IN THE COURT OF COMMON PLEAS
OF SUSQUEHANNA COUNTY, PENNSYLVANIA

CABOT OIL & GAS CORPORATION, Plaintiff	:
VS.	: Case Number 2013-1303 CP
VERA SCROGGINS, Defendant	:

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BRIEF IN SUPPORT OF MOTION TO VACATE PRELIMINARY INJUNCTION

Questions Presented:

(1) Is the preliminary injunction barring Defendant from properties throughout Susquehanna County void for lack of jurisdiction because of Plaintiff's failure to join indispensable parties, where Plaintiff has leased the subsurface rights to the properties from which it seeks to enjoin Defendant, and both the preliminary and final relief Plaintiff seeks will affect the rights of surface owners who have not been joined?

(2) Should the preliminary injunction be vacated because it violates Defendant's constitutional rights to freedom of speech and freedom of movement?

(3) Should the preliminary injunction be vacated because it is overbroad and because Plaintiff is unlikely to prevail on the merits given its failure to show that its leases of *subsurface* rights to various lands in Susquehanna County incorporate a freestanding right to exclude visitors from the *surface* of the land?

INTRODUCTION

The issue presented in this case is how far a gas company's right to extract gas extends beyond the right to seek and acquire the gas itself. As the plaintiff, Cabot Oil and Gas Corporation, would have it, the right to drill below the surface of a piece of property carries with it the right to override the landowner's wishes about who enters the property. In the company's view, the right to extract gas also includes the right to curtail the movements of an individual protesting the company's activities so sharply that the individual is banned from her grocery store, local hospital, rehabilitation center, recycling center, and friends' homes. In short, the right to extract gas is, according to the company, also the right to banish.

That result is inconsistent with the United States and Pennsylvania Constitutions, the common law, and the terms of the very leases on which Cabot's claims rely. The injunction currently in force against defendant Vera Scroggins imposes a substantial hardship on her, is overbroad, and violates her constitutional freedoms of speech and movement. Moreover, Cabot's claim that it may exclude a person from the surface of any land above a Cabot mineral-rights leasehold would, if adopted, fundamentally alter the contours of Pennsylvania property law and usurp the rights of property owners throughout Susquehanna County to decide who may enter their land. For these reasons, the injunction should be vacated.

FACTS

Plaintiff Cabot Oil and Gas has leased subsurface rights to large portions of Susquehanna County for the purpose of extracting natural gas, *see* Second Amended Compl. of Jan. 16, 2014 ("SAC") ¶¶ 1-3, by a process that includes excavation, drilling, fracking and related operations (hereafter collectively "gas extraction/fracking"). The leases Cabot signs with local landowners authorize Cabot to drill for natural gas but not to exclude anyone from the land. *See, e.g.*, Decl. of Vera Scroggins ¶¶ 11-12, Exs. A & B; Decl. of Mary B. Gere ¶ 3 & Attachment; Decl. of Raymond Kemble ¶ 2 & Attachment.

Defendant Vera Scroggins, a retired nurse's aide living in Brackney, Pennsylvania, is a citizen-journalist and advocate who regularly expresses her opposition to gas extraction/fracking. Scroggins Decl. ¶¶ 1, 3, 5, 6, 8, 9, 10. Scroggins documents gas extraction activities in order to inform the public about the environmental dangers they pose, and leads tours of visitors to educate them about gas extraction/fracking. *Id.* ¶¶ 6-7. In conducting these activities, Scroggins drives or walks on public roads and on lands to which the owners have invited her. *Id.* ¶ 7.

Cabot sued Scroggins for civil trespass. *See* SAC ¶¶ 98-121. This Court granted a preliminary injunction on October 17, 2013, and on October 21, 2013, ordered the terms of the injunction continued pending final disposition of the case. The terms of the injunction are simple but sweeping: "Ms. Scroggins is restrained, enjoined and prohibited from entering upon property owned and/or leased by Cabot Oil & Gas Corporation including but not limited to well sites, well pads and access roads." Order of Oct. 21, 2013 (hereafter "Order").

The injunction has had a significant effect on both Scroggins' advocacy and her personal life. As a result of the injunction, she cannot enter properties to which she has been invited by the owners of the land to observe gas extraction/fracking taking place nearby, to give tours of areas affected by gas extraction/fracking, or to protest gas extraction/fracking. Scroggins Decl. ¶¶ 15-18. Accordingly, the injunction obstructs Scroggins' information-gathering, public education, and advocacy activities. *Id.* ¶ 14. Because she has not been given a list of the places from which she is forbidden, Scroggins has had to spend hours at the courthouse learning who owns and leases various properties, and she is anxious that she will accidentally go where she is forbidden. *Id.* ¶ 23. As a result of the injunction, Scroggins can no longer go to her usual grocery store, her rehabilitation center, eye doctor, several restaurants, Andre and Son Hardware Store, Ed's Auto Repair, or the county recycling center. *Id.* ¶ 21. She is unable to visit some of her friends in their homes. *Id.* ¶ 20. She cannot go to the hospital that is nearest to her home, Endless Mountains Health Systems Hospital in Montrose, and so she worries that, if she needs emergency health services, she will be unable to access them. *Id.* ¶ 22.

Additionally, the rights of landowners in the county have been restricted, including friends who would invite Scroggins to their homes but for the injunction and small business owners who are deprived of Scroggins' business because of the injunction. Kemble Decl. ¶¶ 4-9;

M. Gere Decl. ¶¶ 5-8; Decl. of Paul W. Gere ¶¶ 4-6; Decl. of Edward House ¶¶ 5-8. Scroggins is barred from these properties even though there are no active drilling sites on the surface of these lands. Kemble Decl. ¶ 3; House Decl. ¶ 4; M. Gere Decl. ¶ 4; P. Gere Decl. ¶ 3.

ARGUMENT

I. THE INJUNCTION IS VOID BECAUSE THIS COURT LACKS JURISDICTION OVER THE CASE AS A RESULT OF CABOT'S FAILURE TO JOIN INDISPENSABLE PARTIES.

For at least a century, Pennsylvania courts have recognized that

> a party in an equity action is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience. That is to say, his presence as a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights.

Hartley v. Langkemp & Elder, 90 A. 402, 403-04 (Pa. 1914); *accord Van Buskirk v. Van Buskirk*, 590 A.2d 4, 7 (Pa. 1991); *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981). The rule reflects a basic principle of fairness: no party's rights should be impaired by a proceeding to which he or she was not joined. This consideration is particularly important when a third party's property rights will be impaired. *See Hartley*, 90 A. at 403; *Van Buskirk*, 590 A.2d at 7. Failure to join indispensable parties to an equity action deprives the court of jurisdiction. *See Hartley*, 90 A. at 404.

This rule requires that the injunction be vacated for lack of jurisdiction because the owners of the lands Cabot leases are not joined. As Cabot alleges in its complaint, much of the property from which it seeks to exclude Scroggins is not Cabot's land but land as to which it leases subsurface mineral rights. Cabot's expansive claim (which is incorrect, as explained below) is that its right to extract gas from below the surface includes the right to exclude individuals from the surface. Br. in Support of Prelim. Inj'n 9 (Oct. 16, 2013) ("Cabot Br.");

SAC ¶ 100. That claim clashes with the rights of the owners to occupy, and to invite guests onto, the surface of their land. Wherever this Court draws the line between the surface owners' and subsurface lessee's rights, the owners' "rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights." *Hartley*, 90 A. at 403.

This concern is not merely hypothetical. For instance, Cabot lessor Edward House would like to invite Scroggins to his property to do business with her. House Decl. ¶¶ 5-6. Cabot lessor Raymond Kemble would like to invite Scroggins to his property for both social and political reasons. Kemble Decl. ¶¶ 4-7. Cabot lessors Mary and Paul Gere would like to invite Scroggins to their property for both business and social reasons. M. Gere Decl. ¶¶ 5-6; P. Gere Decl. ¶ 4. Cabot's claim that it may usurp these landowners' rights over the surface of their own land demonstrates that the owners of the lands Cabot leases "ha[ve] such an interest that a final decree cannot be made without affecting it." *Hartley*, 90 A. at 403.

For other landowners as well, Cabot's broad assertion of veto power over their prerogative to invite family, friends, and other guests onto their land cannot be adjudicated without the participation of those owners. Were it otherwise, the owners could be stripped of their rights without ever having had the chance to defend them or even to know they are under attack. Therefore, because Cabot failed to join indispensable parties, jurisdiction is lacking and this Court has no power to issue relief, preliminary or otherwise.

II. THE INJUNCTION SHOULD BE VACATED BECAUSE IT VIOLATES SCROGGINS' CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH AND FREEDOM OF MOVEMENT.

A. The Injunction Violates The First Amendment And Article I, Section 7, Because It Sweeps Far More Broadly Than Necessary To Serve Any Legitimate Interests.

The First Amendment right to freedom of speech and the corresponding right under Article I, Section 7 of the Pennsylvania Constitution — which is more protective than the First

Amendment, *see, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002) — are implicated by injunctions that restrict the movements of advocates such as Scroggins. *See, e.g., Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377-80 (1997) (invalidating in part, under the First Amendment, injunction creating buffer zones around abortion clinics and around individuals entering and leaving the clinics); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 771, 773-75 (1994) (same). The First Amendment is equally applicable to Scroggins' protest and journalistic activities whether they take the form of speech or of documenting activities at gas extraction/fracking sites. *See Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) ("[T]he First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas."); *see also Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) ("[P]hotography or videography that has a communicative or expressive purpose enjoys some First Amendment protection."); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("[T]here can be no doubt that the free speech clause of the Constitution protected [the plaintiff] as he videotaped[.]"); *Petition of Daily Item*, 456 A.2d 580, 588 (Pa. Super. Ct. 1983) (Beck, J., concurring) ("The purpose of the First Amendment is to protect the free exchange of ideas, and therefore access and a right to receive information is an integral part of the amendment's guarantee of freedom of speech.").

Political speech does not lose its constitutional protection when it is targeted at a business. *See, e.g., Org, for a Better Austin v. Keefe*, 402 U.S. 415, 415-20 (1971) (striking down injunction against leaflets criticizing a business); *Franklin Chalfont Assocs. v. Kalikow*, 573 A.2d 550, 556 (Pa. Super. Ct. 1990) ("Under Pennsylvania law, peaceful picketing conducted in a lawful manner and for a lawful purpose is lawful, even though it shuts down, bankrupts or puts

out of business the company or firm which is picketed." (citation and internal quotation marks omitted)).

Because "[i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances," a higher standard of scrutiny applies to injunctions as compared to generally applicable regulations. *Madsen*, 512 U.S. at 764-65. Specifically, courts ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765; *accord Schenck*, 519 U.S. at 371; *SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352, 356-57 (Pa. Super. Ct. 2008); *Liberty Place Retail Assoc., L.P. v. Israelite Sch. of Universal Practical Knowledge*, 2013 WL 7020449, at *9 (Pa. Ct. Com. Pleas Phila. County 2013). Applying this test, courts have tolerated injunctions to the extent they provide for small "buffer zones" from which protestors are excluded in order protect the ability to access property that is being picketed. *See Schenck*, 519 U.S. at 380 (upholding 15-foot buffer zone "around the doorways, driveways, and driveway entrances" of abortion clinics as "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so"); *Madsen*, 512 U.S. at 768-70 (upholding 36-foot buffer zone around clinic entrances and driveway). By contrast, courts have invalidated portions of injunctions applicable to commercially used property where the injunctions are difficult to comply with, *see Schenck*, 519 U.S. at 377-79 (striking down "floating bubble zone" that prohibited protestors from coming within 15 feet of a person entering or exiting abortion clinic), or that extend beyond areas in which violence may occur or members of the public might be blocked from carrying on lawful business. *See Madsen*, 512 U.S. at 772 (striking down 36-foot buffer zone covering private property on the back and sides of the clinic, because there was no showing protestors had used that area to "obstruct[]

access to the clinic, block[] vehicular traffic, or otherwise unlawfully interfere[] with the clinic's operation"); *id.* at 774 (striking down ban on all uninvited approaches of individuals within 300 feet of the clinic entrance because, absent evidence of violence, threat, of other basis to proscribe speech, the ban burdened more speech than necessary); *SmithKline Beecham*, 959 A.2d at 359 (striking down provision of injunction prohibiting "picketing, demonstrating, leafleting, protesting or congregating at [company] facilities" because it did not leave open alternative channels of communications).

The injunction in this case, which bars Scroggins "from entering upon property owned and/or leased by Cabot Oil & Gas Corporation," Order, sweeps far more broadly than injunctions that the U.S. Supreme Court, Third Circuit, or Pennsylvania courts have permitted. By covering all Cabot-owned and Cabot-leased lands, the injunction bans Scroggins not only from the active well sites that give rise to Cabot's asserted safety and liability concerns, *see* Cabot Br. 7-11, but also from businesses open to the public, land owned by individuals who would invite Scroggins in, and areas at which her activities could not conceivably pose a safety hazard or threaten access because they are far from any active drilling site. For instance, Scroggins cannot go to the home of her friend Ray Kemble to videotape or demonstrate regarding Cabot's nearby activities, even though Cabot has no active drilling operations on Kemble's property. Kemble Decl. ¶¶ 3, 6-7. No possible safety purpose can be served by banning Scroggins from her nearest hospital, her grocery store, and other local businesses. Scroggins Decl. ¶¶ 21-22. In addition, compliance with the injunction is difficult: Scroggins must spend hours conducting research at the courthouse just to determine where in her home county she may lawfully go. Scroggins Decl. ¶ 23. These sweeping restrictions are a far cry from the narrow tailoring that the First Amendment requires, and they "burden . . . more speech than necessary," *Madsen*, 512 U.S. at 765, to serve interests of

safety, access, or property rights; instead, the broad scope of the injunction serves to mute a dissenting voice and punish Scroggins for her advocacy, in violation of the First Amendment and Article I, Section 7, of the Pennsylvania Constitution. The injunction must therefore be vacated.

B. The Injunction Violates The Fourteenth Amendment Because It Restricts Scroggins' Constitutionally Protected Freedom Of Movement But Is Not Narrowly Tailored.

The injunction is particularly disruptive to Scroggins' freedom of movement. The U.S. Supreme Court has long recognized that the Constitution protects individuals' right to travel. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999) (plurality opinion) ("We have expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage, or the right to move to whatsoever place one's own inclination may direct identified in Blackstone's Commentaries." (citations and internal quotation marks omitted)); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land[.]"); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law[.]").

The Third Circuit and several other courts have concluded that the right to travel includes the right to intrastate travel and general freedom of movement. *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed implicit in the concept of ordered liberty and deeply rooted in the Nation's history." (citations and internal quotation marks omitted)); *accord Ramos v.*

Town of Vernon, 353 F.3d 171, 176 (2d Cir. 2003); *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-98 (6th Cir. 2002); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997); *Arredondo v. Betancourt*, 383 S.W.3d 730, 744 (Tex. Ct. App. 2012); *Halsted v. Sallee*, 639 P.2d 877, 879-80 (Wash. Ct. App. 1982).

The Third Circuit analyzes a restriction on the freedom of movement under intermediate scrutiny, asking whether it is "narrowly tailored to meet significant [government] objectives." *Lutz*, 899 F.2d at 270. Other federal appellate courts generally apply a more rigorous standard. *See Ramos*, 353 F.3d at 176 (strict scrutiny applies to infringements on an adult's freedom of movement); *Johnson*, 301 F.3d at 502 (applying strict scrutiny, though acknowledging intermediate scrutiny might sometimes be appropriate); *Nunez*, 114 F.3d at 946 (strict scrutiny).

The injunction here fails the Third Circuit's test (and therefore necessarily fails strict scrutiny also). The "significant objectives" that Cabot has cited in support of the injunction are the protection of its property rights, safety, and avoiding liability. *See* Cabot Br. 7-11. The injunction is far broader than necessary to protect these interests, because (as noted with respect to the freedom of speech) the injunction bans Scroggins from areas where she poses no danger to anyone and no risk of liability to Cabot, and areas to which she has been invited by the landowner and therefore violates no property interest of Cabot's.

Because the injunction severely disrupts Scroggins' ability to travel within her home county and is not narrowly tailored, the injunction must be vacated.

III. THE INJUNCTION SHOULD BE VACATED BECAUSE CABOT HAS NOT SATISFIED THE STANDARD FOR OBTAINING AN INJUNCTION.

Even if it did not violate Scroggins' constitutional rights, the injunction would be unjustified. To issue a preliminary injunction, each of the following "essential prerequisites" must be met:

(1) the injunction is "necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages";
(2) "greater injury would result from refusing the injunction than from granting it," and the injunction "will not substantially harm other interested parties";
(3) the injunction "will properly restore the parties" to the status quo ante;
(4) "the party seeking the injunction . . . is likely to prevail on the merits";
(5) the injunction is "reasonably suited to abate the offending activity"; and
(6) the injunction "will not adversely affect the public interest."

Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). "For a preliminary injunction to issue, *every one* of these prerequisites must be established[.]" *Allegheny County v. Com.*, 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added).

Here, most of the prerequisites are *not* satisfied.

A. The Injunction Is Overbroad.

Chiefly, the injunction is not reasonably suited to abate the offending activity. "Where the facts and equities call for it, a chancellor is required to give relief by injunction; but such injunction should never go beyond the requirements of the particular case[.]" *Collins v. Wayne Iron Works*, 76 A. 24, 25 (Pa. 1910); *see also Chase v. Eldred Borough*, 902 A.2d 992, 999 (Pa. Commw. Ct. 2006) ("Under the law an injunction must be carefully tailored to remedy only the specific harm shown and be no broader than needed to prevent reoccurrence of the harm.").

For instance, in *Dunbar v. Rivello*, 2013 WL 5890615 (Pa. Ct. Com. Pleas Lackawanna County 2013), another trespass case, the court refused to issue an injunction so broad that it would prohibit the defendant from coming onto the plaintiffs' property "for any reason" and from having "any contact" with the plaintiffs, their employees, tenants, and prospective tenants. Such restrictions, the court held, would sweep more broadly than necessary to remedy the asserted harm, would prohibit the defendant's otherwise lawful entries onto the plaintiffs' property in response to lawful invitations by persons authorized to invite him, and would burden the defendant's speech rights. *Id.* at *5-*8.

Likewise, because the injunction here bars Scroggins from vast swaths of Susquehanna County that do not implicate any of Cabot's interests in its property rights, safety, or avoiding liability, it is vastly overbroad, restricts Scroggins' right to accept lawful invitations from property owners to visit their property, and burdens her freedom of speech (*see supra* Part II.A) as well as her freedom of movement (*see supra* Part II.B).

B. Cabot Has Not Shown That It Is Likely To Prevail On The Merits.

Cabot has not shown a likelihood of prevailing on the merits, at least insofar as concerns its entitlement either to the broad preliminary relief it has obtained or to the final relief its Second Amended Complaint seeks. Not only would either form of relief violate Scroggins' freedoms of speech and movement, but Cabot's underlying conception of the property rights to which its leases entitle it is inconsistent with the text of those leases, finds no support in Pennsylvania law, and would largely divest surface owners of their traditional rights.

Cabot's legal theory rests on the remarkable proposition that "[t]he leases which Cabot enter [sic] into with landowners grant Cabot an *exclusive* property interest in the land on which Ms. Scroggins trespasses." Cabot Br. at 9 (emphasis added). But Cabot has shown this Court no lease language granting it such a broad right or any right to exclude anyone from the surface of the land below which Cabot's mineral rights lie. On the contrary, the leases attached to the supporting declarations reflect that no such rights are contemplated, *see* Scroggins Decl. ¶¶ 11-12, Exs. A & B; M. Gere Decl. ¶ 3 & Attachment; Kemble Decl. ¶ 2 & Attachment, and Cabot has not come forward with any leases suggesting otherwise.

Without lease language supporting its expansive claim, Cabot relies on case law, but the cases it cites make clear that its rights as a subsurface lessee are far less sweeping than Cabot asserts. Cabot is fond of repeating the proposition that it has a right "even as against the owner of

the soil," SAC ¶ 100; *id.* ¶ 101; Cabot Br. 9 (all citing *Belden & Blake Corp. v. Commonwealth*, 969 A.2d 528, 532 (Pa. 2009)), but in fact the case law is more nuanced and limited than that isolated phrase suggests. The cases qualify the right of the subsurface renter "even as against the owner of the soil" as extending only "so far as it is necessary to carry on . . . mining operations." *Belden & Blake*, 969 A.2d at 532 (omission in original). This qualification is well established in case law going back over a century. *See Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893) ("The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it."); *see also Pomposini v. T.W. Phillips Gas & Oil Co.*, 580 A.2d 776, 778 (Pa. Super. Ct. 1990) ("[A]ll rights claimed by the lessee that are not conferred in direct terms or by fair implication are to be considered as being withheld by the lessor." (citation, internal quotation marks, and source's alteration marks omitted)); *Eastern Gas & Fuel Assocs. v. Kalp*, 37 Pa. D. & C.2d 466, 469 (Pa. Ct. Common Pleas Fayette County 1965) ("[A] mining right of necessity will be implied only when an absolute necessity or its equivalent is shown to exist in order to give effect to a grant or reservation of underlying coal, so that it may feasibly be mined and removed[.]").

Cabot's other authorities are not to the contrary: *Calhoon v. Neely*, 50 A. 967, 968 (Pa. 1902), merely observes that if oil is found, "the lessee will be protected in exercising [the right to product it] in accordance with the terms and conditions of his contract," and *Humberston v. Chevron U.S.A., Inc.*, 75 A.3d 504, 512 (Pa. Super. Ct. 2013), confirms that the subsurface lessee may use the surface only "as is reasonably necessary or convenient to develop the natural gas under the . . . property." The courts have not hesitated to deny mineral lessees the right to use land in a manner not contemplated by their leases and not necessary for extracting the minerals.

See Pomposini, 580 A.2d at 778-79 (right to extract gas did not include right to use subsurface for underground storage of gas); *Eastern Gas*, 37 Pa. D. & C.2d at 469-70 (mining rights did not include right to erect surface electric power installations).

"What is necessary and reasonable" for the purpose of gas extraction "may be determined by reference to what is customary, and is a question of fact." *Oberly v. H. C. Frick Coke Co.*, 104 A. 864 (Pa. 1918) (quoting and affirming the decision of the Court of Common Pleas). This Court has not found (and Cabot points to no other case finding) that as a matter of fact or custom, the right to seek gas under a property's surface includes the right to determine who comes onto the surface *anywhere* on the property. Thus, what Cabot claims to be an "exclusive" right to exclude people from the property it leases is actually limited to what is necessary to carry on the operations to extract gas. To put it in more concrete terms, although Cabot has the right to drill beneath the surface to reach the gas and the concomitant right to keep individuals out of the way of its gas extraction operations, it does not have the right to determine who may and may not come onto properties or parts of properties on which it is not operating. Except as necessary for the operations, the right to exclude and invite remains with the owners of the land. *See, e.g., T.A. v. Allen*, 669 A.2d 360, 366 (Pa. Super. Ct. 1995) (Olszewski, J., concurring and dissenting) (noting that an owner of land has "every right to invite" someone onto it); *Petition of Borough of Boyertown*, 466 A.2d 239, 245 (Pa. Commw. Ct. 1983) ("[I]ncluded in the bundle of rights constituting 'property' is the right to exclude other persons from using the thing in question.").

If it were otherwise, the right of the lessee would swallow the right of the lessor, and property owners such as declarants Ray Kemble, Ed House, and Mary and Paul Gere could be kicked off their own land at Cabot's whim. This Court should not upend the settled expectations of the property owners of Susquehanna County by granting Cabot rights that would "seriously

jeopardize and adversely affect surface owners generally by exposing them to unjustified and oppressive intrusions upon their right to a peaceful and uninterrupted possession of their surface estates." *Eastern Gas*, 37 Pa. D. & C.2d at 470.

C. Greater Injury Results From Continuing The Injunction Than Vacating It, The Injunction Does Not Restore The Parties To The Status Quo Ante, And The Injunction Adversely Affects The Public Interest.

In addition to being overbroad and not supported by a likelihood of success on the merits, the injunction should be vacated because three of other "essential prerequisites" for a preliminary injunction, *Summit Towne Ctr.*, 828 A.2d at 1001, are absent. In the balance of harms, Scroggins is suffering far more under the injunction than Cabot would without it. Barring Scroggins from a substantial fraction of the land in her home county, including her grocery store, the nearest hospital, and the homes of her friends imposes a serious hardship on her. Cabot, by contrast, has a security team sufficient to keep Scroggins away from the company's active operations even without an injunction. Indeed, the owner of Cabot's private security service testified that Cabot has had the security service keep track of Scroggins' movements "[a]s they pertain to Cabot property" for over two years. Tr. of Hrg. on Prelim. Inj'n 79 (Oct. 21, 2013). Thus, Cabot does not need the injunction to protect itself, and the injunction causes significant injury to Scroggins. Moreover, the rights of "other interested parties" are a factor in the balance of interests. *Summit Towne Ctr.*, 828 A.2d at 1001. As discussed, the rights of property owners are diminished by the injunction, which effectively gives Cabot the right to exclude individuals from land it does not own and to exercise more control over the land than is granted by its subsurface leases.

The injunction also does not restore the parties to the status quo ante. It makes Cabot far better off — what business would not prefer to keep a protestor out of sight and out of earshot? — and Scroggins far worse, because of all the places she can no longer go and things she can no

longer do. Before the injunction, for instance, Scroggins could lawfully go to land that Cabot leased if that property was open to the public (as is her grocery store, Ed's Auto Repair, or Mary's Home Furnishings) or if she Scroggins was invited (as she has been to the homes of her friends Ray Kemble and Mary and Paul Gere). Now she is banned from land that Cabot passively leases without any ongoing operations.

Finally, the public interest is harmed by the injunction. The injunction sends a chilling message to those who oppose fracking and wish to make their voices heard or to document practices that they fear will harm them and their neighbors. That message is loud and clear: criticize a gas company, and you'll pay for it. The First Amendment, of course, exists to protect discourse and the exchange of ideas, even ideas that are controversial or vehemently expressed. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Accordingly, the First Amendment needs "breathing space . . . to survive," *id.* at 272 (citation and internal quotation marks omitted), and chilling effects are something "the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion). In addition, the public interest is harmed by casting doubt upon property owners' rights to determine who may visit land under which the mineral rights have been leased, as discussed in Part III.B, *supra*. This case directly poses this concern because the injunction has already impaired local landowners' rights. *See* Kemble Decl. ¶¶ 8-9; House Decl. ¶¶ 7-8; M. Gere Decl. ¶¶ 7-8; P. Gere Decl. ¶¶ 5-6.

Tellingly, even Cabot itself no longer seems to believe that it is entitled to relief it has so far been awarded. Despite having obtained this exceptionally broad *preliminary* injunction in October 2013, Cabot's Second Amended Complaint filed in January 2014 seeks a more limited *permanent* injunction. *See* SAC, at 19 (seeking injunction prohibiting Scroggins from entering

onto properties *owned* by Cabot, from entering onto properties *leased* by Cabot only where it is conducting operations, and from coming within 150 feet of certain other features on Cabot-owned or Cabot-leased land). Although the relief now sought, particularly the 150-foot buffer zone, is still overly broad, Cabot has retreated from its claim that it can ban Scroggins from any property it owns or leases in the entire county.

CONCLUSION

Due respect for Scroggins' constitutional rights to freedom of speech and movement, as well as for the property rights of Susquehanna County landowners, requires that the overbroad injunction against Vera Scroggins be vacated.

Respectfully submitted,

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