418 F. Supp. 2d 816 (E.D. Va. 2006) (analyzing a public school teacher's right to display religious materials in the classroom), *aff'd*, 484 F.3d 687 (4th Cir. 2007). Other cases focus on the scope of media rights in the context of judicial proceedings. *See, e.g., Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574 (1981); *Globe Newspaper Co. v. Commonwealth*, 264 Va. 622 (2002).

[3] Additional references to or quotations from Plaintiffs' Amended Complaint will be indicated by citing the corresponding paragraph number(s).

*Bd. of Sup'rs of James City Cty. v. Rowe*, 216 Va. 128, 132 (1975) (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964)).

Count III of the Amended Complaint rests solely on future and speculative facts. To proceed on Plaintiffs' request, the Court would have to assume that Plaintiffs will protest again and when they do, Defendants will declare an unlawful assembly and use crowd control tactics to disperse the crowd because they did so in the past. Such a determination requires the Court to speculate as to how the parties will act in the future. Therefore, the facts alleged are insufficient to confer standing upon the individual Plaintiffs because they have not asserted a justiciable controversy.

### 3. Counts IV and V – First and Fourth Amendments to the United States Constitution

Because Plaintiffs essentially seek to enjoin Defendants and do not seek damages, they have standing only where there is a real or immediate threat that they will suffer injury in the future. In *City of L.A. v. Lyons*, 461 U.S. 95 (1983), Lyons sought to enjoin the City and its police officers from using "chokeholds." *Id.* at 97-98. He feared that he would be subjected to chokeholds in the future which "threatened impairment of rights protected by the First, Fourth, Eighth and Fourteenth Amendments." *Id.* at 98. Lyons lacked standing to pursue his claim because he was unable to show, without engaging in speculation and conjecture, that "he was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105-10.

Plaintiffs claim they establish an actual controversy in this case simply by alleging "that the City ordered or authorized police officers" to deprive them of their constitutional rights. *Id.* at 106. That argument, however, misses a crucial part of the *Lyons* opinion.

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such a manner.

*Id.* at 105-06. To obtain standing under the *Lyons* rationale, Plaintiffs would have to allege (1) that they *will* protest again in the future; (2) that they *will* be confronted by Defendants; and (3) that Defendants *will*, without justification, declare the event an unlawful assembly and use force against Plaintiffs because Defendants were ordered or authorized to do so. However, Plaintiffs' allegations as to what may happen in the future are too speculative to satisfy this threshold.

Furthermore, the likelihood of any future injury to Plaintiffs has become more remote since the incident in question occurred. After the incident, Richmond's Mayor, Levar Stoney, announced that the then-interim chief of the Richmond Police Department, William Blackwell, was being replaced by Defendant Gerald Smith. ¶¶ 37, 70. Plaintiffs construe this change-in-authority argument as one that does not defeat standing but arguably renders the case moot. If the case is moot, Plaintiffs believe it falls under the "capable of repetition, but evading review" exception to the mootness doctrine. The same argument was set forth and disposed of in *Lyons*. The *Lyons* Court stated that that the exception "applies only in exceptional situations, and generally only where the named plaintiff

can make a reasonable showing that he will again be subjected to the alleged illegality." *Lyons*, 461 U.S. at 109. Here, like *Lyons*, Plaintiffs have not alleged that "reasonable showing."

Therefore, the Court finds that the individual Plaintiffs lack standing to bring Counts IV and V of their Amended Complaint.

### B. Organizational Standing

Plaintiffs seek to establish organizational standing on behalf of VSPN, a non-profit organization which focuses on "social, racial, and economic justice issues." ¶ 9. There are two ways in which an organizational plaintiff can obtain standing. First, an organization has "direct" or "individual" standing when the organization itself suffers injury. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013). An organization can also obtain representational standing which allows it to sue in a derivative capacity on behalf of its members. *Id.* at 183-84.

It is unclear in which capacity VSPN seeks to proceed.[4] To the extent VSPN is suing on behalf of its members, it lacks standing. Under Virginia law, an organization needs express statutory authorization to bring suit on behalf of its members. *See W.S. Carnes, Inc. v. Bd. of Sup'rs of Chesterfield Cty.*, 252 Va. 377, 383 (1996). Under federal law, an organization satisfies Article III and obtains representational standing when "(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." *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd.*, 48 Va. App. 35, 54 (2006), *aff'd sub nom. Philip Morris USA Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564 (2007).

As to Counts I, II, and III, VSPN cannot proceed in a representational capacity because it lacks statutory authorization to do so. As to Counts IV and V, the Amended Complaint neither identifies who VSPN's members are nor states how they would be able to establish standing.[5] *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (stating that an organizational plaintiff must specifically allege "that at least one identified member had suffered or would suffer harm); *S. Walk at Broadlands Homeowner's Ass'n, Inc.*, 713 F.3d at 183-85 (upholding the district court's judgment dismissing the plaintiff-organization because the complaint failed to identify a single member who suffered injury). Because VSPN cannot meet the first prong of the Article III representational standing test, VSPN lacks standing to bring Counts IV and V.

VSPN also fails to establish direct standing. Plaintiffs allege that Defendants' actions have

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[4] Plaintiffs argued that VSPN is suing as an organization, but the Amended Complaint suggests otherwise. Counts I and II assert that Defendants' actions have chilled Plaintiffs' *and their members'* rights under Article I, Section 12 of the Virginia Constitution. ¶¶ 75, 81. Similarly, Counts IV and V seek relief to ensure that Plaintiffs *and other persons similarly situated* will not suffer further violations of their rights under the United States Constitution. ¶¶ 97, 101.

[5] Prior to the hearing on Plaintiffs' Motion for a Temporary Injunction, Isabelle Han, the Executive Director of VSPN filed a declaration which identified two members of VSPN who attended the June 22-23 protest. However, neither they nor any named Plaintiff who may be a member of VSPN would have individual standing for the reasons discussed in Section III.A.3, *supra*.

caused VSPN to divert its resources, and VSPN "will need to continue to divert resources from its public education and organizing activities to ensur[e] fellows and event participants can exercise their rights safely." ¶ 9. However, the mere diversion of resources, without more, does not constitute a sufficient injury for purposes of standing. *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012).

In *Lane*, a non-profit gun rights organization alleged that it had suffered an Article III injury because it needed to divert resources in order to help its members navigate a new handgun law. *Id.* at 671, 674-75. Consequently, the organization could not spend those funds on its other goals. *Id.* at 675. The Court held that voluntary "budgetary choices" like spending money on legal action instead of education and research are not cognizable injuries. *Id.* To rule otherwise would be to imply standing for organizations with merely abstract concerns. *Id.*

Plaintiffs rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which is distinguishable from the case at bar. There, an organization dedicated to equal housing opportunities claimed that the defendant's racial steering practices "frustrated [its] counseling and referral services, with a consequent drain on resources." *Id.* at 368-69. The organization had standing because its ability to operate – *i.e.*, "to provide counseling and referral services for low-and moderate-income homeseekers" – was "perceptibly impaired" by the defendant's actions. *Id.* at 379. By contrast, nothing that the police allegedly did in order to respond to the protests in this case directly impaired VSPN's ability to provide its services or to function as an organization.

Similarly, in the recent case of *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020), the Court found that CASA, "a non-profit organization . . . that offers a wide variety of social, health, job training, employment, and legal services" to immigrants, did not have Article III standing to enjoin a rule adopted by the Department of Homeland Security. *CASA de Maryland, Inc.*, 971 F.3d at 236-41. The Court reasoned that, as was the case in *Lane*, "CASA's unilateral and uncompelled response to the shifting needs of its members cannot manufacture an Article III injury." *Id.* at 238. "Organizational injury, properly understood, is measured against a group's ability to *operate* as an organization, not its theoretical ability to *effectuate* its objectives in its ideal world." *Id.* at 239.

Here, VSPN has decided to devote its resources to challenge Defendants' allegedly unconstitutional practices. Additionally, after nationwide protests began it decided to shift its focus to specific issues within its general mission. For instance, VSPN previously helped "register voters, engage in public education, [and] encourage [others] to engage in advocacy[.]" ¶ 9. After George Floyd's death, however, VSPN decided to focus on "organizing peaceful protests . . . to raise awareness of social injustices, inequities in the criminal legal system, and [to] advocate for an end to violence[.]" ¶ 9. These general allegations show nothing more than VSPN's conscious decision to reprioritize its efforts and redirect its resources. Defendants' allegedly unconstitutional actions have in no way frustrated or impaired VSPN's mission to educate its members and the public about social, racial, and economic injustices. Therefore, VSPN also lacks direct standing as to all Counts.

### C. Liability Under § 1983

Pursuant to 42 U.S.C. § 1983, Plaintiffs assert federal claims (violations of their First and Fourth Amendment rights during the June 22-23 protest) against all Defendants.

### 1. The City of Richmond

Plaintiffs claim the City of Richmond is liable for depriving them of their constitutional rights. To establish municipal liability, they allege that the City maintained a policy or custom of ignoring or condoning acts of unconstitutional conduct.

Assuming, *arguendo*, that Plaintiffs did suffer a violation of their constitutional rights, *see* discussion *infra* Sections III.D.1, 3, "a municipality is only liable . . . if it causes such a deprivation through an official policy or custom." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)).

> Municipal policy may be found [1] in written ordinances and regulations, [2] in certain affirmative decisions of individual policymaking officials, or [3] in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens. Outside of such formal decisionmaking channels, a municipal custom may arise if a practice is so persistent and widespread and so permanent and well settled as to constitute a 'custom or usage' with the force of law.

*Id.* (internal quotations and citations omitted). Municipal liability cannot be predicated on a theory of *respondeat superior*, *Monell*, 436 U.S. at 691, and suits "most likely to slip into that forbidden realm" are those in which the plaintiff "alleges municipal omission – either a policy of deliberate indifference or the condonation of an unconstitutional custom." *Carter*, 164 F.3d at 218. When a plaintiff proceeds under that theory, "rigorous standards of culpability and causation" apply, and the plaintiff "cannot rely upon scattershot accusations of unrelated constitutional violations to prove" indifference or causation. *Id.* Rather, "a plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a *particular* constitutional or statutory right will follow the decision." *Id.*

In this case, Plaintiffs do not claim that their alleged injuries were caused by a formally enacted policy, ordinance, or regulation. Instead, they allege that the City and Gerald Smith (as Chief of the Richmond Police Department) were deliberately indifferent to their constitutional rights or otherwise condoned the City's unconstitutional custom. Their allegations supporting this theory, however, are insufficient for multiple reasons.

Plaintiffs seek to establish a policy or custom by drawing similarities between prior instances in which Defendants allegedly used force against citizens protesting police and the events that transpired during the June 22-23 protest. However, the prior protests occurred at various locations around the City and at different times of the day and night; ¶¶ 32, 34-36, they involved different police officers and protesters who are not parties to this action; and responding officers used different tactics to control varying sized crowds, ¶¶ 32, 34, 36. These prior instances are markedly different than the protest on June 22-23, when Plaintiffs admittedly erected barricades, "set up tents . . . on the street," and "blocked [] intersections." ¶ 58.

Aside from these distinguishing features, Plaintiffs' allegations fail to support either a theory of condonation or deliberate indifference. The City expressly stated that it did not condone the use

of force on peaceful protesters. ¶¶ 5, 33. Such express disapproval does not comport with Plaintiffs' theory of condonation. The City also indicated its lack of condonation or deliberate indifference by rotating through Chiefs of Police after significant media attention was given to certain protests. ¶¶ 5, 33, 70 (Chief Gerald Smith, who assumed his role after the June 22-23 protest, is the third person to serve as Chief since the nationwide protests began). Plaintiffs cannot claim a policy of condonation or deliberate indifference when the City replaced the responsible policymakers in an effort to change course.

Plaintiffs' allegations regarding prior protests are also insufficient to find a policy of deliberate indifference. Plaintiffs cite to prior instances in which non-lethal force was allegedly deployed against peaceful protesters; however, they do not allege that the City or the Police Department ever received any formal complaints or conducted any investigations of particular police officers. Furthermore, there was never any finding that previous police action during anti-police protests was unconstitutional. Therefore, the Court dismisses Plaintiffs' § 1983 action against the City.

### 2. Gerald Smith

Plaintiffs do not seem to allege that Gerald Smith is liable in his supervisory capacity, but even if the Amended Complaint could be read to do so, their claim fails. To assert supervisory liability, Plaintiffs must show, *inter alia*, an "affirmative causal link between [Gerald Smith's] inaction and the particular constitutional injury" they allegedly suffered. *Id.* (internal quotations and citation omitted). That link is affirmatively missing here: Gerald Smith was not Chief of the Richmond Police Department on June 22-23, and Plaintiffs do not otherwise allege that he possessed any supervisory authority at such time. ¶¶ 5, 70 (William "Jody" Blackwell, not Gerald Smith, was Chief of the Richmond Police Department on June 22-23).

Without grounds to impose supervisory liability, the official capacity claims against Gerald Smith fail because they are redundant with Plaintiffs' claims against the City. *See Kentucky v. Graham*, 473 U.S. 159, 163 (1985) (stating that suits against government officials in their official capacity are properly "treated as a suit against the entity" because the entity is "the real party in interest."). Here, the City of Richmond is the real party in interest. *See* Section III.C.3, *infra*. For these reasons, the Court finds Plaintiffs' allegations insufficient to impose liability against Gerald Smith pursuant to § 1983.

### 3. The Richmond Police Department

The Richmond Police Department "is not a suable entity separate and apart from the City of Richmond." *Dance v. City of Richmond Police Dept.*, No. 3:09-CV-423-HE, 2009 WL 2877152, at *4 n.3 (E.D. Va. Sept. 2, 2009) (citing *Davis v. City of Portsmouth,* 579 F. Supp. 1205, 1210 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir.1984)). As such, Plaintiffs' § 1983 claims against the Department fail.

### 4. The Virginia State Police and Virginia Division of Capitol Police

Plaintiffs sue both the Virginia Department of State Police ("VSP") and the Virginia Division of Capitol Police ("VCP") under § 1983. Under the doctrine of sovereign immunity, neither states nor arms of the state are "persons" subject to § 1983 liability, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989), and the grant of immunity extends to "a state's agencies, divisions, departments, and officials." *Ferrer v. Garasimowicz*, No. 1:13CV797, 2013 WL 5428110 (E.D. Va. Sept. 27, 2013), *aff'd sub nom. Ferer v. Garasimowicz*, 569 F. App'x 149 (4th Cir. 2014).

Plaintiffs acknowledge that VSP and VCP are agencies of the state. ¶ 23 (VSP "is a state law enforcement agency" designed to protect the Commonwealth); ¶ 24 (VCP "is a state agency" that "provid[es] services to state agencies, state employees, and elected officials."). Further, the Eastern District has concluded, and the Fourth Circuit has affirmed, that sovereign immunity precludes courts from "exercise[ing] subject-matter jurisdiction over" the VSP in a § 1983 action. *Ferrer*, 2013 WL 5428110, at *2, *aff'd sub nom. Ferer*, 569 F. App'x 149. Finding that such immunity protects the VCP for the same reasons, the Court dismisses Plaintiffs' § 1983 claims as asserted against VSP and VCP.

### 5. Gary Settle and Anthony Pike

Plaintiffs sue Gary Settle (Superintendent of the VSP) and Anthony Pike (Chief of the VCP) in their official capacities.[6] While the agencies they head enjoy the protection of sovereign immunity, claims for "prospective, injunctive relief" may be asserted against state officials when sued in their official capacities. *Moore v. Parsons*, No. 7:20-CV-00157, 2020 WL 4677408, at *2 (W.D. Va. Aug. 12, 2020) (citing *Ex parte Young*, 209 U.S. 123 (1908); *see also Will*, 491 U.S. at 71 n.10. Although this rule operates as an exception to the doctrine of sovereign immunity, it is not "implicated where there is not any ongoing violation of federal law and a plaintiff is simply trying to rectify the harm done in the past[.]" *Id.* (internal quotations and citations omitted).

To determine whether the exception applies, the Court must "conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). A plaintiff seeking to invoke the exception need not actually prove an ongoing violation of federal law, *D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x. 334, 338 (4th Cir. 2010), because the relevant inquiry is whether such violation was alleged. *See S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324 (4th Cir. 2008) (environmental groups alleging violations of the National Environmental Policy Act in connection with the proposed building of a bridge properly invoked the exception because they sought to enjoin defendants from moving forward until they fully complied with the Act); *Curling v. Sec'y of Ga.*, 761 F. App'x 927 (11th Cir. 2019) (action against state election officials challenging the use of electronic voting machines fell within the exception because defendants' actions and inactions, as alleged, continually violated plaintiffs' Fourteenth Amendment

[6] Aside from being named in the caption, Plaintiffs' allegations against Settle and Pike are conclusory, contain legal conclusions, and are otherwise unsupported by other facts they allege. *See* ¶¶ 20-21 (stating that Settle and Pike are being "sued in [their] official capacit[ies] for the planned, unconstitutional use of force against peaceful demonstrations on or around June 22-23, as well as other instances before and after that date[.]").

rights); *Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236 (4th Cir. 2020) (employee who was demoted and sought reinstatement fell within the exception as his race-discrimination claim constituted an ongoing violation of federal law).

Plaintiffs have failed to allege an ongoing violation of federal law. *See* discussion *infra* Sections III.D.1, 3. The alleged violations were sporadic and occurred in the past. Without such ongoing violation, Defendants Settle and Pike are not "persons" subject to § 1983 liability. As such, Plaintiffs' § 1983 claims against them fail.

### D. Merits of Plaintiffs' Claims

The Court finds that all Counts fail to state a claim as a matter of law.

#### 1. Counts I, II, and IV

The Amended Complaint alleges facts and incorporates evidence establishing that Plaintiffs and others were engaged in an unlawful assembly that authorities lawfully dispersed after repeated warnings to disperse were ignored. Plaintiffs incorporate into the Amended Complaint five videos that capture a portion of the events on June 22-23. ¶ 99 n.36. This footage and other allegations in the Amended Complaint clearly show that the crowd audibly acknowledged the declaration of an unlawful assembly and ignored instructions to disperse prior to the police deploying any force; protesters blocked public streets in front of Richmond City Hall with tents and construction barriers removed from construction sites nearby; they resisted instructions by using umbrellas and other shields; and the crowd fired police weapons back towards the approaching law enforcement officers. Plaintiffs refer to the occupied area as "Reclamation Square," ¶ 56, and admit that they planned to stay there overnight. ¶ 58. They set up barricades controlled by bike marshals charged with determining who could come and go. ¶ 59. In the early hours of June 23, Defendants declared the event an unlawful assembly. ¶ 61. As the Court stated in its June 30, 2020 Order, Defendants were justified in both determining the protest an unlawful assembly and dispersing the crowd. *See Owens v. Commonwealth*, 211 Va. 633 (1971); *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282 (E.D. Va. 1982).

As a matter of law, Plaintiffs' claims alleging violations of their freedom of speech, assembly, and petition rights fail because the allegations and videos show that Defendants acted reasonably and without a retaliatory motive. A retaliation claim under the First Amendment requires a plaintiff to show that "a causal relationship exists between [plaintiff's] speech and the defendant's retaliatory action." *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)). The same analysis applies to Plaintiffs' claims under Article I, Section 12 of the Virginia Constitution because the provisions thereof are coextensive with the First Amendment. *Key v. Robertson*, 626 F. Supp. 2d 566, 583 (E.D. Va. 2009).

In this case, the protest began sometime before 5:30 p.m. on June 22. ¶ 59. Defendants' allegedly unconstitutional actions occurred sometime after 12:42 a.m. on June 23, ¶ 61, after they had lawfully declared the protest an unlawful assembly. These allegations establish that it was the protesters' actions, not the content of Plaintiffs' message, which caused Defendants to declare the June 22-23 protest an unlawful assembly. Because Plaintiffs' cannot establish the required causal

link, they have failed to allege a claim for retaliation under both constitutional provisions. Finding there to be no violation of Plaintiffs' constitutional rights based on the pleadings and documents referenced therein, the Court can properly dispose of Plaintiffs' claims at this stage of the proceeding. *E.g.*, *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277 (W.D. Va. 2020).

Counts I, II, and IV require a finding that Plaintiffs' freedom of speech and assembly rights were violated; however, their allegations and videos contain facts sufficient to support Defendants' declaration of an unlawful assembly and subsequent actions. Therefore, the Amended Complaint fails to state a claim upon which relief may be granted.

**2. Count III**

For the reasons discussed in the Court's June 30, 2020 Order and Section III.A.2, *supra*, Plaintiffs' request for declaratory judgment fails as a matter of law because Defendants were justified in declaring the protest an unlawful assembly. Virginia courts cannot entertain an action for declaratory judgment if there is no "actual" or "justiciable" controversy. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Sup'rs*, 285 Va. 87, 98 (2013). If that prerequisite cannot be met, the declaration of the parties' rights would constitute "an advisory opinion that the court does not have jurisdiction to render." *Id.*

To entertain Count III, this Court would have to speculate that Plaintiffs will protest again in the future and Defendants will confront them and declare their protest an unlawful assembly without justification. *See City of L.A. v. Lyons*, 461 U.S. 95, 105-06 (1983). Because Plaintiffs' theory of relief implicitly requires the Court to entertain future and speculative facts, granting the requested relief would amount to an improper advisory opinion. Therefore, the Court finds that the Amended Complaint fails to assert a justiciable controversy and likewise fails to state a claim upon which relief may be granted.

**3. Count V**

In Count V, Plaintiffs allege that Defendants seized them (and other persons similarly situated) because they used objectively unreasonable force in dispersing the unlawfully assembled group of protesters. Claims of excessive use of force are analyzed under an objective reasonableness standard which requires the Court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" with "the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396-99 (1989). Reasonableness is measured in light of "the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 397. The non-exclusive factors "*Graham* encourages [the Court] to evaluate" are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018) (quoting *Graham*, 490 U.S. at 396). Ultimately, the Court must determine "whether the totality of the circumstances justified a particular sort of . . . seizure." *Id.*

The videos included in Plaintiffs' allegations, *see* ¶ 99 n.36, establish that Defendants used

force in response to protesters who (1) failed to immediately disperse[7] after being lawfully told to do so and therefore violated Virginia Code § 18.2-407; (2) armed themselves with defensive protection, such as umbrellas, attempting to nullify Defendants' obligation and efforts to disperse the crowd; and (3) actively attempted to thwart Defendants' efforts by launching Defendants' crowd control weapons back towards the line of law enforcement officers. While the individual Plaintiffs may not have participated in such acts, the totality of the circumstances shows that Defendants' use of non-lethal forms of force was taken to protect themselves and others from serious injuries. The facts alleged in the Amended Complaint and the videos attached thereto show that the force used was reasonable as a matter of law.

Plaintiffs argue that even if protesters were unlawfully assembled, Defendants were not permitted to use force against "peaceful protesters . . . without any basis in individualized determinations of conduct justifying such force." ¶¶ 99-100. But law enforcement officers' efforts to protect the public would be heavily constrained if, after declaring an unlawful assembly, they were required to pick and choose which protesters were acting unlawfully. *See Kessler*, 441 F. Supp. 3d at 291-92 (stating that Virginia's unlawful assembly statute does not require law enforcement officers to determine which protesters are "non-violent individuals"); *United Steelworkers of Am.*, 544 F. Supp. at 289 (stating, "[t]o require individual determinations of who is acting lawfully and who unlawfully would prove unduly burdensome. The ability of the police to restore order would be impaired; the restoration of order, unnecessarily slowed."). Put another way, it is not unreasonable to authorize the police to "clear the streets" after an unlawful assembly declaration is made. *United Steelworkers of Am.*, 544 F. Supp. at 289. In fact, they are statutorily permitted to "use such force as is reasonably necessary" to effectuate dispersal if those unlawfully assembled fail to immediately comply with dispersal orders. Va. Code § 18.2-411.

For the reasons discussed above, and notwithstanding the fact that no named Defendant is subject to § 1983 liability, Plaintiffs have failed to state a claim upon which relief may be granted.

## IV. CONCLUSION

For the reasons stated herein, the Court **SUSTAINS** Defendants' Demurrers to all Counts and **DISMISSES** Plaintiffs' Amended Complaint with prejudice.

Enter: 1/20/21

By: Beverly W Snukals

Judge Beverly W. Snukals

[7] After the unlawful assembly declarations were made via megaphone and "repeated at least" once more, ¶ 62, protesters stood their ground and began to chant: "Whose Street? OUR Street!" ¶ 99 n.36.