

July 28, 2020

Heather Mulloy  
Assistant Corporation Counsel  
City of Charleston  
180 Lockwood Drive  
Charleston, SC 29403

RE: Law enforcement response to protests

Dear Ms. Mulloy:

On June 2, 2020 the ACLU of South Carolina sent Charleston Police Department (“CPD”) Chief Luther Reynolds a letter regarding the police actions in and around Marion Square on the afternoon and evening of May 31, 2020. All of these police actions occurred before the City of Charleston (“City”) curfew went into effect that day at 6:00pm.

Our letter asked specific questions to allow us and the public to understand the CPD’s rationale for responding to a non-violent protest in riot gear with armored vehicles and, ultimately, deploying chemical agents against and engaging in the arrest of people exercising their fundamental right to protest. Our letter was an attempt to understand the decision-making by the CPD that led to these outcomes that afternoon and evening. While we thank you for responding via email on behalf of the City on June 22, 2020, your response served to further increase our concerns.<sup>1</sup>

The City’s response ignored the specific questions outlined in our letter. At approximately 3:30 pm on May 31, 2020 a group of people were peacefully protesting in Marion Square against police violence and for racial justice. CPD officers and other law enforcement officers arrived in Marion Square wearing pads, gas masks, and helmets, and were accompanied by at least one armored vehicle. Shortly thereafter, CPD and other officers further escalated the situation by indiscriminately launching tear gas and pepper balls at a group of people who were

---

<sup>1</sup> Email from Heather Mulloy to Frank Knaack, June 22, 2020 (on file with ACLU of South Carolina).

engaging in non-violent protest in a public space. Your response ignored these facts, and instead referred to a non-violent protest as a “civil disturbance.”<sup>2</sup>

The City’s response also attempted to use events that occurred on another day as the justification for the police violence on May 31, 2020.<sup>3</sup> Our letter focused on the actions by CPD and other officers on the afternoon and evening of May 31, 2020, and not on May 30, 2020 or later dates.

The actions by CPD officers on May 31, 2020 conflict with CPB Administrative General Orders and the U.S. Constitution.

### **Violations of CPD Administrative General Orders**

CPD cannot justify the use of excessive force against individuals by pointing to things that happened on another day. As CPD’s own Administrative General Order states, “[f]orce is to be regarded as an unusual procedure and an absolute last resort in police operations. Applied force should be limited to the force that is objectively reasonable and necessary under the circumstances existing *at the time force is applied.*”<sup>4</sup> When CPD officers chose to deploy force on May 31, 2020, there was no objectively reasonable case for those actions.

The use of chemical agents against people peacefully protesting is also a violation of CPD Administrative General Orders. According to CPD Administrative General Order 25, “the use of a chemical agent may be necessary in circumstances *where a serious danger to life and property exists* and other methods of apprehension would

---

<sup>2</sup> Email from Heather Mulloy to Frank Knaack, June 22, 2020 (on file with ACLU of South Carolina) (“To prevent a civil disturbance from escalating any further, groups were ordered to disperse and arrests were made for failure to obey a lawful order.”)

<sup>3</sup> Email from Heather Mulloy to Frank Knaack, June 22, 2020 (on file with ACLU of South Carolina) (“On the evening of Saturday, May 30, 2020, after a day of peaceful protests, an unprecedented riot broke out in Charleston’s central business district, with numerous instances of assault, arson, burglary and vandalism reported throughout the night. The following day, as unfolding events made it clear that there could be a repeat of the previous night’s violence, Charleston police enforced city laws against unpermitted public gatherings. To prevent a civil disturbance from escalating any further, groups were ordered to disperse and arrests were made for failure to obey a lawful order.”)

<sup>4</sup> City of Charleston Police Department Policy and Procedure Manual, Administrative General Order 23 Response to Resistance / Aggression, Effective Date: 02/01/08, Revised: 02/01/17, available at <https://www.charleston-sc.gov/DocumentCenter/View/16968/General-Order-23---Response-to-Resistance---Aggression> (emphasis added).

be ineffective or more dangerous.”<sup>5</sup> There is no objectively reasonable way to equate the peaceful protest on May 31, 2020 with “a serious danger to life and property,” nor is there an objectively reasonable way to claim that other methods of apprehension against passive protestors were not available.

Even those officers who did not use excessive force were in violation of CPD Administrative General Orders because they failed to intervene. As Administrative General Order 23 states, “[a]ny officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of such excessive force. Officers shall promptly report these observations to a supervisor.”<sup>6</sup> We witnessed no attempts by officers to prevent the use of excessive force.

### **Violations of the U.S. Constitution**

The act of declaring a protest in a public space as unlawful was an unconstitutional act by CPD. The right to gather and speak out against abuses of power by the government in traditional public forums is fundamental to our democracy and protected by the Constitution. Political expression related to public policy is the prototypical example of protected speech.<sup>7</sup> And, public parks like Marion Square are “prototypical” examples of public fora, and have long been considered a rightful place for political demonstrations.<sup>8</sup> The arrests and use of force against the individuals exercising the First Amendment right to protest were unconstitutional infringements on this fundamental right.

CPD’s response to protests and other mass assemblies should not involve militarized displays or mass violence, and CPD should never deploy indiscriminate weapons, such as tear gas, on any mass gathering or assembly. In addition to posing serious risks to people’s health and safety, such weapons almost by definition violate the right to due process and will seldom, if ever, constitute the least

---

<sup>5</sup> City of Charleston Police Department Policy and Procedure Manual, Administrative General Order 25 Less-Lethal & Lethal Weapons, Effective Date: 02/01/08, Revised: 05/13/20, available at <https://www.charleston-sc.gov/DocumentCenter/View/18918/General-Order-25---Less-Lethal-and-Lethal-Weapons> (emphasis added).

<sup>6</sup> City of Charleston Police Department Policy and Procedure Manual, Administrative General Order 23 Response to Resistance / Aggression, Effective Date: 02/01/08, Revised: 02/01/17, available at <https://www.charleston-sc.gov/DocumentCenter/View/16968/General-Order-23---Response-to-Resistance---Aggression>.

<sup>7</sup> Texas v. Johnson, 491 U.S. 397, 411 (1989).

<sup>8</sup> Hague v. C.I.O., 307 U.S. 496, 515 (1939).

restrictive means available to regulate conduct in the context of a protest. We are deeply disturbed that instead of protecting the rights of protestors on May 31, 2020, the CPD decided to violate their rights and trample on the Constitution. The fact that property had been damaged the night before does not and cannot justify overt police hostility toward peacefully protesting people the next day.

### **Additional Concerns**

Beyond violating CPD General Administrative Orders and the U.S. Constitution, as we hope you already know, so called “less than lethal” weapons can and have killed people<sup>9</sup> and caused other long-term health consequences.<sup>10</sup> These are weapons of last resort, not first. Nevertheless, our law enforcement thought it was appropriate to use them indiscriminately, a decision that would have been unjustifiable even in the best of times and is especially so during COVID-19. Experts have clearly warned that the use of tear gases threatens to worsen this respiratory pandemic.<sup>11</sup>

Additionally, in the context of COVID-19, CPD’s decision to arrest people instead of citing and releasing them risked escalating what was clearly at the time, and continues to be, a global pandemic.<sup>12</sup> As you know, jails are home to some of the most severe COVID-19 outbreaks in the country.<sup>13</sup> Yet, CPD participated in the arrest of multiple individuals for protesting.

---

<sup>9</sup> Graham Kates, *Flash grenades, rubber bullets and pepper balls: A look at “less than lethal” devices that can sometimes be fatal*, CBS News, June 4, 2020, available at <https://www.cbsnews.com/news/flash-grenades-rubber-bullets-and-pepper-balls-the-police-weapons-used-against-protesters/>.

<sup>10</sup> Center for Disease Control and Prevention, *Facts About Riot Control Agents Interim document*, available at <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp>.

<sup>11</sup> *Tear-Gassing Protesters During An Infectious Outbreak Called ‘A Recipe For Disaster’*, NPR, June 5, available at <https://www.npr.org/sections/health-shots/2020/06/05/870144402/tear-gassing-protesters-during-an-infectious-outbreak-called-a-recipe-for-disast>.

<sup>12</sup> This is assuming the CPD was justified in declaring a First Amendment protected activity to be unlawful. As discussed below, this is unlikely.

<sup>13</sup> Taylor Miller Thomas, *How U.S. Prisons Became Ground Zero for Covid-19*, Politico, June 25, 2020, available at <https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-coronavirus-in-prisons-338022> (“Eight of the top 10 coronavirus clusters in the country have been in jails and prisons, where inmates live in close quarters, sharing everything from cells to telephones.”). See also Letter to Chief Reynolds from the ACLU of South Carolina, Mar. 18, 2020, available at [https://www.aclusc.org/sites/default/files/field\\_documents/03.18.20\\_aclu\\_of\\_sc\\_coronavirus\\_criminal\\_justice\\_recommendations\\_.pdf](https://www.aclusc.org/sites/default/files/field_documents/03.18.20_aclu_of_sc_coronavirus_criminal_justice_recommendations_.pdf).

Again, we ask that you respond in writing to the following questions:

- What was the legal rationale for ordering protestors to disperse from Marion Square?
- Do you consider Marion Square to be a public forum? If not, why not?
- Why were law enforcement officers deployed in riot gear and accompanied by armored vehicles to a non-violent protest?
- Why did law enforcement conduct arrests of non-violent protestors?
- How did the COVID-19 pandemic and the acute threat of COVID-19 spread in jails impact your decision to arrest and jail non-violent protestors?
- Why did law enforcement choose to escalate from verbal commands to disperse to the use of weapons including gasses and “less than lethal” weapons, which have documented histories of causing death and severe bodily injury, against protestors who were non-violent?
- Why were de-escalation options not taken?
- What steps are you taking, including review of officer body-cam footage, to hold officers who used excessive force accountable?
- What steps are you taking to ensure that your officers respect the fundamental right to protest during future protests?

In addition to the concerns raised in our letter dated June 2, 2020, we have since learned that following the police violence in and around Marion Square in the afternoon and early evening of May 30, 2020, CPD and other department officers continued their path of excessive force that evening in Charleston’s Eastside community where officers carried out their brutality against Black community members. This excessive, unprovoked police action is a part of a pattern against Black Eastside community members that cannot be ignored.

We are united in solidarity with Charleston’s Eastside residents who face police aggression. Residents’ calls for accountability have been dismissed by CPD leadership and other local and statewide law enforcement leaders whose officers executed this pattern of violence. It is unconscionable that law enforcement have chosen to disregard community concerns about police violence. It also highlights why procedural reforms will never be enough to end police violence.

Again, we ask that the CPD publicly apologize for the violent escalation that your officers took against peaceful protestors and Eastside residents and take immediate steps to hold your officers who participated in this police brutality accountable. Community trust will never exist when officers can engage in violence with impunity, which currently appears to be the case in Charleston.

Thank you for your time and please let me know if you have any questions.

Sincerely,



Frank Knaack  
Executive Director  
ACLU of South Carolina

Cc: The Honorable John Tecklenburg  
The Honorable Marie Delcioppo  
The Honorable Kevin Shealy  
The Honorable Jason Sakran  
The Honorable Robert M. Mitchell  
The Honorable Karl L. Brady, Jr.  
The Honorable William Dudley Gregorie  
The Honorable Perry K. Waring  
The Honorable Michael S. Seekings  
The Honorable A. Peter Shahid, Jr.  
The Honorable Harry Griffin  
The Honorable Ross A. Appel  
The Honorable Carol Jackson  
Chief Luther Reynolds