

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

BNY MELLON, NATIONAL ASSOCIATION  
and THE BANK OF NEW YORK MELLON,

Plaintiffs,

v.

OCCUPY PITTSBURGH, an unincorporated  
association, JANE DOES (1-50), and JOHN  
DOES (1-50),

Defendants.

CIVIL DIVISION

No.: GD 11-025549

**REPLY BRIEF IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Code: 003-Trespass Against Property Owner

Filed on behalf of Plaintiffs BNY Mellon,  
National Association and The Bank of New  
York Mellon

Counsel of Record for These Parties:

Daniel I. Booker, Esquire  
PA I.D. No. 10319  
Joel P. Aaronson, Esquire  
PA I.D. No. 28067  
Dusty Elias Kirk, Esquire  
PA I.D. No. 30702  
Michael E. Lowenstein, Esquire  
PA I.D. No. 34880  
Jeffrey G. Wilhelm, Esquire  
PA I.D. No. 201935  
Reed Smith LLP  
Firm I.D. 234  
225 Fifth Avenue  
Pittsburgh, PA 15222  
Telephone: 412.288.3131

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Defendants' position is unprecedented and indefensible. Defendants have taken BNY Mellon Green from BNY Mellon and, day after day, are depriving BNY Mellon of the ability to control what happens on its property. Regardless of their motives, Defendants are defiant trespassers, and the law simply does not permit their trespass to continue.

**I. BNY MELLON IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS.**

Defendants admit that BNY Mellon Green is "privately owned" by BNY Mellon. (Def. Br. 1). Defendants also admit that, on December 9, 2011, BNY Mellon delivered and posted at BNY Mellon Green a notice (the "Notice") that: (1) required the removal of tents, structures, camping equipment, and other stored personal items by noon on December 11, 2011; (2) stated that, after that time, camping overnight and structures, camping equipment, or stored personal items would be prohibited on the Green and "considered an unlawful trespass;" and (3) noted that BNY Mellon closes the Green each winter. (Compl. ¶¶ 45-46; Answer ¶¶ 45-46).

Defendants defied the Notice, tore it down, and announced that they had "reclaimed" the Green from BNY Mellon as the "People's Park." (Compl. ¶ 57; Answer ¶ 57; Reiser Aff. ¶¶ 38-44). Since then, Defendants have seized and held the Green as if it were their own property, obstructing BNY Mellon's ability to exercise its property rights. *Id.* The Green has been inaccessible to those who ordinarily would use it for short-term, quiet, passive recreation during warm weather, and it cannot be closed for the winter as usual. (Rose-John Aff. ¶¶ 16-25). Defendants' conduct is a trespass and nuisance.

Defendants maintain that they can hold the Green indefinitely because: (1) it is zoned as Urban Open Space; (2) it is a "dedicated" "public asset" by virtue of being built in part using tax increment financing; (3) BNY Mellon has given them an implied license to camp in perpetuity; and (4) BNY Mellon has unclean hands. (Def. Br. 37-46). These arguments lack merit.

- **Urban Open Space.** First, as the zoning approval documents make clear, the Green does not constitute “Urban Open Space.” Second, only the City may enforce Urban Open Space requirements. Third, even if the Green could be deemed Urban Open Space, Defendants would not have a right to set up a camp on it or hold it indefinitely to the exclusion of both the owner and the public. (Pl. Br. 4-9, 17-20).<sup>1</sup>
- **Dedication as a public asset via tax increment financing.** First, Defendants cite no authority to support their arguments about the Green being a “dedicated” “public asset” by virtue of being built in part using tax increment financing. Second, whether the Green was built in part using tax increment financing, BNY Mellon owns it; it was never offered to, or accepted by, the City as a public asset. Third, any conceivable dedication of the Green to public use would be limited by the intent of BNY Mellon, which would allow BNY Mellon to restrict its use to particular purposes (such as passing through or eating lunch) and for “particular seasons” (such as warm weather months) and not give Defendants a right to set up a camp or hold it indefinitely. *Coffin v. Old Orchard Dev. Corp.*, 186 A.2d 906, 910 (Pa. 1962); *Gowen v. Phila. Exch. Co.*, 5 Watts & Serg. 141, 1843 WL 5003, at \*2 (Pa. 1843).
- **“Irrevocable license.”** First, any implied license that may have been granted to Defendants was revocable at will by BNY Mellon and, in any event, terminated when they violated the guidelines provided to them. *Buffington v. Buffington*, 568 A.2d 194, 200-01 (Pa. Super. Ct. 1989); REST. 2D TORTS § 168 cmt. d.<sup>2</sup> Second, Defendants’ alleged expenditures on camping equipment are not the type of permanent improvement to real property necessary for an irrevocable license. *Pa. Game Comm’n v. Bowman*, 474 A.2d 383, 385-86 (Pa. Commw. Ct. 1984) (no irrevocable license for temporary cabin, lean-to, or house trailer). Third, Defendants cannot show that they actually relied on the alleged license; nor can they show that any actual reliance was “reasonable” or “detrimental” under the circumstances. *Buffington*, 568 A.2d at 200-01. Defendants’ assertion—that they acquired an irrevocable license to camp by soliciting donations or buying a small amount of equipment and clothing—is absurd.
- **Unclean hands.** This argument is a rehash of arguments about the Green being Urban Open Space and the Sidewalk not being lawfully constructed. Furthermore, prohibitions on occupying and camping on the Green and closing it for winter are commonsense measures to avoid dangers to people and property—the antithesis of inequitable conduct. Indeed, BNY Mellon has closed the Green each winter for a decade without complaint from the City of

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<sup>1</sup> Defendants argue that, if the Green is closed, the “Sidewalk” (which is BNY Mellon property adjacent to and not part of the Green) might not comply with the Americans with Disabilities Act or Code requirements. (Def. Br. 38-39). Yet, other fully accessible, public sidewalks border the Sidewalk and the streets around the BNY Mellon Complex. The Sidewalk’s features cannot transform the Green into Urban Open Space or give Defendants a right to hold the Green indefinitely.

<sup>2</sup> Defendants admit they did not seek consent (Def. Br. 6) and point to no express consent by BNY Mellon for their conduct. Their contention that BNY Mellon’s “Guidelines” for health and safety during their Occupation are a license to occupy the Green indefinitely is wrong. The Guidelines said no such thing and made clear that there would be a “duration” to the Occupation.

Pittsburgh. *Cf. McTernan v. City of York*, 577 F.3d 521, 527-28 (3d Cir. 2009) (handicapped entrance ramp to clinic built in part on government-controlled right-of-way was not a traditional public forum for purposes of free speech and assembly).

Simply put, BNY Mellon is likely to prevail on the merits of its trespass and nuisance claims.<sup>3</sup>

## **II. BNY MELLON'S INABILITY TO EXERCISE CONTROL OVER ITS PROPERTY BECAUSE OF DEFENDANTS' ACTIONS IS IRREPARABLE HARM.**

Defendants claim that BNY Mellon is not entitled to preliminary injunctive relief because it has failed to show that it is suffering immediate and irreparable harm on account of their seizure of BNY Mellon Green. This is wrong as a matter of law and fact.

It is settled that a *continuous* trespass or nuisance constitutes immediate, irreparable harm warranting preliminary injunctive relief to halt the offense, even in the absence of evidence of specific dangers or risks. *Stuart v. Gimbel Bros., Inc.*, 131 A. 728, 730 (Pa. 1926) (reinstating a preliminary injunction to enjoin a continuous trespass); *Westinghouse Elec. Corp. v. United Elec., Radio & Mach. Workers of Am.*, 118 A.2d 180, 181 (Pa. 1955) (reinstating a preliminary injunction of mass picketing that had seized property; holding that such a property seizure is “illegal” and “does not [receive] constitutional, statutory, common law or equitable protection”); *White v. Foley*, 54 Pa. D. & C. 4th 145, 150 (Pa. Ct. Com. Pl. 2001) (same), *aff'd without opinion*, 804 A.2d 71 (Pa. Super. Ct. 2002).<sup>4</sup>

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<sup>3</sup> Defendants offer no serious response to BNY Mellon's alternative nuisance claims. (Def. Br. 46-48). Their seizure of the Green is intentional and unreasonable and has deprived BNY Mellon, its tenants, employees, and guests of access to, and use of, the Green.

<sup>4</sup> None of Defendants' cited authorities involved a *continuous* trespass or seizure of another's property. (Def. Br. 14-18). Defendants' primary authority does not even involve a trespass. *See Routes 202 and 309 Novelties and Gifts, Inc. v. The Kings Men*, No. 11-CV-5822, 2011 WL 5084569, at \*4 (E.D. Pa. Oct. 14, 2011) (motion for reconsideration pending) (noting throughout that defendants were on a public right-of-way); *see also Wilkes-Barre Indep. Co. v. Newspaper Guild, Loc. No. 120*, 314 A.2d 251, 253-54 (Pa. 1974) (picketing did not obstruct owner's access to, or control of, property); *Coatesville Dev. Co. v. United Food & Comm. Workers, AFL-CIO*, 542 A.2d 1380, 1385 (Pa. Super. Ct. 1988) (en banc) (short-term picketing

Evidence of a danger to people or property, a risk of liability, or a risk of loss of good will is not required but also supports immediate relief. *E.g.*, *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196, 206 (Pa. Commw. Ct. 2006); *N. Penn Gas Co. v. Mahosky*, 378 A.2d 980, 981 (Pa. Super. Ct. 1977). Here, the record shows evidence of such dangers and risks. (Reiser Aff. ¶¶ 28, 31-36, 45-47; Rose-John Aff. ¶¶ 37-46). Day after day, BNY Mellon remains unable to manage the risk of serious harms to people using its property. This is an independent and additional basis for immediate injunctive relief.

### **III. ALL OTHER PRELIMINARY INJUNCTION FACTORS ARE SATISFIED.**

Defendants are wrong when they argue that an injunction would not preserve the *status quo* as it existed immediately prior to the alleged wrongful conduct. Even assuming Defendants had a privilege to be on BNY Mellon Green before the Notice, that privilege only can arise from BNY Mellon's consent. An injunction would preserve the status quo as it existed immediately prior to the alleged wrongful conduct by restoring BNY Mellon's ability to control access to, and activity on, the Green.

Defendants also are wrong when they claim that an injunction would cause them and others substantial harm and fail to serve the public interest. Defendants' assertions of harm to themselves, third parties, and the general public depend primarily on their legally erroneous assertion of a constitutional right to seize and hold BNY Mellon Green permanently. Furthermore, Defendants may engage in their conduct in other places lawfully, without creating a trespass or nuisance.

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that had ended and already was subject to injunction; decision not based on irreparable harm); *Indus. Park Dev. Co. v. EPA*, 604 F. Supp. 1136, 1144 (E.D. Pa. 1985) (clean-up by EPA contractor on undeveloped industrial site compensable at law where owner conceded that some contractor must be on the site).

#### **IV. FREE SPEECH AND ASSEMBLY GUARANTEES DO NOT GIVE DEFENDANTS A RIGHT TO SEIZE AND HOLD BNY MELLON GREEN PERMANENTLY.**

Defendants claim that BNY Mellon's right to preliminary injunctive relief is nullified by the U.S. and Pennsylvania Constitutions' free speech and assembly guarantees. Yet, Defendants cite *no case* where these guarantees have been held to give anyone a right to put up tents and other structures and camp indefinitely on someone else's private property. Such a claim has no support in the history of American law and is completely untenable.

**A. *BNY Mellon is a private party, not a state actor, and therefore is not constrained by any constitutional limits in the exercise of its property rights.***

The U.S. and Pennsylvania constitutional guarantees of free speech and assembly are limitations on the power of government and ordinarily “erec[t] no shield against merely private conduct.” *Hurley v. Irish-Am. Gay Group of Boston*, 515 U.S. 557, 566 (1995) (citation omitted); *W. Pa. Socialist Workers v. Conn. Gen. Life Ins.*, 515 A.2d 1331, 1335 (Pa. 1986). A private owner of property does not become the government for constitutional purposes merely because it allows or invites members of the public onto its property. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 556, 570 (1972) (privately owned property does not “lose its private character merely because the public is generally invited to use it for designated purposes”); *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (same); *W. Pa.*, 515 A.2d at 1336-37 (same). This is a bedrock principle of constitutional law.

The U.S. and Pennsylvania Supreme Courts have recognized an exception to this principle only in two, highly idiosyncratic situations. In both of these situations, the private owner had assumed broad powers and responsibilities that were traditionally the exclusive prerogative of the state. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (company could not prohibit leafleting on streets and sidewalks where it owned the entire town and provided all

customary municipal services including sheriff, fire, and postal service); *Commw. v. Tate*, 432 A.2d 1382 (Pa. 1981) (private college could not arbitrarily deny a permit for short-term, non-disruptive leafleting where it (1) had a post office and federal book depository on campus, (2) held itself out as a community center, and (3) allowed organizations to use facilities for public speeches by national officials).

Subsequent decisions confirm, however, that *Marsh* and *Tate* are limited to their particular facts and do not establish a general rule under either constitution that could transform a private property owner into a state actor whenever the owner allows or invites the general public to come on to its property for limited purposes. The U.S. Supreme Court made this crystal clear in *Hudgens v. NLRB*, where it held First Amendment free speech and assembly guarantees inapplicable to privately owned but publicly accessible shopping centers:

[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *State* action, not on action by the owner of private property. . . . Respondents contend . . . that the property of a large shopping center is ‘open to the public,’ serves the same purposes as a ‘business district’ of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

“The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama, supra*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.”

We conclude, in short, that . . . the constitutional guarantee of free expression has no part to play in a case such as this.

*Hudgens*, 424 U.S. at 519-21 (quoting *Lloyd Corp.*, 407 U.S. at 567-69) (emphasis added); *See W. Pa.*, 515 A.2d at 1336-37 (declaring *Lloyd* and *Hudgens* “correct” and “persuasive” under the Pennsylvania Constitution); *Crozer-Chester Med. Ctr. v. May*, 506 A.2d 1377, 1380-82 (Pa. Super. Ct. 1986) (under *W. Pa.*, a hospital and health services company were not state actors and could (1) bar demonstrators from privately owned roads, sidewalks, and parking areas without any constitutional scrutiny and (2) obtain an injunction to enforce that restriction).

Defendants cannot show that BNY Mellon’s ownership and control of the Green involves the broad exercise of traditional and exclusive government powers comparable to the company town in *Marsh* or the college in *Tate*. To the contrary, like the plaintiffs in *Crozer*, BNY Mellon is engaged in a quintessentially private effort to control access to, and activity on, its property. BNY Mellon is a private property owner, plain and simple.

***B. The concept of a “public forum” cannot be used to turn BNY Mellon into a state actor.***

Defendants argue the state action requirement “is not an issue in the matter” because BNY Mellon is performing a “public function” by owning and operating a “quintessential” public forum. (Def. Br. 26-28 & n.4, 41). But their effort to characterize BNY Mellon Green as a “public forum” and then to argue that BNY Mellon therefore stands in the shoes of the government is to no avail. As the U.S. Supreme Court has repeatedly made clear, the “public forum” doctrine governs the regulation of speech on government-owned property. *Hudgens*, 424 U.S. at 520-21. Indeed, it has expressly *rejected* the assertion that the mere “operation of a park” by a private party constitutes state action for constitutional purposes. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 & n.8 (1978) (holding that the state action found in *Evans v. Newton*, 382 U.S. 296 (1966), was based on very specific facts of that case, including (1) the transfer of a park from the government to a private party and (2) the government’s active involvement in the

subsequent management, “maintenance and care of the park”); *see also U.A.W., Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 908 (4th Cir. 1995) (private entity’s organization of a municipal festival in a park was not state action, in part because “the full-time management and operation of a park” is not considered “a traditionally exclusive government function”); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1217-18 (N.Y. 1985) (“[T]he shopping mall has taken on many of the attributes and functions of a public forum . . . , but the characterization or the use of property is immaterial to the issue of whether State action has been shown. Nor can the nature of property transform a private actor into a public one.”).

Defendants cite a hodgepodge of federal circuit and district court decisions that apply the First Amendment to privately owned property, but all are readily distinguishable. Most deal with situations where a historic, government-owned public forum was *transferred* to a private entity that either had a legal obligation to maintain the public forum or otherwise had continued to do so—circumstances that do not exist here.<sup>5</sup> None involves the indefinite seizure of property to the exclusion of the owner’s right to access and use it.<sup>6</sup>

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<sup>5</sup> *See, e.g., Freedom From Religion Found., Inc. v. Marshfield*, 203 F.3d 487 (7th Cir. 2000) (city’s sale of small parcel containing a religious monument did not avoid a state-endorsement of religion because the parcel was located within a city-owned park); *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937 (9th Cir. 2001) (sidewalk constructed on private property under an agreement among a private entity and state and local governments was subject to free speech and assembly guarantees; agreement required the entity to “replace” a government-owned sidewalk that was a historic “public forum” and dedicate the replacement to “unobstructed pedestrian access,” including expressive activity historically associated with the government-owned sidewalk); *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114 (10th Cir. 2002) (city’s sale of a street to a religious organization was not sufficient to change the status of the property as a government-controlled public forum subject to free speech guarantees, given an easement that the city retained); *Sumnum v. Duchesne City*, 482 F.3d 1263, 1270 (10th Cir. 2007) (city’s sale of small parcel containing a religious monument was not sufficient to change the property’s status as a government-owned public forum), *vacated*, 129 S. Ct. 1523 (2009).

<sup>6</sup> *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 453 (6th Cir. 2004), is the *only* case that remotely supports Defendants’ argument that a private party stands in the

Pennsylvania constitutional law also does not support Defendants' effort to use the concept of a "public forum" to circumvent the state action requirements. (Def. Br. 28-31 & n.4.) The *Tate* case does not hold, or even suggest, that the concept of a traditional public forum can be used routinely to transform a private party into a state actor. Moreover, as *W. Pa.* and *Crozer* make clear, *Tate* is an exceedingly narrow decision. *Coatesville*, 542 A.2d at 1383, also is unavailing: It arose under common law and did not involve any constitutional guarantees.<sup>7</sup>

Defendants insist that BNY Mellon Green "has been open to the public," "appears to any passerby to be a typical city sidewalk and plaza," and "is used by pedestrians as a public

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shoes of the government by creating and maintaining a public forum. However, the reasoning in *United Church of Christ* is irreconcilable with the U.S. Supreme Court's decisions in *Hudgens* and *Lloyd* and the Pennsylvania Supreme and Superior Courts' decisions in *W. Pa.* and *Crozer*. Furthermore, even *United Church of Christ* acknowledges that a public forum must have *all* the characteristics of a place that has been devoted to "public assembly and debate" by tradition or government fiat and that a private party can avoid creating a public forum by taking measures to limit and control access to, and activity, on the property as BNY Mellon has done here. Finally, the public forum and state action found in *United Church of Christ* is completely different factually from BNY Mellon Green and BNY Mellon's actions here to regain control of its property. *Id.* at 452-54 (sidewalk encircling sports complex was a "public forum" for short-term, nondisruptive expression because it was continuously open to the public and indistinguishable from adjoining government-controlled sidewalks; however, plazas, grassy areas, and internal streets of a sports complex were not "public fora" where the defendant historically had taken measures to limit mass assembly and expression on that part of the property).

<sup>7</sup> The majority of other states to consider the issue have declined to extend a state constitutional right of free expression to privately owned property simply because it was open to the public. These states include Arizona (*Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719 (Ariz. 1988)), Connecticut (*Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984)), Georgia (*Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8 (Ga. 1990)), Hawaii (*Estes v. Kapiolani Women's and Children's Med. Ctr.*, 787 P.2d 216 (Haw. 1990)), Illinois (*Illinois v. DiGuida*, 604 N.E.2d 336 (Ill. 1992)), Iowa (*Iowa v. Lacey*, 465 N.W.2d 537 (Iowa 1991)), Michigan (*Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985)), Minnesota (*Minnesota v. Wicklund*, 589 N.W.2d 793 (Minn. 1999)), New York (*SHAD Alliance*, 488 N.E.2d 1211), North Carolina (*North Carolina v. Felmet*, 273 S.E.2d 708 (N.C. 1981)), Ohio (*Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59 (Ohio 1994)), Oregon (*Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228 (Or. 2000)), South Carolina (*Charleston Joint Venture v. McPherson*, 417 S.E.2d 544 (S.C. 1992)), Texas (*Rep. Party v. Dietz*, 940 S.W.2d 86 (Tex. 1997)), Washington (*Southcenter Joint Venture v. Nat'l Dem. Policy Comm.*, 780 P.2d 1282 (Wash. 1989)), and Wisconsin (*Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987)).

thoroughfare and park” (Def. Br. 5, 25-28), and then argue that there is no legal difference between it and a traditional, government-owned public forum. No court has ever gone that far. Indeed, such a conclusion would run counter to the constitutional right to control one’s own private property and discourage private owners from opening their property to public use. In any event, for *any* property to take on the characteristics of a public forum it must have all the characteristics of a place that has been “devoted to assembly and debate by long tradition or government fiat.” *United States v. Kokinda*, 497 U.S. 720, 728-30 (1990) (post office sidewalk not a public forum); *Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc.*, 473 U.S. 798, 802 (1985) (federal charity drive not a public forum).

Those characteristics are absent here. BNY Mellon has assumed no legal obligation to make the Green broadly available to the public for purposes of assembly and expression and, in fact, has limited access to, and activity on, the Green in a manner consistent with private property. *Chicago Acorn v. Metro. Pier and Expo. Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (government-owned sidewalks, service street, and park-like recreational spaces on Chicago’s Navy Pier not a public forum). BNY Mellon has closed the Green for approximately four-and-a-half months of each year over the last decade and also instructed guests to leave for many reasons, including (1) sleeping, (2) sitting on the Green at night, and (3) skateboarding or bicycling. BNY Mellon has limited the use of the Green for any kind of public event or assembly. Since its opening a decade ago, BNY Mellon has conducted only a handful of employee picnics and gatherings on the Green. (Rose-John Aff. ¶¶ 16-28; Reiser Aff. ¶¶ 4-18). In no sense is there a tradition of any assembly or debate on the Green, much less Defendants’

indefinite and exclusive occupation. No matter how one looks at it, BNY Mellon is a private land owner, not a state actor.<sup>8</sup>

**C. *Defendants would have no constitutional right to camp indefinitely on BNY Mellon Green, as they are, even if it were a government-owned public forum.***

Even if BNY Mellon could be a state actor, Defendants' constitutional claims would fail. The continuous and indefinite occupation of property goes beyond the bounds of free expression protected by either the U.S. or Pennsylvania Constitution even in a traditional government-owned public forum. No person has the constitutional right to "stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). Although "city streets are recognized as a normal place for the exchange of ideas," this "does not mean that the freedom is beyond all control." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Even the government may impose reasonable time, place, and manner restrictions on the use of its property, including a government-owned park. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Most notably, in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984), the U.S. Supreme Court upheld the constitutionality of a National Park Service regulation prohibiting camping in Lafayette Park in Washington, D.C., even as applied to demonstrators who wanted to sleep overnight to dramatize the plight of the homeless. Moreover, although the Park Service *voluntarily* had allowed demonstrators to set up temporary tents, the Court made it

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<sup>8</sup> Defendants also err in contending that the state action requirement may be satisfied by a Court order granting BNY Mellon's request for preliminary or permanent injunctive relief. "[Because] exclusivity is an attribute of private property, the owner may use the neutral trespass laws to enforce [any] decision [concerning the use of his property] so long as he has no other connection to state action." 2 R. Rotunda & J. Nowak, *Treatise on Con. L.* § 16.3, at 786 (3d ed. 1999); see also *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (an injunction prohibiting demonstrations interfering with access to private property is not an impermissible prior restraint on expression).

clear that the First Amendment did not *require* the Park Service to permit any demonstration in the park “involving a 24-hour vigil and the erection of tents to accommodate 150 people.” *Id.* at 296. “To permit camping—using these areas as living accommodations—would be totally inimical” to the purposes of an urban park. *Id.* (noting that such prohibitions leave open many alternative channels for expression). Consistent with *Clark*, courts across the country have held that the government may issue and enforce similar regulations to prevent other affiliates of “Occupy Wall Street” from occupying and camping continuously and indefinitely on property that the government owns or controls. *See, e.g., Occupy Boston v. City of Boston*, No. 11-4152-G (Mass. Sup. Ct. Dec. 7, 2011); *Davidovich v. City of San Diego*, No. 11CV2675 WQH-NLS, 2011 WL 6013010 (S.D. Cal. Dec. 1, 2011); *Occupy Minneapolis v. County of Hennepin*, No. CIV. 11-3412 RHK/TNL, 2011 WL 5878359 (D. Minn. Nov. 23, 2011); *Occupy Fort Myers v. City of Fort Myers*, No. 2:11-CV-00608-FTM-29, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011); *Occupy Sacramento v. City of Sacramento*, No. 2:11-cv-02873-MCE-GGH, 2011 WL 5374748 (E.D. Cal. Nov. 4, 2011).<sup>9</sup> BNY Mellon’s Notice puts all on notice of similarly reasonable time, place, and manner restrictions for the use of BNY Mellon Green.

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<sup>9</sup> Defendants’ reliance on *Metro. Council, Inc. v. Safir*, 99 F. Supp. 2d 438 (S.D.N.Y. 2000), is misplaced. *Safir* concerned the application of a citywide ban on sleeping on sidewalks to a short-term, nondisruptive, demonstration totally unlike Defendants’ conduct here. Defendants also miss the mark when they cite *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6318587 (D.S.C. Dec. 16, 2011). Less than a week later, the court considered a newly promulgated time, place, and manner regulation issued by the state prohibiting all camping and sleeping on State House grounds. *Occupy Columbia v. Haley*, 2011 WL 6698990 (D.S.C. Dec. 22, 2011). In *Haley II*, the court held that this new regulation could be enforced against the ongoing occupation of the State House grounds. *Id.*

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Respectfully submitted,



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Daniel I. Booker, PA I.D. No. 10319  
Joel P. Aaronson, PA I.D. No. 28067  
Dusty Elias Kirk, PA I.D. No. 30702  
Michael E. Lowenstein, PA I.D. No. 34880  
Jeffrey G. Wilhelm, PA I.D. No. 201935

*Counsel for Plaintiffs BNY Mellon, National Association  
and The Bank of New York Mellon*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction to be served upon the following via e-mail and hand delivery:

Michael J. Healey, Esquire  
Healey & Hornack, P.C.  
436 7th Avenue, Suite 2901  
Koppers Building  
Pittsburgh, PA 15219

Counsel for Defendant Occupy Pittsburgh

Dated: January 9, 2012

A handwritten signature in black ink, appearing to read "Michael J. Healey", written over a horizontal line.

Counsel for Plaintiffs  
BNY Mellon, National Association and  
The Bank of New York Mellon