IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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63 MAP 2018

ADAM BRIGGS, PAULA BRIGGS, HIS WIFE, JOSHUA BRIGGS, AND SARAH H. BRIGGS,
Appellees

v.

SOUTHWESTERN ENERGY PRODUCTION COMPANY,
Appellant

BRIEF OF *AMICUS CURIAE*, PROTECT PT

Appeal from the Order of the Superior Court dated April 2, 2018, Reconsideration Denied on June 8, 2018, at No. 1351 MDA 2017 Reversing the Order of the Court of Common Pleas of Susquehanna County, Civil Division, dated August 8, 2017 at No. 2015-01253

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STATEMENT OF INTEREST OF AMICUS CURIAE

Protect PT is a nonprofit citizens' organization that engages in education and advocacy to protect the economic, environmental, and legal rights of citizens of Penn Township, Trafford, and other surrounding communities in Westmoreland County, particularly as they relate to fracking.[1] Protect PT is a prior and current litigant in numerous actions to vindicate the rights of its members and constituent communities vis-à-vis fracking,[2] and it has a strong interest in this appeal insofar as the economic, environmental, and property rights of its members and constituent communities are threatened by Southwestern's attempt to transform the rule of capture into a newly minted, freestanding right to frack not only beneath its own leased property, but beneath its neighbors' property as well, exposing them to significant environmental risks, and taking their valuable natural resources without consent or remuneration.

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[1] *See generally* www.protectpt.org.

[2] *See, e.g., Protect PT v. Penn Twp. Zoning Hearing Bd.*, CP-65-CV-3499-2017 (Ct. Com. Pl. Westmoreland 2017).

STATEMENT OF SCOPE AND STANDARD OF REVIEW

An appellate court reviews an order granting summary judgment *de novo* and with plenary scope. *See O'Donoghue v. Laurel Savings Assn.*, 728 A.2d 914, 916 (Pa. 1999). Additionally, an appellate court reviews the question of how the law of trespass and the rule of capture apply to Southwestern's fracking into its neighbors' land, exposing them to significant environmental risks, and taking their valuable natural resources without consent or remuneration, a pure question of law, *de novo* and with plenary scope. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 943 (Pa. 2013).

COUNTER-STATEMENT OF QUESTION INVOLVED

May a fracking company frack into the subsurface of its neighbors' property, expose them to significant environmental risks, and take their valuable natural resources without consent or remuneration?

Suggested Answer: No.

COUNTER-STATEMENT OF THE CASE

The factual and procedural history of this matter, as pertinent herein, is relatively straightforward. Southwestern, a fracking company, leases certain land in Susquehanna County for the purpose of fracking.[3] Appellees, the Briggses, own certain adjacent land. On November 5, 2015, the Briggses filed an action alleging, *inter alia*, that Southwestern was extracting natural

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[3] Although this Court is already intimately familiar with the mechanics of fracking, *see generally*, *e.g.*, *Robinson Twp. v. Commonwealth*, 147 A.3d 536 (Pa. 2016), Protect PT reiterates that it is a process whereby a fracking company creates artificial fractures in subterranean shale rock to serve as conduits to access previously inaccessible oil and/or natural gas therein. Specifically, an oil and gas company (1) drills a vertical well; (2) drills a horizontal extension of the well; (3) injects and propels a highly pressurized chemical solution to create, and sand or other particulate matter to prop open, artificial fractures throughout the shale rock; and (4) withdraws, via the fractures, previously inaccessible oil and/or natural gas. *See generally* United States Environmental Protection Agency, "The Process of Unconventional Natural Gas Production – Hydraulic Fracturing," *available at* https://www.epa.gov/uog/process-unconventional-natural-gas-production <last visited Mar. 14, 2019>.

Protect PT also notes that fracking poses significant environmental risks, including, *inter alia*, contamination of land or water with the aforementioned chemical solution and otherwise, air pollution, carbon dioxide release, and even artificial earthquakes. *See generally* United States Geological Survey, "What environmental issues are associated with hydraulic fracturing," *available at* https://www.usgs.gov/faqs/what-environmental-issues-are-associated-hydraulic-fracturing?qt-news_science_products=0#qt-news_science_products <last visited Mar. 14, 2019>.

gas from the subsurface strata of their land,[4] asserting, *inter alia*, claims of trespass and conversion, and requesting, *inter alia*, damages in the amount of the value of the extracted gas. Southwestern filed an answer, alleging, *inter alia*, that it had drilled only on its property, and that the Briggses' claim was precluded by the rule of capture: *i.e.*, the rule that a landowner may withdraw from its portion of a reservoir of inherently migratory natural resources it shares with a neighbor, even if such withdrawal causes migration of such resources to his portion of the reservoir from his neighbor's portion of the reservoir. *See generally Pierson v. Post*, 3 Cai. R. 175 (Sup. Ct. N.Y. 1805) (landmark case holding that only capture of inherently

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[4] The Briggses' allegation in this regard and certain of the Briggses' statements that Southwestern drilled its well too close to their land have been misconstrued by Southwestern, and the trial court, as allegations that Southwestern's placement of its well caused migration of gas onto Southwestern's land from the Briggses' land, or "drainage." Were it so, the claim would be precluded by the rule of capture. However, the allegation's appropriate construction appears to be that Southwestern's placement of its well is so close to the Briggses' land that it is highly likely that its artificial fractures physically invaded the Briggses' land and Southwestern's withdrawal from the fractures extracted previously inaccessible gas from their land.

In any event, assuming *arguendo* that the Briggses' allegations related to drainage, Protect PT suggests that this Court should let the Superior Court's well-reasoned holding – *i.e.*, that a fracking company's creation of artificial fractures that tunnel into the subsurface of their neighbors' property and use of the fractures to take their valuable natural resources constitutes a trespass – stand, and dismiss this appeal from the Superior Court's application of its holding to the discrete facts herein as improvidently granted error review. *Accord* Pa.R.A.P. 1114.

migratory wild animals, or animals *ferae naturae*, on uninhabited property, creates a property right therein); *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 18 A. 724 (Pa. 1889) (holding that a landowner may withdraw from its portion of a reservoir of water, oil, or gas, regardless of drainage, and creatively describing them as minerals *ferae naturae*, and reasoning that the landowner's capture of the water, oil, or gas on its own land created a property right therein); *Hamilton v. Foster*, 116 A. 50 (Pa. 1922) (explaining that the analogy is imprecise in that prior to their escape into another portion of such a reservoir, minerals *ferae naturae* are already owned in place). The parties then proceeded to discovery, and, ultimately, Southwestern filed a motion for summary judgment, reiterating its position. On August 8, 2017, the trial court entered an order granting the motion.

The Briggses appealed to the Superior Court, which, on April 2, 2018, reversed and remanded for further proceedings. *See Briggs v. Southwestern Energy Prod. Co.*, 184 A.3d 153 (Pa. 2018). The court explained that, in Pennsylvania, one commits a trespass to land if one "enters land in the possession of the other, or causes a thing . . . to do so" including by "propelling or placing a thing . . . beneath the surface of the land." *Id.* at 157 (internal quotations and citations omitted). The court further explained that, in Pennsylvania, pursuant to the rule of capture, one is free

to withdraw from one's portion of a reservoir of inherently migratory natural resources one shares with another even if such withdrawal causes migration of such resources to one's portion of the reservoir from the other's portion of the reservoir; indeed, one may even place a well or use devices within one's portion of the reservoir to promote such migration. *See id.* at 157 (citing, *inter alia*, *Westmoreland*, *supra*; *Barnard v. Monongahela Nat. Gas Co.*, 65 A. 801 (Pa. 1907) (applying rule where landowner placed a well to promote migration); *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900) (applying rule where landowner used vacuum pumps to promote drainage). The court then acknowledged that the application of these principles to fracking was an issue of first impression, and, after discussing two extrajurisdictional decisions on the subject,[5] as well as the mechanisms of conventional oil and gas development and hydraulic fracturing, determined that a fracking company is liable for trespass if it fracks *into* a neighbor's land:

> [H]ydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease,

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[5] *See Briggs*, 184 A.3d at 159-62 (discussing *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), and *Stone v. Chesapeake Appalachia, LLC*, 2013 WL 2097397 (N.D. W.Va. filed Apr. 10, 2013)).

> resulting in the extraction of natural gas from beneath the adjoining landowner's property.

Id. at 163-64.[6] The court noted that a contrary rule would essentially grant fracking companies the right to ignore small landowners and simply frack into their property and take their natural resources without consent or remuneration. *Id.* at 163. The court then applied its holding, reversing the trial court's order, finding that further development of the record was necessary to determine whether summary judgment was appropriate, and remanding for that purpose. *Id.* at 164.

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[6] Additionally, the Superior Court advanced distinctions between conventional oil and gas development and fracking – *i.e.*, that conventional development merely taps into a pool of natural resources, whereas fracking creates a conduit to obtain previously inaccessible pockets of natural resources – as foundational to its ensuing holding. *See Briggs*, 184 A.3d at 163 ("In light of the distinctions between hydraulic fracturing and conventional oil and gas drilling, we conclude that the rule of capture does not preclude liability for trespass due to hydraulic fracturing."). Two *amici curiae* contend that these distinctions are without a difference. *See* Brief of *Amicus Curiae* Prof. Terry Engelder ("Engelder's Brief"), at 11-21; *see generally* Brief of *Amicus Curiae* Thomas D. Gillespie, P.G.

Whatever the import of technical distinctions between fracking and conventional oil and gas drilling, they are largely beside the point where an actual trespass occurs: as detailed below, both fracking and conventional drilling that physically invade neighbors' land are trespasses that the rule of capture does not protect, and the Superior Court's holding remains sound.

Southwestern sought reargument, which was denied, and then sought allocatur, which this Honorable Court granted, rephrasing the issue as follows:

> Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller's own property and the hydraulic fracturing fluids are injected solely beneath the driller's own property?

Briggs v. Southwestern Energy Prod. Co., 2018 WL 6069999 (Pa. order filed Nov. 20, 2018).[7]

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[7] This Honorable Court's reformulation appears to recognize that, where a fracking company drills a vertical well or horizontal extension into a neighbor's property, or *injects* fracking solution or proppant beneath a neighbor's property – *i.e.*, where the site of injection is beneath a property – it commits a trespass that the rule of capture does not protect. This leaves only the question of whether, where a fracking company does all of the foregoing on its own property, but nevertheless *propels* fracking solution from an otherwise appropriate site of injection into its neighbors' property, creating fractures beneath its neighbors' property, and uses the fractures to take their valuable natural resources without consent or remuneration, it commits a trespass that the rule of capture does not protect, remaining. Accordingly, Protect PT has focused its arguments toward that inquiry.

SUMMARY OF ARGUMENT

A fracking company may not frack into the subsurface of its neighbors' property, expose them to significant environmental risks, and take their valuable natural resources, without consent or remuneration. A fracking company is liable for trespass if it enters, or causes a thing to enter, another's land, including by propelling frack fluid and proppant to create and prop open fractures throughout the shale rock beneath another's land.

Additionally, the Superior Court correctly rejected Southwestern's ill-conceived reliance on the rule of capture. That rule permits a landowner to withdraw from its portion of a reservoir of inherently migratory natural resources it shares with a neighbor even if such withdrawal causes migration of such resources to his portion of the reservoir from his neighbor's portion of the reservoir. It does *not* permit a landowner to withdraw from *its neighbor's portion* of the reservoir or *its neighbor's land*. Southwestern's invocation of the rule of capture actually seeks the creation of a newly minted, freestanding right to frack not only its own leasehold, but also its neighbors' property as well, to expose them to significant environmental risks, and to take their valuable natural resources without consent or remuneration, granting fracking companies a privilege to take land denied even to the State, and creating an essentially anarchical system of

subsurface property rights. Finally, Southwestern's arguments to the contrary are founded on a misapprehension of the rule of capture and raise dubious policy concerns that are, in any event, outweighed by the countervailing interest in the right to exclude unwanted interference with property, the very core essence of the private ownership of property.

ARGUMENT

1. A fracking company may not frack into the subsurface of its neighbors' property, expose them to significant environmental risks, and take their valuable natural resources without consent or remuneration. A fracking company is liable for trespass if it enters, or causes a thing to enter, another's land, including by propelling frack fluid and proppant to create and prop open fractures throughout the shale rock beneath another's land.

First, it is black-letter Pennsylvania law that one may not engage in conduct that physically invades another's property. In Pennsylvania, one is liable for trespass to land in accordance with the Restatement (Second) of Torts. *See Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235 (Pa. 1952) (adopting Restatement [(First)] of Torts); *Liberty Place Retail Assocs., L.P. v. Israelite Sch. Of Universal Practical Knowledge*, 102 A.3d 501, 506 & n.5 (Pa. Super. 2014) (explaining that liability for trespass to land pursuant to the Restatement [(First)] of Torts is substantially identical to liability pursuant to the Restatement (Second) of Torts and that the Superior Court has frequently relied upon the latter). Thus, in Pennsylvania,

> One is subject to liability to another for trespass . . . if he intentionally . . . enters land in the possession of the other, or **causes a thing or third person to do so . . . The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land**[.]

Restatement (Second) of Torts § 158. Additionally, one's trespass may occur "beneath . . . the surface of the earth[,]" for example, "by . . . tunneling beneath the surface of the land into adjoining land[.]" *Id.* § 159 & cmt. e.

Thus, a fracking company is liable for trespass if it enters, or causes a thing to enter, the subsurface strata of its neighbors' land. As this Court appears to have recognized in reframing the issue presented in this appeal, a fracking company's drilling of a vertical well or horizontal extension, or its *injection* of frack fluid or proppant beneath a neighbor's land, is a trespass because it "causes a thing to" "enter land in the possession of" its neighbor. *Id.* § 158. Indeed, such conduct "throw[s], propel[s], or plac[es] a thing . . . beneath the surface of the land," and the vertical well and horizontal extension are, functionally speaking, "tunnel[s] beneath the surface of the land into [its neighbors'] adjoining land[.]" *Id.* § 159 & cmt. e.

So, too, it must be if a fracking company *injects* fracking solution on its own land, but nevertheless *propels* the fluid and proppant into its neighbors' land to create and prop open fractures throughout the shale rock beneath its neighbors' land. Just as in the case of drilling a vertical well or horizontal extension into its neighbor's land, a fracking company's propulsion of frack fluid and proppant to create and prop open fractures throughout the shale rock beneath its neighbors' land "causes a thing to" "enter land in the

possession of" its neighbors, *id.* § 158, and "throw[s], propel[s], or plac[es] a thing . . . beneath the surface of the land," and creates what are, functionally speaking, "tunnel[s] beneath the surface of the land into [its neighbors'] adjoining land," *id.* § 159 & cmt. e.

2. The Superior Court correctly rejected Southwestern's ill-conceived reliance on the rule of capture. That rule permits a landowner to withdraw from its portion of a reservoir of inherently migratory natural resources it shares with a neighbor even if such withdrawal causes migration of such resources to his portion of the reservoir from his neighbor's portion of the reservoir. It does not permit a landowner to physically intrude upon and withdraw from within its neighbor's portion of the reservoir. Southwestern's purported invocation of the rule of capture actually seeks the creation of a newly minted, freestanding right to frack not only its property, but its neighbors' property as well, exposing them to significant environmental risks, and taking their valuable natural resources without consent or remuneration, granting fracking companies a privilege to take land denied even to the sovereign, and creating an essentially anarchical system of subsurface property rights.

Second, the rule of capture permits a landowner to develop its property to withdraw oil and gas, not to trespass into *its neighbors'* property to do so. As alluded to above, the rule's genesis lay in *Pierson*'s holding that only capture of an inherently migratory wild animal creates a property right therein, which logically translated to a landowner's development of its land's reservoirs of inherently migratory natural resources. As this Honorable Court explained in *Westmoreland*:

> Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.

Westmoreland, 18 A. at 725.

Yet, the translation was imprecise. Whereas *Pierson*'s inherently migratory wild animal had no owner whatsoever, as this Court subsequently recognized, "minerals *ferae naturae*" are already owned in place as part of the land in which they are contained:

> [*Westmoreland*] does not determine that oil and gas are not capable of ownership, even when in place, or may not be the subject of a grant. On the contrary, in this state these matters are firmly established otherwise.
>
> It has been many times decided that oil and gas are minerals, though not commonly spoken of as such, and while in place are "part of the land" (Kier v. Peterson, 41 Pa. 357, 362; Funk v. Haldeman, 53 Pa. 229, 249; Stoughton's Appeal, 88 Pa. 198, 201; Marshall v. Mellon, 179 Pa. 371, 374, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601); like other minerals within the bounds of the freehold (which extends to

> the center of the earth—Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 295, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645), they may be the subject of sale (which is precisely what in legal effect . . . lease accomplishes—Mcintosh v. Ropp, 233 Pa. 497, 512, 82 Atl. 949), separate and apart from the surface and from any other minerals beneath it. This being true . . . like all other minerals they necessarily belong to the owner in fee or his grantee, so long as they remain part of the property, and though he cannot use them until he has severed them from the freehold, exactly as in the case of all other minerals beneath the surface, he nevertheless has an ownership which he can sell, and which otherwise he will lose only by their leaving the property.

Hamilton, 116 A. at 50.

Thus, the rule of capture as explicated in Pennsylvania does not provide that, like wild animals, only the capture of oil and gas creates a property interest therein. (Were it otherwise, like wild animals, they could not be sold.) Rather, the rule merely permits a landowner to withdraw from its portion of a shared reservoir of inherently migratory natural resources even if such withdrawal causes migration of such resources to the landowner's portion of the reservoir from the neighbor's portion. Indeed, the landowner is essentially free to develop *its* portion of the reservoir and *its* land in any manner it sees fit, even with the aim of promoting migration: *e.g.*, by using explosives to fracture rock within *its* property, *see Kepple v. Pennsylvania Torpedo Co.*, 7 Pa. Super. 620, 621 (1898) (applying the rule where

landowner used explosives to "shoot" its well and increase its capacity); by placing a well in *its* portion of the reservoir but near a neighbor's portion so as to promote migration, *see Barnard*, *supra*; or even by using devices, such as vacuum pumps, to promote migration, *see Jones*, *supra*.

Yet, a landowner's right to develop *its* property ceases at its neighbors' property lines; the rule of capture is not a license to physically invade – *i.e.*, trespass upon – its neighbors' portion of a shared reservoir, much less reservoirs wholly within the neighbors' property. *See generally Lynch v. Burford*, 50 A. 228 (Pa. 1901) (holding landowner liable in trespass for drilling well in lessee's leasehold); *accord Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389 (Tex. 1950); *Edwards v. Lachman*, 534 P.2d 670 (Okla. 1974).

Thus, the Superior Court correctly rejected Southwestern's ill-conceived reliance on the rule of capture. As the court recognized, a fracking company may frack – *i.e.*, it may drill a vertical well or horizontal well or inject and propel frack fluid and proppant to create artificial fractures throughout shale rock – beneath *its* property, and, pursuant to the rule of capture, it may use these means to withdraw from any reservoir of oil and/or gas it shares with a neighbor notwithstanding migration of such resources to the landowner's portion from the neighbor's portion. It may *not*, on the other hand, drill a vertical well or horizontal extension, or inject or propel frack fluid

or proppant to create artificial fractures throughout the shale rock beneath *its neighbors'* property to access previously inaccessible oil and gas therein.

Indeed, Southwestern's invocation of the rule of capture actually seeks the creation of a newly minted, freestanding right to frack not only its land, but also into the subsurface of its neighbors' property, to expose them to significant environmental risks, and to take their valuable natural resources for its own private gain without consent or remuneration. Notably, such a privilege is not available even to the sovereign State itself. *See* U.S. Const., amend. V ("[N]or shall private property be taken for public use, without just compensation."); *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement[.]"); Pa. Const., art. I § 10 ("[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."); *Reading Area Water Auth. v. Schuylkill River Greenway Assn.*, 100 A.3d 572, 577 (Pa. 2014) (noting takings in Pennsylvania must primarily benefit the public); 26 Pa.C.S. §§ 306–307 (requiring public purpose and just compensation). As the Superior Court recognized, interpreting the rule of capture to permit oil and gas companies to frack into their neighbors' land would essentially give them *carte blanche* to ignore small landowners entirely and simply take their

natural resources, thereby creating an essentially anarchical system of subsurface property rights.

3. Southwestern's and its associated *amici*'s arguments to the contrary are not persuasive.

Southwestern's and its associated *amici*'s arguments to the contrary, although prolific, are not persuasive.[8]

a. Southwestern's arguments are not persuasive: they misapprehend the rule of capture, rely on nonsense, raise policy concerns that are dubious, ignore the strong countervailing interest in the right to exclude interference with land as the core right of the private system of property ownership, and ignore this Court's province as the keeper of the common law.

i. Southwestern's argument the Briggses' claims are precluded by the rule of capture misapprehends the rule of capture and relies on nonsense.

In its first argument, Southwestern well-enough explains that the rule of capture precludes liability for drainage, but then quizzically proceeds to suggest that it also permits a landowner to frack into its neighbor's land.

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[8] Indeed, Southwesterns' and its associated *amici*'s arguments are so numerous and ill-supported that one wonders whether they are engaged in a Gish Gallop. *See generally* https://speakingofresearch.com/2012/09/11/gish-gallop <last visited Mar. 5, 2019> (noting the term is named after creationism advocate Duane Gish and describing the term as "a technique . . . whereby someone argues a cause by hurling as many different half-truths and no-truths into a very short space of time so that their opponent cannot hope to combat each point").

Southwestern suggests this possibility is of no moment because "hydraulic fracturing involves the same considerations regarding the rights of adjacent landowners and the nature of oil and gas development as do other methods of production": to wit, (1) "[l]ike other methods of production, hydraulic fracturing is a lawful activity that landowners have the right to engage in on their property"; (2) "[a]lso like other methods, engaging in lawful production of oil and gas by hydraulic fracturing necessarily involves indeterminable subsurface movements–both of oil and gas and of fractures and fracturing fluids"; and (3) fracking is simply another mechanism for oil and gas development like the vacuum pumps in *Jones*, or the explosives in *Kepple*.[9]

Southwestern's first argument is unpersuasive. As detailed above, a fracking company whose development activities physically invade – *i.e.*, trespass upon – neighboring land are liable for trespass, and the rule of capture does not apply. Moreover, Southwestern's ill-formulated attempts to circumvent this obvious consequence are plainly irrelevant. First, it is of no moment that a landowner's engaging in conventional oil and gas

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[9] Industry-side *amicus curiae* American Petroleum Institute ("API"), as well as Marcellus Shale Coalition ("MSC"), *et al.* offer a version of Southwestern's argument in this regard in their briefs as well, but emphasize that fracking, in some form, existed well prior to the current fracking boom. *See* API's Brief at 3-8; MSC's Brief at 14. *Amici curiae*, Professor Terry Engelder and Thomas Gillespie, corroborate as much. *See* Engelder's Brief at 7-9.

development and fracking on its own land are lawful activities; doing so beneath its neighbors' lands is not a lawful activity.

Second, it is likewise unimportant that both conventional oil and gas development and fracking involve inherently migratory resources. A landowner's bottoming a conventional well in its neighbor's portion of a shared reservoir of fugacious resources is not justified by the resources' fugacity; so, too, it must be with a landowner's creation of fractures beneath its neighbor's land. It is similarly irrelevant that the size and direction of hydraulic fractures is difficult to project. Preliminarily, Southwestern's averment that it is impossible to do so is belied by the existence of entire fields of geological research devoted to the task, *see*, *e.g.*, Rachel Westwood, et al., "Horizontal respect distance for hydraulic fracturing in the vicinity of existing faults in deep geological reservoirs: a review and modelling study," Geomechanics and Geophysics for Geo-Energy and Geo-Resources, Vol. 3, Issue 4, 379-391 (Dec. 2017), *available at* https://link.springer.com/article/10.1007/s40948-017-0065-3 <last visited Mar. 14, 2019> (projecting method for determining necessary lateral buffer to avoid, *inter alia*, interference with existing fault lines that creates artificial earthquakes); Richard J. Davies, *et al.*, "Hydraulic Fractures: How far can they Go?," Marine and Petroleum Geology, Vol. 37, Issue 1 at 1-6 (Nov.

2012), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0264817212000852?via%3Dihub <last visited Mar. 14, 2019> (noting the highest-reported upward-propagating fracture in tested American shale plays and projecting a maximum upward-propagating fracture of approximately 350 meters in 99% of cases). Moreover, and perhaps more importantly, the law of trespass and the rule of capture have never been predicated on the difficulty of keeping one's activities within the physical confines of one's leasehold, and, indeed, have consistently recognized that an oil and gas developer has a duty to do so. *See Lynch*, *supra*.

Finally, the fact that vacuum pumps, explosives, and fracking are all technological mechanisms for oil and gas development is similarly a *non sequitur*. The fact that Pennsylvania law permits landowners to use artificial means, including explosives, on their own land to promote well expansion throughout the subterranean strata of their own land and drainage from elsewhere, does not mean that it permits landowners to install devices and explosives beneath, or to cause explosions beneath, their neighbors' property. Indeed, Southwestern's arguments illustrate the absurdity of its position: that it is free to engage in any exploitative mechanism whatsoever, including the use of explosive devices, so long as it initiates the mechanism beneath its own land, regardless of whether it physically invades and impacts

others' property. In other words, it is one thing to say that a landowner may explode or tunnel throughout his own estate; it is another entirely to say that he may explode or tunnel throughout his neighbor's.

ii. Southwestern's argument that this Court should not "change" the rule of capture misapprehends the rule of capture, raises policy concerns that are dubious, and ignores the strong countervailing interest in the right to exclude interference with land as the core right of the private system of property ownership.

In its second argument, Southwestern argues at some length that this Honorable Court should not "change the rule of capture," identifying a parade of horribles that would ensue were it to do so. Specifically, Southwestern maintains that such a "change" would "upend settled property rights," by diminishing landowners' and augmenting neighbors' property rights, and, although Southwestern does not explain how, upsetting oil and gas companies' contractual promises to protect their lessors from drainage. Southwestern's Brief at 28. Southwestern then proceeds to explain how "changing" the rule of capture would create proffered calamitous policy pitfalls: *inter alia*, (1) it would undermine landowners' expectations that they are free to use their land in whatever method they deem appropriate; (2) it would diminish fracking, which Southwestern deems "highly socially beneficial" because it provides economic activity and energy; (3) it would hold oil and gas companies accountable for creating hydraulic fractures

when, Southwestern asserts, there is no reliable way to determine the direction and extent of such fractures; (4) it would diminish fracking, thereby diminishing the fracking industry in Pennsylvania,[10] as well as related revenue,[11] and increasing the cost of energy; (5) it would require courts to engage in "speculative and unwieldy" litigation over the direction and extent of fractures and the apportionment and value of unlawfully extracted oil and gas; and (6) it would diminish other land uses, such as carbon capture or waste disposal wells, that cause "modest or undeterminable and inconsequential subsurface intrusions" -- *i.e.*, other trespasses. *Id.* at 47-48.[12] Southwestern maintains that afflicted neighbors have sufficient

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[10] Industry-side *amicus curiae*, the Pennsylvania Chamber of Business and Industry ("PCBI"), *et al.*, offered a version of Southwestern's argument in this regard in its brief as well. *See* PCBI's Brief at 6-15.

[11] Industry-side *amicus curiae*, County of Washington, filed a brief in which it notes that fracking enriches county and local governments, and that a reduction in fracking would reduce their enrichment. *See* County of Washington's Brief at 2-4.

[12] Protect PT has omitted some of Southwestern's more unreasonable and untenable arguments, such as that affirming the Superior Court's holding that it may not frack its neighbor's land is the peak of a slippery slope to outlawing aviation and space exploration. *See* Southwestern's Brief at 47-49.

remedies because they remain free to sue in trespass if an actual well is bottomed on their property, or if they suffer land subsidence. [13]

Southwestern's second argument is likewise unpersuasive. Preliminarily, as detailed above, the Superior Court's decision did not "change" the rule of capture: it merely stated that an oil and gas company's right to develop its property ends at its neighbors' property line, which is consistent with the law of trespass and the rule of capture as explicated in Pennsylvania for over a century. Thus, Southwestern's derivative arguments that this Court should not "change" the rule are misguided: affirmance of the Superior Court's holding would neither "upend settled property rights"[14] nor modify existing contracts concerning drainage. Relatedly, affirming the Superior Court's holding would continue to permit landowners to develop their land: it would simply preclude them from developing their *neighbors'* land and taking their *neighbors'* natural resources without consent or remuneration.

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[13] API and MSC, *et al.* offer a version of Southwestern's argument in this regard in their briefs as well, emphasizing reliance on the rule of capture in the leasing process, the difficulties inherent in trespass-by-frack litigation, and the importance of fracking to Pennsylvania's economy and the energy sector as a whole. *See* API's Brief at 8-13; MSC's Brief at 21-26, 28-36.

[14] Granting fracking companies a freestanding right to frack into their neighbors' land, on the other hand, would clearly do so.

Southwestern's policy concerns are dubious at best. First, contrary to Southwestern's protestations, precluding fracking companies from entering unleased property and taking natural resources does not prevent them from developing their own leaseholds: it merely means that they must lease what they intend to, or might reasonably have to, develop. Second, although reasonable minds may differ whether fracking is "highly socially beneficial" in the grand scheme of energy and public policy,[15] it is difficult to imagine that the continued vitality of fracking as a source of energy in the United States substantially depends upon fracking companies' ability to fracture into, and remove natural gas from, their neighbors' land. Indeed, even if it is so, the industry's commercial viability is no justification for permitting it to invade others' land and take their resources without consent or remuneration. Southwestern's apparent position in this regard is remarkable, as it appears to suggest that it is entitled not to a common-law right of forced pooling (under which it would be liable to apportion royalties

[15] *See, e.g.*, Christopher Smith, et al., "Current fossil fuel infrastructure does not yet commit us to 1.5° C warming," *Nature Communications* 10 (2019), *available at* https://www.nature.com/articles/s41467-018-07999-w (explaining that even if all new fossil fuel development ceased today, there remains a 64% chance of exceeding international targets for maximum global warming and occasioning calamitous environmental consequences).

among affected neighbors), but, rather, a common-law right to condemn without compensation (which is unheard of in our constitutional republic).

Next, Southwestern's concerns over the difficulties inherent in fracking trespass litigation, too, are ill-conceived. Again, Southwestern exagerrates the indeterminability of fracking's reach. *See* Section 3(a)(i), *supra*. In any event, whatever the vagaries of evaluating the direction and extent of artificial fractures, the burden of proof remains on the plaintiff to do so, likely via expert testimony, and the calculation of the present value of gas at the time of a verdict is obviously a task just as capable of performance as the calculation of monetary damages in any other commodity-related case.

Finally, Southwestern's arguments related to other land uses that trespass into their neighbors' land similarly fail. It is of little importance whether a landowner views its trespass into its neighbor's property as "modest" or "inconsequential": it is not the landowner's, but, rather, the neighbor's, right to make that determination.

Indeed, all of Southwestern's arguments ignore the fundamental tenet of American law that the right to exclude unwanted interference is the essence of the private ownership of property. *See, e.g., Kaiser Aetna v. United States*, 44 U.S. 164, 176 (1979) (noting that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are

commonly characterized as property"); *see also, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Commn.*, 483 U.S. 825, 831 (1987). Indeed, as one academician has explained:

> [T]he right to exclude is more than just "one of the most essential" constituents of property–it is the *sine qua non*. Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.

Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

In other words, endeavoring to ground this abstraction in the instant case, if Southwestern is free to use hydraulic pressure and slurry to create artificial fractures in the Briggses' land, and thereby expose them to environmental risks and take their valuable natural resources, even supposing that privilege helps the fracking industry remain viable or alleviates litigation burdens on the courts, it is Southwestern's land, not the Briggses'. Conversely, if the Briggses are not free to exclude Southwestern, whether because they wish to bargain for a lease with Southwestern or another company, whether they have environmental concerns over the dangers inherent in fracking, or for no reason at all, it is not the Briggses' land, it is Southwestern's.

iii. Southwestern's argument that affirming the Superior Court's holding would invade legislative prerogatives misapprehends the rule of capture and ignores this Court's province as the keeper of the common law.

In its final argument, Southwestern claims that "changing" the rule of capture would run afoul of legislative prerogatives because the Superior Court relied upon a policy view "that liability for drainage should be imposed in order to protect small landowners from large oil and gas developers." Southwestern's Brief at 55. Southwestern claims this policy goal is counterbalanced by the policy goal of providing for efficient production of oil and gas resources, that balancing the two goals is the province of the legislature, and that if the rule of capture is to be "changed," it must be changed via legislative authority, citing various legislative efforts at addressing the difficulties surrounding oil and gas development vis-à-vis small landowners that did not come to fruition.[16]

Again, inasmuch as the Superior Court did not change the law of trespass or the rule of capture, Southwestern's arguments proceed from a faulty premise and are, therefore, invalid. Thus, it remains for this Court to apply the common law of trespass in the absence of legislative directives to the contrary.

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[16] MSC offers a version of this argument in its brief as well. *See* MSC's Brief at 27.

CONCLUSION

Accordingly, Protect PT requests that the Court affirm the April 2, 2018 order of the Superior Court.

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CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records and Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMITS OF PA.R.A.P. 531

I hereby certify that this brief complies with the word-count limits of Pa.R.A.P. 531.

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