

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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In the matter of the Petition of

**THE CITY OF ALBANY,**  
Petitioner,

-against-

**OCCUPY ALBANY, OCCUPY ALBANY  
LEGAL GROUP, MARK MISHLER,  
as legal representative of OCCUPY ALBANY,  
JOHN DOE AND JANE DOE,**  
Respondents.

**NOTICE OF REMOVAL**  
Civil Action No. 1 : 11 -CV- 1524  
(NAM/ATB)

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To the Honorable Court:

The Respondents **Occupy Albany, Occupy Albany Legal Group, Mark Mishler, as legal representative of Occupy Albany, John Doe and Jane Doe**, respectfully remove this proceeding from the Supreme Court of the State of New York for Albany County to the United States District Court for the Northern District of New York based on the fact that this Court has original jurisdiction of the above-entitled action pursuant to 28 U.S.C.A. § 1331 (federal question jurisdiction) and the action is removable to this Court pursuant 28 U.S.C.A. § 1441(b) based on the following grounds:

1. On December 22, 2011, the Petitioner City of Albany served a copy of a Verified Petition on the Respondents. The Special Proceeding was filed in the Supreme Court for the State of New York for Albany County on December 22, 2011. It has been assigned Index Number 7983-11. A copy of the Verified Petition with exhibits, the Order to Show Cause, and the Memorandum of Law in support of the Petition are attached to this Notice as Exhibits A, B, C, and D respectively.

2. The Verified Petition seeks a permanent injunction against Respondents to enjoin Respondents from engaging in “an encampment” and from camping, tenting or sleeping within a public park known as Academy Park as part of a national protest movement against inequality in political representation; the failure of governmental bodies from the federal level to the local level to address the economic hardship millions of Americans are suffering and to seek reform of the political system in order to eliminate these injustices. An integral part of these nation-wide “Occupy” protests, including in Albany, has been the establishment of 24 hour encampments in public spaces to highlight the urgency of the crisis faced by this country and to further the goals of protected speech, protected peaceful assembly, protected petitioning of the government for redress of grievance and protected consultation for the public good.
3. On December 22, 2011, the Petitioner City obtained a Temporary Restraining Order from State Supreme Court and the return date for respondents to submit their opposition is December 28, 2011 at 4pm.
4. The City had executed the TRO before the Respondents had the opportunity to make their submission on December 28, 2011.
5. As noted in the Verified Petition the Respondents assembled and began using Academy Park which is adjacent to both the City of Albany and State of New York seats of government on October 21, 2011.
6. The activities of Occupy Albany were and are protected activities under the First Amendment to the U.S. Constitution as protected speech, protected symbolic speech, protected peaceful assembly, protected petitioning of the government for redress of grievances, and protected public consultation for the common good.

7. The City allowed the protest encampment until December 22, 2011.
8. During the period from October 21, 2011 to December 22, 2011 there was an ongoing dialogue between the parties and numerous meetings were held between representatives of the Respondents and representatives of Petitioner City.
9. During the course of these numerous discussions, the City raised concerns relating to health and safety issues regarding the encampment in Academy Park. These concerns were discussed and addressed by respondent Occupy Albany. In fact, the health and safety issues had been addressed to the satisfaction of the City as shown by the fact that on or about December 7, 2011 the City issued a permit for the use of Academy Park by Occupy Albany which extended until December 22, 2011.
10. As the date for the expiration of the City issued permit approached, further meetings and discussions took place between Petitioner and Respondents with the goal of working out a new agreement to continue past the December 22, 2011 permit expiration.
11. Respondents provided Petitioner with information and documentation to support the continuation of the encampment, including copies of agreements which had been reached in the cities of Rochester, NY, and Buffalo, NY, between their respective municipal governments and the local "Occupy" movements in those cities, each of which permitted ongoing encampments during the winter months.
12. These meetings between the City and representatives of Respondent Occupy Albany included a meeting late in the afternoon on December 21, 2011 where the Respondents presented the City with a detailed plan for winterizing the encampment, which included protocols for ensuring the health and safety of participants in the Occupy Albany encampment. Petitioner City informed the Respondents at the December 21, 2011

meeting that the City was not sure what it was going to do next, that it was considering the proposal made by Respondent Occupy Albany and that the City would be back in touch with the representatives of Occupy Albany. No further contact was made from the City to Respondents until after the City had filed this Petition and had obtained the TRO.<sup>1</sup>

13. The City's Verified Petition for a permanent injunction arises under federal law, namely, the First Amendment to the U.S. Constitution because in order to obtain the relief it seeks the City must show that the First Amendment to the Constitution permits the issuance of injunctive relief under the circumstances outlined in the Verified Petition.<sup>2</sup>

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<sup>1</sup>Respondents note that the City failed to follow proper procedures, *inter alia*, by seeking the TRO *ex parte*. See: 22 NYCRR 2027(f) requiring that a good faith effort be made by the party seeking a temporary restraining order to notify the party against whom the order is sought:

“Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.”

In addition, the purpose of a TRO is to preserve the status quo during the pendency of the legal proceeding, not to destroy the status quo, which is what the City sought and obtained without providing any notice to the Respondents or Respondents' representatives.

<sup>2</sup>The City asserts it took legal action primarily based on a purported City rule promulgated *after* the Occupy Albany encampment was well underway which purports to ban “camping” and/or the “erection of tents” in City parks. See, e.g., City's Memorandum of Law, p. 3. Respondents assert that this “rule” was promulgated improperly, that the promulgation was, itself, a violation of the First Amendment protected rights of Occupy Albany, that the “rule” is vastly and unconstitutionally over-broad and, in addition, is unconstitutional as applied to Occupy Albany on December 22, 2011. Thus, reliance on this purported “rule” emphasizes the important federal constitutional issues that are at the core of this litigation and provide a basis for this removal to U.S. District Court.

Respondents assert that the relief sought by the Petitioner would infringe upon the First Amendment protected activities of Occupy Albany.

14. In fact, the City goes to great lengths in the Verified Petition and its Memorandum of Law in support of the Petition to argue that the issuance of an injunction does not violate the First Amendment. (See Paragraphs 51, 58 -65 of the Verified Petition and Points I and II of the Memorandum of Law attached hereto as Exhibits A and D, respectively.) Respondents dispute the city's interpretation of the First Amendment, and, in fact, submit that the continuation of the Occupy Albany encampment was and will be protected activity under the First Amendment. See, e.g: *Spence v. Washington*, 418 U.S. 405 (1974) (First Amendment protects "symbolic" speech).
15. The City further claims throughout its Petition and Memorandum that it has "clean hands" because it purportedly does not desire to suppress First Amendment protected activities. The City cites federal case-law extensively in its Memorandum of Law.
16. In short, it is clear that an essential element of the City's prayer for equitable relief is their contention that the request for the injunction is permitted by the First Amendment and that the Temporary Restraining Order allowing the City to dismantle the camp does not violate the First Amendment.
17. Respondent Occupy Albany intends to oppose the City's request for a preliminary and permanent injunction against the encampment in Academy Park and, therefore, opposes the relief sought by Petitioner City.
18. Thus, this Court has original jurisdiction of the above-entitled proceeding in that "the case arises under federal law" because the resolution of the Verified Petition "depends on resolution of a substantial question of federal law." *Bracey v. Bd. of Educ. of City of*

*Bridgeport*, 368 F.3d 108,113 (2d. Cir. 2004) Also see *Ting v. University of Bridgeport*, 2011 WL 2222309 (D. Conn 2011) [where plaintiff brought a state law claim that was removed to federal court because it raised a federal issue involving the First Amendment, the issue was actually disputed and substantial and the balance between the judicial responsibility of the federal and state courts would not be disturbed.]

19. Both *Bracey* and *Ting* rely on *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) and *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S.1 (1983).
20. This Notice of Removal is filed within 30 days after service on removing party of the Verified Petition, Order to Show Cause and Memorandum of Law in support of the Verified Petition on December 22, 2011.
21. A copy of this Notice of Removal will be filed with the Clerk of the Supreme Court for the State of New York for Albany County in which this proceeding was commenced.
22. Also, counsel for the Petitioner City of Albany will be served with a copy of this Notice of Removal.

**WHEREFORE** , removing parties remove this proceeding from the Supreme Court for the State of New York for Albany County to this United States District Court for the Northern District of New York.

Dated: December 28, 2011

Respectfully submitted,

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