

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SAMUEL J. SWIGER, et al.

Plaintiffs Below and Appellees

v.

UGI/AMERIGAS, INC., a Foreign Corporation,
d/b/a AMERIGAS, INC. et al.,

Defendants Below and Appellants.

Supreme Court No. 31792

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In an effort to obscure and detract, Appellees (generally referred to herein as Plaintiffs) have filed a Brief that contains factual inaccuracies and fanciful suppositions, but which does not address the core legal issues raised in Appellants' Initial Brief. Specifically, Plaintiffs never address the plain and unambiguous language contained in the Section 1.5 Exemption;¹ they never acknowledge that the Section 1.5 Exemption has been adopted numerous times as a Legislative Rule for over twenty-five years and, accordingly, has the force and weight of a statute, as well as reflects the Legislative will; they ignore that the statutory arguments that they have raised were all specifically considered and *rejected* by this Court in *Redden v. Comer*, 200 W. Va. 209, 488 S.E.2d 484 (1997); and they insist on proffering twisted logic to avoid application of the plain language of the Exemption, arguing that it cannot apply to businesses and vendors, that it cannot apply to the yard around a home and that, in short, the words cannot mean what they say in black and white. Indeed, perhaps most tellingly, Plaintiffs state that "it is unclear exactly what the Exemption means or the scope of its coverage."² To the contrary, the only way to arrive at such a conclusion is willfully to refuse to see the words for what they are – a clear and plain directive from the Legislature that the State Fire Code is to have no application to one and two family dwelling homes.

It is clear that Plaintiffs do not like the Exemption and try to employ scare tactics to conjure a host of calamities they say will surely ensue if the language of the Exemption is applied as written. What they ignore, however, is that the Exemption *has been* applied as written since its inception, as the deposition testimony of former State Fire Marshal Walter Smittle

¹ W. Va. C.S.R. § 87-1-1.5 (2004).

² Plaintiffs' Brief at 28.

shows.³ The predictions of dire consequences foreseen by Plaintiffs (and the *amici*) have not come to pass, which demonstrates how hollow are their arguments.

What Plaintiffs are really asking this Court to do is accept and impose *Plaintiffs'* public policy choices and ignore the twenty-five year history of Legislative mandates concerning the applicability of the State Fire Code. However, as this Court has said on numerous occasions “this Court cannot substitute its own judgment for that of the legislature and significantly rewrite the statute” and “it is not for the courts to arbitrarily read into a statute that which it does not say.” *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003) (quoting *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23, 28 (1997) (original alterations omitted). Indeed, to the extent that Plaintiffs believe that their fears are well-founded, it is to the Legislature that they should turn for redress, for it is those elected officials who set public policy. As to this Court, however, its role is clear – to wit: to enforce plain and unambiguous legislative enactments as written. This is precisely what occurred in *Redden* when the Court was presented with identical arguments as those presented here by Plaintiffs, and this is the same course that the Court should follow in deciding the instant matter.

With these general principles in mind, Appellants (generally referred to herein as AmeriGas) will address below the various specific assertions and arguments that Plaintiffs have posited in their Brief.

³ See Smittle Depo. at pp. 166-172 (“that it’s my opinion as almost 26 years as state fire marshal that one and two family dwellings are exempt under the code, and therefore the fire marshal can’t enforce any provisions of the code on the one and two family dwellings, the premise of the property included . . . and that’s also remembering to the best of my recollection discussions with the attorney general’s office regarding our authority in one and two family dwellings”); see also Letter from Walter Smittle, III, State Fire Marshal, to David D. Molgaard, dated November 17, 1995 (“Smittle Letter”), attached as Exhibit C to AmeriGas’s Motion for Recon., and also attached as Exhibit A to the *Redden* Appellee’s brief.

II. ARGUMENT

A. Plaintiffs' Statement of Fact is Grossly Misleading

Trying to cast AmeriGas in the most unfavorable light possible and thereby prejudice the Court against it, Plaintiffs resort to a series of factual misstatements and distortions. This ploy should be seen for what it is and not distract the Court from the true issues presented for review -- *i.e.*, the validity and application of the Section 1.5 Exemption. Nonetheless, AmeriGas believes that it cannot allow some of Plaintiffs' more egregious statements to go unanswered and, thus, in an Addendum at the end of this Brief, AmeriGas sets the record straight so that the Court will have a balanced and accurate factual background against which to consider this matter. The Addendum discusses the following points, each of which has been misrepresented by Plaintiffs.

- West Virginia Law *Does Not* Requires Propane Lines to be Buried 18 Inches
- AmeriGas's 2001 Re-Burial Efforts Were *Not* Undisclosed to Plaintiffs
- AmeriGas Has *Not* Changed Its Position Concerning the Applicability of NFPA
- AmeriGas's Agreement to the Protocol Did *Not* Constitute a Concession on the Appropriate Burial Depth of Underground Propane Lines
- AmeriGas Did *Not* Wait Until November 2002 to Inform the Circuit Court of the Section 1.5 Exemption
- AmeriGas Has *Not* Argued that it Can Install Underground Propane Lines Without any Fire Safety or Legal Restraints

B. Plaintiffs' Recitation of Their Version of the Legislative History is Speculative, Erroneous and Incomplete

1. Plaintiffs' Recitation of Legislative History Consists of Unsupported Supposition that is Inconsistent with a Review of Prior Statutes and Present Public Policy Choices

Rather than addressing the arguments that AmeriGas raised in its Initial Brief regarding the lengthy history of the State Fire Code, including the Section 1.5 Exemption, and the fact that it has been continuously adopted as a Legislative Rule since 1979, Plaintiffs offer instead a completely irrelevant and convoluted history of the statute that *pre-dates* the Fire Prevention and Control Act⁴ and then fill their brief with a series of unsupported claims about what the Legislature “clearly” and “obviously” “decided,” “desired,” “understood” and “intended.”⁵ This is not legal argument, but wishful thinking on the part of Plaintiffs and should be ignored.

First, to the extent that the history of prior statutes is relevant, what information is available suggests that historically the powers of the State Fire Marshal were extremely limited, thereby indicating that the Legislature had always favored a narrow approach to the imposition of these types of standards on West Virginia's citizens. For example, in *Dorsey v. City of Moundsville*, 102 W. Va. 210, 135 S.E. 6 (1926), in a case regarding the Fire Marshal ordering the installation of a fire escape on a three story building, this Court explained: “The duties of [the State Fire Marshal] are few and its authority is very limited. His department is given the right to investigate and take testimony relative to every fire where the damage exceeds fifty dollars, to arrest or cause the arrest of incendiaries, to examine buildings, and to require the installation of fire escapes and the necessary exits on certain buildings.”

⁴ W. Va. Code § 29-3-1 *et seq.*

⁵ See generally Plaintiffs' Br. at 10-13.

Second, turning to the State Fire Marshal Act⁶ – *i.e.*, the statute that immediately pre-dates the 1976 Fire Prevention and Control Act – that statute on its face strictly limited the authority of the State Fire Marshal to promulgating rules and regulations and, in fact, limited that authority solely to eleven specific types of situations. *See* W. Va. Code § 29-3-4(a) (1949)⁷. The vast majority of these situations concerned either public buildings or buildings used for public gatherings (*e.g.*, churches, schools, theaters, etc.).⁸ While it is true, as Plaintiffs point out, that the Fire Marshal was given authority to promulgate rules and regulations concerning various combustibles, including liquefied petroleum gas, as well as the installation of electrical wiring, there is nothing in the Fire Marshal Act that specifically would have authorized the Fire Marshal to issue generalized rules and regulations constituting a fire code applicable to single family homes. Indeed, after listing the various limited areas of authority granted to the Fire Marshal, the only more general provision included in the statute applied solely to *public buildings*. The Fire Marshal was permitted to “Prescribe protection, safeguards, or other means best adapted to

⁶ The State Fire Marshal Act, was originally enacted in 1909 and amended various times through the years. A copy of this Act is attached as Exhibit 1 to Plaintiff Class Members’ Response to Defendants’ Motion for Reconsideration Regarding Determination of Regulation Applicable to Burial Depth Standards, dated December 2, 2002. Plaintiffs are relying in particular on § 29-3-4(a), which was adopted in 1949.

⁷ *See also* West Virginia Attorney General Opinion, November 7, 1967, 52 W. Va. Op. Att’y Gen. 538 (1967) (available at 1967 WL 93432) (Order issued by State Fire Marshal to West Virginia University to evacuate various fraternity and sorority houses; “Section 4(a) [of the 1949 Statute] provides that the State Fire Marshal may adopt and promulgate rules and regulations as may be deemed necessary as safety precautions to guard against the loss of life and property regarding *certain specifically designated subjects and buildings*.”) (Emphasis added.)

⁸ Specifically, the Fire Marshal was given authority to issue rules and regulations about combustibles; installation of electric wiring; the construction and maintenance of fire escapes; exits for public buildings, including multiple residence apartments, and various buildings where people congregate; fire drills that were to be conducted at schools; demolition of buildings that represent a fire hazard; and the installation of certain types of fire escapes in non-single family home structures. *See* §29-3-4(a)(1)-(11) (1949).

render *any public building* inherently safe from the hazards of fire and the loss of life by fire as required by law, ordinance, or lawful orders.” W. Va. Code § 29-3-4(a)(11) (emphasis added).

Thus, contrary to Plaintiffs bald assertion that “there was no exception for one and two-family dwellings [in the prior Act] as it was not the intent of the Legislature that such structures be excluded wholesale from necessary safety regulations,”⁹ the State Fire Marshal Act on its face *precluded* the issuance of such general fire safety regulations to private homes.

Moreover, this reading is consistent with the testimony of former State Fire Marshal Walter Smittle, who served as State Fire Marshal for almost 26 years starting in 1974 and testified that the exclusion in the 1979 State Fire Code of one and two family homes from the jurisdiction of the State Fire Marshal “was there prior to I being fire marshal. It was a standpoint in the statutory law. It was clear that the fire marshal didn’t have the jurisdiction in one and two family dwellings”¹⁰ Furthermore, the foregoing, together with the information underlying the 1976 State Fire Prevention and Control Act and its implementation, also demonstrate that Plaintiffs’ speculation about the Fire Marshall’s authority to regulate LP gas at *all* installations is unsupported.¹¹

⁹ See Plaintiffs’ Br. at 11

¹⁰ See Depo. of Walter Smittle at p. 154, lines 14-17.

¹¹ Plaintiffs argue – but with no foundation, citation, or any other evidence – that the reference in the State Fire Marshal Act to regulating combustibles, including liquefied petroleum gas meant that “This naturally could include requiring minimum burial depth standards for propane gas lines used to fuel a private dwelling.” Plaintiffs’ Br. at 10. Certainly, what Plaintiffs suppose “could have been” has no meaning in terms of determining Legislative intent or what actually occurred in prior times. That Plaintiffs have come forward with nothing but a guess as to what might have occurred demonstrates the weakness of their argument. Moreover, what evidence does exist suggests that just the opposite was true. The 1976 State Fire Prevention and Control Act required the newly created State Fire Commission to promulgate a State Fire Code by January 1, 1977. (W. Va. Code § 29-3-5(b)). However, as explained in a letter sent from the president of the State Fire Commission to the Secretary of State on December 29, 1976, the day before the statutory deadline, the Fire Commission did not have either the confirmed

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In fact, this history, which is rooted in the actual text of the prior statute, this Court's and the Attorney General's Office reading of those statutes, and the testimony of the State Fire Marshal who served under both Acts, shows a clear and consistent legislative intent towards confining the role of State Fire Marshal and authorizing him to act in only particular and specifically delimited areas, which did not include as a general matter one and two family homes. Thus, a decision in 1979 at the time that the present State Fire Code was first adopted to ensure that the State Fire Code did not reach to one and two family homes is *consistent* with a legislative scheme and sentiment reaching back to the early part of the last century.

Moreover, nothing about the language of the 1976 statute changes this interpretation. As AmeriGas pointed out in its initial brief – and as Plaintiffs ignore – the 1976 statute does *not* state that its purpose was to reach to *all* citizens of West Virginia.¹² Rather, the statute begins

membership or the resources to prepare a final fire code by the deadline. *See* letter from Paul Ed Blackwell to Secretary of State James R. McCartney at App. 2-3. (Copies of excerpts of earlier versions of the State Fire Code, including any accompanying correspondence to the Secretary of State are collected for the Court's convenience in a separate Appendix. AmeriGas is filing simultaneously herewith a Motion requesting that the Court accept this separate Appendix.) Accordingly, the Fire Commission submitted temporary rules and regulations until all required procedures could be followed in terms of producing an approved State Fire Code through the legislative rule-making review committee and the Legislature. *Id.* The December 1976 temporary rules contain a provision on liquefied petroleum ("LP") gases (*id.* at App. 13-14), which in light of Mr. Blackwell's letter, it is logical to assume had been the regulation that the State Fire Marshal had used under the prior Act – an Act that specifically mentioned LP gas as opposed to the 1976 Act, which made no such mention. Notably, the LP provision called for all LP dealers to obtain a permit from the State Fire Marshal and, consistent with the limitations on the Fire Marshal's authority under the Fire Marshal Act, provided that in "order to protect the public from any improper installation" that dealers in LP gases submit detailed sketches and specifications for LP installations in any school, church or other place of public assembly. *Id.* Hence, such protections were not required for one and two family homes.

¹² Indeed, a review of the preface to the Senate bill (S.B. 146) that was adopted in 1976 as the State Fire Prevention and Control Act indicates that the purpose was to reorganize the administration of fire oversight matters such that the Fire Commission was created and the Office of the Fire Marshal was removed from the supervision of the Office of the Insurance Commissioner under which it previously had been administratively placed. The preface goes on
(cont'd)

with the statement that “A *significant part* of the population of the state needs improved fire prevention and control.” W. Va. Code § 29-3-2(a) (1976). Given how limited the State Fire Marshal Act was in terms of reach and scope, that the Legislature sought in 1976 to redefine the Fire Marshal’s authority cannot be equated to an affirmative statement that the intent was to reach either all citizens of West Virginia or in particular to reach to one and two family homes.

2. The Actual History Behind the Development of the First State Fire Code Under the 1976 Act, Which Plaintiffs Ignore, Contradicts Their Claim That The Exemption Was An “Unconstitutional Usurpation of Executive Prerogative” and “A Violation of the Separation of Powers”

As is their want, Plaintiffs make sweeping accusations about usurping “executive prerogative” and violating principles of “separation of powers”¹³ without actually looking at the manner in which the Section 1.5 Exemption came into existence. Yet, the actual history of the creation of the first State Fire Code under the 1976 Act further supports a determination that the Section 1.5 Exemption was developed consistent with the legislative process and included opportunity for legislative review and oversight.

to speak of the establishment of the Fire Commission to promulgate a State Fire Code; the duties and responsibilities of the Fire Marshal; and a host of other administrative aspects of the reorganization of fire oversight activities. This preface read in conjunction with the statute’s identified policy concerning “[a] significant part of the population” needing improved fire prevention and control and “a coordinat[ed] program for fire prevention and control,” as well as a revamping of “certain administrative functions and procedures” would suggest that by 1976 the placement of fire related matter under the authority of the State Insurance Commissioner had proven inadequate or no longer manageable. Thus, the focus was more on administrative reorganization as opposed to a wide-sweeping statement concerning the standards of fire safety that were to be adopted at particular types of structures. In fact, the standards aspect was statutorily delegated to the newly created Fire Commission, which was given the “power to promulgate, amend and repeal regulations” that were to become the State Fire Code. W. Va. Code § 29-3-5(a) (1976).

¹³ Appellee’s Brief at p. 19.

Specifically, at the time that temporary rules were forwarded to the Secretary of State in December 1976,¹⁴ the State Fire Commission also forwarded a copy of the temporary rules to the legislative rule making committee,¹⁵ and announced a public hearing to be held on February 14, 1977 to consider the proposed State Fire Code.¹⁶ The December 1976 temporary rules that the Fire Commission submitted included various provisions that on their face would have applied to one and two family homes – *i.e.*, a requirement that all building construction and modification plans be submitted to the Fire Marshal for pre-approval; a prohibition of any person occupying or using a building which had been erected or altered in violation of the State Fire Code; and fire resistance standards for carpeting used throughout the State.¹⁷

A public hearing was held on February 14, 1977 to consider the proposed State Fire Code.¹⁸ Changes resulting from that public hearing were adopted and the proposed revised rules were forwarded to the legislative rule-making review committee.¹⁹ Significantly, in the sections concerning building construction/modification approvals, building occupancy, and carpeting, a sentence was added to each such section stating the provisions would have no application to one

¹⁴ See *supra* discussion at note 11 regarding the reasons for the use of temporary rules prior to 1979.

¹⁵ See letter of December 29, 1976 from Fire Commission president Paul Ed Blackwell to the Secretary of State at App. 2-3.

¹⁶ See Notice of Public Hearing in re Adoption of State Fire Commission Rules and Regulations, filed with the Secretary of State on December 30, 1976 at App. 4.

¹⁷ See excerpts of December 30, 1976 temporary rules and regulations at App. 5-18. As the table of contents indicates, the vast majority of the provisions in the proposed rules and regulations addressed non-single family home subjects.

¹⁸ See letter of March 24, 1977 from Fire Commission president Paul Ed Blackwell to the Secretary of State at App. 22-23.

¹⁹ *Id.*

and two family dwelling structures.²⁰ These same exceptions were included in a June 1977 version of the proposed rules filed with the Secretary of State.²¹

On November 12, 1979, Senator Steptoe and Delegate Shingleton, on behalf of the Legislative Rule-Making Committee, sent a letter to the Secretary of State stating that on November 11, 1979 the legislative rule-making committee had approved various regulations, including the State Fire Code.²² A copy of the State Fire Code (correcting some prior typographical errors and nonsubstantive changes) was attached.²³ That copy of the State Fire Code, which had been reviewed and approved by the legislative rule-making review committee, contained the exemption language – “This State Fire Code has no application to buildings used wholly as dwelling houses for no more than two families and has no applications to farm structures.”²⁴ In another section dealing with Sprinkler Protection for nursing homes and similar types of institutions, an “Exception” was listed for “Homes caring for not more than three persons.”²⁵

This history supports a determination that not only is the Section 1.5 Exemption *not* violative of public policy, but that it is the fruit of a process designed to serve the public interest

²⁰ See excerpts of March 24, 1977 temporary rules and regulations at App. 30-31, 32 and 35.

²¹ See excerpts of June 22, 1977 temporary rules and regulations at App. 39-55.

²² See letter for November 12, 1979 from Legislative Rule-Making Committee to Secretary of State at App. 56-57.

²³ *Id.* at App. 58-72.

²⁴ See excerpts of 1979 State Fire Code, effective December 14, 1979, Section 1.06, at App. 58-65. The provision continues that sleeping quarters for farm workers or farm structures used for educational or institutional occupancy shall not be exempt. Language to this effect has continued to be included in the State Fire Code through the present day, although more expansive language was added in 1984 to address personal care homes. See excerpts of 1984 State Fire Code, effective March 30, 1984 at App. 71.

²⁵ See excerpts of 1979 State Fire Code at App 63. Similar language was later added to the Exemption section. See excerpts of 1984 State Fire Code, effective March 30, 1984 at App. 71.

as voiced by members of the community, and as developed through the Legislature's rule-making system, consistent with the Administrative Procedures Act ("APA")²⁶, and then the Legislature's own final approval process. Hence, very shortly after the creation of the first temporary iteration of the State Fire Code in late 1976, decisions were made to explicitly exempt one and two family homes from various provisions – that is, those provisions that most immediately applied to such structures. That philosophy grew and evolved and – as former Fire Marshal Walter Smittle testified – by 1979, the legislative rule-making review committee, which had been sent earlier versions as they were developed – determined that the Exemption was a proper addition to the State Fire Code.²⁷ Indeed, according to Walter Smittle, it was Senator Steptoe, one of the co-chairmen of the legislative rule-making review committee, who personally promoted the inclusion of the Exemption.²⁸ The decision, therefore, was not arbitrary, capricious, sudden or unconsidered, but arose from a slow, deliberative process in which both the public and legislators had input and an opportunity to be heard. In short, the process by which the Section 1.5 Exemption was adopted served and reflected the public policy interests of West Virginia.²⁹

²⁶ W. Va. Code § 29A-1-1 *et seq.*

²⁷ Smittle Dep. at p. 153, line 5 through p. 154, line 8.

²⁸ *Id.*

²⁹ Plaintiffs' reference to *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) does not alter this analysis. In *Barker*, this Court examined certain provisions of the APA that were adopted in 1976, in which the Legislature created the legislative rule-making committee and delineated the procedures under which it was to operate. At issue was the validity of a provision that permitted the legislative rulemaking committee to veto *in toto* proposed agency rules, without requiring any concomitant review by the full Legislature of the proposed rule (or a recommendation to veto the rule). The *Barker* Court ultimately held that such conduct was not constitutional. *Id.* at 178, at 636. In response, the Legislature amended the contested section of the APA. See *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 16, n. 17, 462 S.E.2d 586, 591, n. 17 (1995) (setting forth amended text of § 29A-3-11 in response to
(cont'd)

In short, a review of the history of legislation and interpretations reaching back in time does not support an interpretation that as of 1976 the Legislature had determined that all structures or all citizens were to be – for the first time – covered by a Fire Code or subject to wide-reaching authority of the State Fire Marshal . Indeed, the fact that by 1979, at the time that the first State Fire Code was approved, the Legislature chose specifically to *exclude* one and two family homes demonstrates an intention to preserve limitations on the Fire Marshal’s authority that had long been in place.

Barker). Among the changes was a provision that the legislative rulemaking committee was to forward the proposed rule to the Legislature and recommend authorizing the rule in whole or in part or to do so as proposed to be amended by the rulemaking committee. *See id.*; *see also*, W. Va. Code § 29A-3-11(c). Here, unlike the situation in *Barker*, there is no basis for assuming that in 1979, when considering the proposed State Fire Code, that the legislative rulemaking committee vetoed the proposed language that was submitted by the State Fire Commission for consideration and that the Legislature never considered the final rule as approved (and/or amended) by the legislative rulemaking committee. As Plaintiffs’ acknowledge, there appears to be no record at this juncture of the final Legislative approval process in 1979 of the State Fire Code. However, it is not proper to assume that the Legislature did not act constitutionally. *See generally State ex rel. Marockie v. Wagnor*, 191 W. Va. 458, 466-67, 446 S.E.2d 680, 689 (1994) (there is a presumption that the Legislature followed the constitutional rules when enacting legislation). In any case, neither *Barker* or the later *Hechler* decision (in which this Court held that it was unconstitutional for the Legislature to veto a proposed agency rule by failing to consider and vote on it) stand for the proposition that the legislative rule making committee may not proposed changes or alterations to an agency’s proposed rule. In fact, § 29A-3-11(d) provides that when the rulemaking committee recommends to the Legislature that a rule be approved in whole or in part, the committee’s staff is to prepare a proposed bill “authorizing the promulgation of all or part of the legislative rule and incorporating such amendments as the committee desires.” In addition, subsection (d) further provides that any draft bill prepared by the rulemaking committee “shall contain a finding that the rule is within the legislative intent of the statute which the rule is intended to implement” Thus, even if there were there some infirmity in the way that the State Fire Code was adopted in 1979 – a point that AmeriGas does not concede – since at least the post-*Barker* changes in 1982, the numerous versions of the State Fire Code adopted since that time would have been validly enacted and upon a finding that the rules, including the Exemption, were consistent with the intent of the statute.

C. Plaintiffs' Theories Regarding the Significance of Having An Optional Building Code Are Unpersuasive And Unsupported

Plaintiffs, likewise offer another unsupported theory that the State Building Code was made optional – a fact that no party contests – because “The Legislature *obviously decided* that the State Fire Code *must* be applicable to the entire State . . .” and that the “Legislature *clearly understood and intended* that the State Fire Code . . . must apply to . . . all those who live in one- and two- family dwellings.” (Plaintiffs’ Br. at 13-14) (emphasis added).³⁰ There is nothing so “obvious” or “clear” about the Legislature’s intent – except in Plaintiffs’ mind.

What should be remembered, however, is that there are myriad subjects covered by the State Building Code that have absolutely nothing to do with fire safety. To list only a very few examples, the Building Code addresses plumbing, light activation on interior stairways, stair geometry; installation of handrails; HVAC requirements; building materials and a host of other subjects – all of which deal with health and safety features in one way or another, including in one and two family homes.³¹ And yet, the State Legislature deliberately chose *not* to impose *any* of these standards on any of the citizens of West Virginia, while simultaneously eliminating any local or municipal standards that may have been adopted in the past. In other words, the Legislature determined that it would select standards, but would leave it to the local jurisdictions, and the local populace to decide if these standards would be applicable in a particular area. In making this decision, the Legislature, therefore, adopted a legislative scheme that by its

³⁰ See also Plaintiffs’ Br. at 34 (maintaining that different parts of the Fire Prevention and Control Act calling for a State Fire Code and State Building Code should be read *in pari materia* and that because the State Fire Code was to apply statewide in all counties and municipalities, the State Building Code was made optional).

³¹ That the State Building Code applies to one and two family homes is made clear by incorporation of the 2000 International Residential Code into the State Building Code. See 87 C.S.R. § 4.1.7. The full title of this code is the International Residential Code for One- and Two-Family Dwellings.

unambiguous terms clearly meant that it was entirely possible that no building safety standards or regulations would exist anywhere in the entire State.³²

In other words, if Plaintiffs' theory were true – which it is not – the mere existence or presence of the State Fire Code would do nothing to address the numerous health and safety issues that the State Building Code was designed to address, on a non-mandatory basis. Thus, there is no way to surmise that the existence of the State Fire Code was presumed to fill in the gap left by the optional nature of the State Building Code. Rather, the more plausible reading is that the West Virginia Legislature has demonstrated a consistent approach to public safety matters that elects to limit application of minimum standards and not make them mandatory on all citizens of West Virginia. This would include residents living in one and two family dwellings.

Plaintiffs are unhappy with this result and they maintain that it does not make sense and it could not be what the Legislature really intended to do.³³ If that is their argument, however, the

³² Clearly, this has not come to pass, as a large number of the cities and towns in West Virginia *have* adopted the State Building Code. So have three counties. But the fact that the vast majority of West Virginia counties have elected not to adopt the State Building Code demonstrates a public policy decision *at the local level* to forgo a wide variety of safety standards that were authorized by the Legislature in order to “safeguard life and property and to ensure the quality of construction of all structures erected or renovated throughout this state” W. Va. Code § 29-3-5b(a). Indeed, this language is very similar to the language in the statute regarding the establishment of a fire code, which calls for a code to “safeguard[] life and property from the hazards of fire and explosion.” Notably, although the language and purpose of the two provisions is very similar, the State Building Code is clearly non-mandatory throughout the State, which would support a *pari materia* reading that Legislature as a general matter did not intend to make safety code provisions automatically applicable to all citizens in West Virginia.

³³ Likewise, the State Attorney General regards this result as lamentable, and speaks of the “so-called” State Building Code which really is “[no] statewide code” given that it is not applicable to more-than two-thirds of the State. *See* Attorney General’s Br. at 4. That the Attorney General’s Office, however, is not pleased with the result of a statutory scheme that has been in existence since the Legislature first authorized a State Building Code in 1988 does not alter the result – *i.e.*, that the duly elected members of the Legislature deliberately chose *not* to apply
(cont’d)

appropriate place to make it is at the Legislature itself or to authorities in the 52 of 55 counties that have chosen not to adopt the safety measures in the State Building Code.³⁴ These would be the appropriate audiences to consider the purported information and statistics that Plaintiffs have gathered concerning the percentage of home ownership in West Virginia, the usage rate of propane heating in single family homes, and the location of propane users in rural areas outside of incorporated municipalities.³⁵ But until then, the legislators and the county officials of this State have made their choices and have set a consistent course of public policy in West Virginia that does not favor the wide imposition of fire and safety regulations on large portions of the populace.

D. Plaintiffs Fail to Overcome the Twenty-Five Year History of the Fire Code Being Adopted as a Valid Legislative Rule, Which Has the Force of a Statute

Perhaps the biggest flaw in Plaintiffs' argument is their steadfast refusal to recognize the import of the twenty-five year history of the continuous adoption of State Fire Codes, all of

safety standards on a state-wide basis to all citizens and that decision has not been altered in any fashion over the course of the last 14 years. Indeed, it seems somewhat ironic that the Attorney General's Office is now – evidently for the first time – voicing any concern about the wisdom of the Legislature's choice and the supposed impact that this choice has on unsuspecting consumers and their to ability to use the Consumer Protection Act in the event of a dispute with a home service-provider. See Attorney General's Br. at 2-5. Notably, no examples of any such problems are provided. In any case, these arguments rightly should be made to the Legislature, which is the proper branch to make such choices of public policy and the Attorney General's Office should not expect this Court to enter into a public policy debate and "engage in the arduous task of rewriting legislation, regulations and agency structure simply on the whim of a few who have expressed dissatisfaction with an agency's action." *Appalachian Power Co. v. State Tax Dep. 't of West Virginia*, 195 W. Va. 573, 578, 466 S.E.2d 424, 439 and 442 (1995).

³⁴ *Appalachian Power*, 195 W. Va. 591, n.22, 466 S.E.2d at 442, n.22 (stating that this case represents a "classic example of a [citizen] arguing to the wrong branch of government. The appropriate route for the relief requested in this case is in the West Virginia Legislature.").

³⁵ See Plaintiffs' Br. at p. 13, n.11 and p. 22, n.14. AmeriGas notes, however, that in these footnotes Plaintiffs make factual assertions concerning, for example, federal studies conducted in the 1980s on propane usage, but provide no citation or support for this contention.

which included the language of the Section 1.5 Exemption relating to one and two family dwellings, and each of which was adopted as a Legislative Rule. Instead, Plaintiffs argue that the Legislative Rules, under which the various incarnations of the State Fire Code were adopted, were unlawful or improper because they were approved as part of omnibus bills³⁶ and, therefore, must be subject to a careful scrutiny analysis.³⁷ Plaintiffs' arguments, however, overlook this Court's guidance concerning the appropriate analysis to be rendered regarding legislative rules adopted via omnibus bills, as well as changes that the Legislature adopted in their procedures following this Court's pronouncements made in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

1. Under Post-Kincaid Decisions, Careful Scrutiny is Not Required

First, in its 1993 *Kincaid* decision, this Court established two new rules: a) that the practice of enacting legislative rules through an omnibus bill is *prospectively* invalid; and b) that rules previously enacted in this manner must be given special scrutiny. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W. Va. 573, 584, 466 S.E.2d 424, 435

³⁶ In discussing this portion of Plaintiffs' arguments, AmeriGas does not concede that the various versions of the State Fire Code were adopted via improper omnibus legislation, in particular those versions that post-date this Court's decision in *Kincaid*. *See infra* discussion at 20-23.

³⁷ Plaintiffs try to blur the proper analysis to be made by claiming that "special scrutiny is similar to that required when a fundamental constitutional right or suspect class is the subject of legislative enactment." *See* Plaintiffs' Br. at 19. In support of this proposition, Plaintiffs cite *Whitener v. W. Va. Board of Embalmers*, 169 W. Va. 513, 288 S.E.2d 543 (1982). In short, Plaintiffs improperly are trying to equate the "careful" or "special" scrutiny analysis called for by *Kincaid* when considering legislative rules adopted as part of omnibus legislation, with "strict scrutiny" – *i.e.*, the "difficult compelling state interest test" – that is employed when laws affect fundamental constitutional rights. *Whitener*, 169 W. Va. at 517, 288 S.E.2d at 545. Neither *Whitener* nor any other decision would support stretching a "careful" scrutiny test as far as a constitutional "strict scrutiny" analysis.

(1995) (synthesizing rulings in *Kincaid*). However, by 1996, this Court further modified its analysis and held:

Unless *specific procedural or substantive infirmities* are brought to our attention, we will no longer presume invalid legislative rules adopted prior to *Kincaid* merely because they were enacted as part of omnibus legislation. What we suggested in *Appalachian Power* . . . we now hold: ‘[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious.

While we recognize interpretative analysis of omnibus legislation is to be conducted with great caution, *unless specific procedural or substantive infirmities are proven, the case-by-case “careful scrutiny” standard cannot justify the expense of judicial resources required for its implementation.* Thus, we are reluctant to interpret *Kincaid* to mandate pointless expenditure of effort. *If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. Even where there is conflict between the legislative rule and the initial statute, that conflict will be resolved using ordinary canons of interpretation. In this regard, it is a settled principle of statutory construction that courts presume that the Legislature drafts and passes statutes with full knowledge of existing law.* . . . Accordingly, when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will.

West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 335-336, 472 S.E.2d 411, 420-421 (1996) (emphasis added; internal citations omitted).

In short, *Boone Memorial* stands for the clear proposition that the “careful scrutiny” called for in *Kincaid* to be given legislative rules adopted by omnibus bills would *no longer* be necessary or required *unless specific procedural or substantive infirmities* were identified. Moreover, in the case of a legislative rule in conflict with the initial, authorizing statute, normal canons of interpretation, including the “last in time” rule would apply to determine legislative will. Indeed, the *Boone Memorial* Court explained that based on its new rule being announced in

its decision, the regulation under question in that case would be “home free.” *Id.* at 336 and 421. Only because the Court felt that its new ruling would apply solely to future cases (which, of course, the instant case is) did the Court then engage in a careful scrutiny analysis.

Here, Plaintiffs simply ignore the existence of and the clarifications provided in *Boone Memorial*, and instead merely argue that the various versions of the State Fire Code have been adopted by omnibus bills and, therefore, are entitled to special scrutiny.³⁸ What they do not do is point to any such “special procedural or substantive infirmities” other than the fact that omnibus bills were used for adoption of the State Fire Codes through the years.³⁹ However, this was the very point that *Boone Memorial* sought to clarify – to wit: the mere fact that a rule was approved as part of an omnibus bill did *not* constitute sufficient grounds to subject the parties and the courts to the burdens of engaging in a careful scrutiny analysis. Something more would be required – and Plaintiffs have come forward with nothing.

2. A Legislative Rule has the Force and Effect of a Statute and the “Later in Time” Rule Controls Conflicts Between a Legislative Rule and the Authorizing Statute

Plaintiffs’ second argument on this point is equally unavailing and equally blind to the ruling in *Boone Memorial*. Specifically, Plaintiffs argue that the State Fire Code is contrary to the enabling statute and, thus, is invalid.⁴⁰ They then argue that there is, accordingly, no need to engage in any further analysis whatsoever.⁴¹ However, *Boone Memorial* specifically addressed this point by making clear that a legislative rule *is* the equivalent to a statute and that conflicts between the rule and the initial statute are to be resolved by examining the legislative will as

³⁸ Plaintiffs’ Br. at 19-20.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 20.

⁴¹ *Id.*

expressed in the most recent enactment – *i.e.*, the legislative rule. The *Boone Memorial* Court, indeed, went further and noted that where there is “evidence that the Legislature both contemplated and authorized . . . [a previous regulation] as a formal legislative rule. . . [t]he only reasonable conclusion that can be drawn . . . is that the Legislature [concurred with the language].”⁴² Similarly, in *Appalachian Power*, this Court upheld the validity of the contested legislative rule, which had been adopted via omnibus legislation, because the Legislature had given a “stamp of approval” to the agency’s actions through a *later* omnibus bill. “If any doubt existed as to the meaning of the statute and what the Legislature intended, the doubt was removed by the adoption of a subsequently enacted omnibus bill . . . [that] gave its endorsement to the [agency’s] interpretation.”⁴³

In this case, there have been twenty-five years’ worth of legislative endorsements through numerous enactments and re-enactments of the State Fire Code, each one continuing and maintaining the specific language of the one and two family dwelling exemption. Thus, under *Appalachian Power* and *Boone Memorial*, this history directly answers the question as to what has been the legislative will and intent since 1979 upon the adoption of the first State Fire Code. Moreover, it should be recalled that after this Court in *Redden v. Comer*, 200 W. Va. 209, 488 S.E.2d 484 (1997) considered and specifically acknowledged the authority of the Fire Commission (and the Legislature) to adopt the one and two family exemption – and thereby denied relief of any kind to the family of a young man who died in a house fire – the Legislature did not alter or amend the wording of the Section 1.5 Exemption. Thus, had the Legislature been offended by either the result in *Redden* or this Court’s reading of its enactments, it could have

⁴² *Boone Memorial*, 196 W. Va. at 339, 472 S.E.2d at 424.

⁴³ *Appalachian Power*, 195 W. Va. at 593, n.25, 466 S.E.2d at 444, n.25.

moved to alter or rescind the Exemption. It did not take any such steps, which demonstrates its continuing concurrence with the Exemption as adopted, written and applied over the last twenty-five years. *See Haney v. County Commissioner of Preston County*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002) (“the Legislature has had more than eight years to correct this Court’s construction of [the statute] as set forth in [our prior decision], if it disagreed with it, and it has not done so.”).⁴⁴

3. Changes in the APA Addressed Concerns Raised in *Kincaid*

In making their arguments, Plaintiffs also ignore the fact that after *Kincaid* was issued in 1993, the West Virginia Legislature amended the APA to address the concerns raised in *Kincaid*. Specifically, pursuant to H.B. 4066, the APA was amended to permit the “Legislature to combine and group bills authorizing legislative rules by executive department, by agencies and by bills having a unity of subject matter.”⁴⁵ The Legislature then amended § 29A-3-12 concerning Submission to Legislative Rules to the Legislature to provide that:

In acting upon the separate bills authorizing the promulgation of rules, the Legislature *may*, by amendment or substitution, *combine the separate bills of authorization insofar as the various rules authorized therein are*

⁴⁴ Plaintiffs apparently discern legislative intent exclusively from their reading of the 1976 Act and choose to ignore all legislative actions taken since that time. Thus, Plaintiffs argue that because the 1976 Act made only narrow exclusions for one and two family homes in its provisions, the Legislature “must” have intended for the Act to apply generally, absent those specific exceptions to one and two family homes. What Plaintiffs overlook (in addition to ignoring the legislative history and Smittle’s testimony, both of which undercuts their argument) is that as time went on, the Legislature well may have changed its mind between 1976 and 1979 and subsequently decided on a broader exemption for one and two family homes. Plaintiffs’ static examination, which looks only at one point in time for legislative intent, is unrealistic and ignores that the Fire Code is a legislative rule that has the force of law. *See also* AmeriGas Initial Brief at pp. 24-27 (showing other conscious steps of Legislature to exempt and recognize exemption for one and two family homes.)

⁴⁵ H.B. 4066 , 71st Leg., 2nd Reg. Sess., at Preface (W. Va. 1994). This bill was passed on February 21, 1994 and approved on March 8, 2004, with an effective date of February 21, 1994.

proposed by agencies which are placed under the administration of one of the single separate executive departments identified [in this code], or, the Legislature may combine the separate bills of authorization by agency or agencies within an executive department. In the case of rules proposed for promulgation by an agency which is not administered by an executive department . . . the separate bills of authorization for the proposed rules of that agency may, by amendment or substitution, be combined. The foregoing provision relating to combining separate bills of authorization according to department or agency are not intended to restrict the permissible breadth of bills of authorization and do not preclude the Legislature from otherwise combining various bills of authorization which have a unity of subject matter. Any number of provisions may be included in a bill of authorization, but the single object of the bill shall be to authorize the promulgation of proposed legislative rules.⁴⁶ (Emphasis added.)

In so amending the APA, the Legislature apparently was responding to the portion of the *Kincaid* decision that reads: “Accordingly, we hold that if there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or other deceiving tactics, then the one-object rule in [the West Virginia Constitution] is not violated.” *Kincaid*, 189 W. Va. at 412; 432 S.E.2d at 82. Since the 1994 change in the APA, evidently no challenge has been brought to this Court contesting the validity of the Legislature’s remedy, as there is no reported decision addressing the issue. Thus, it should be presumed that these changes satisfied the concerns raised in *Kincaid*.

Prior to the 1994 amendment to the APA, various changes to the State Fire Code were adopted as part of very broad legislative authorizations, approving legislative rules for numerous agencies, including, for example, the Department of Administration; the Department of Commerce, Labor and Environmental Resources; the Department of Education and the Arts; the Department of Health and Human Resources; the Department of Tax and Revenue; the

⁴⁶ *Id.* at § 29-3-12.

Department of Transportation.⁴⁷ The approved changes to the State Fire Code were included among the authorized changes to agencies and divisions falling under the Department of Public Safety.⁴⁸ The same is true for approved legislative rules in 1993.⁴⁹

However, after the 1994 changes to the APA, legislative rules amending the State Fire Code were approved in short, succinct and focused legislation that related solely to the Military Affairs and Public Safety Department (1995 and 1997), under which the Fire Commission is administered⁵⁰ or to the Fire Commission, Protective Services and Police (2002).⁵¹ Thus, following upon the mandate and directive adopted as part of the 1994 amendment to the APA – and consistent with *Kincaid* – the Legislature from 1994 onward began combining various bills of authorization that had a unity of subject matter, and in terms of the Fire Commission and changes to the State Fire Code, this meant that legislative rule amendments were approved on a limited state departmental basis. Accordingly, and very much contrary to the arguments made in Plaintiffs’ Brief, it cannot be said that “all [amendments to the State Fire Code] were adopted

⁴⁷ See S.B. 637, 69th Leg., Reg. Sess. (W. Va. 1991) (passed March 9, 1991 and approved April 2, 1991).

⁴⁸ *Id.* at § 64-6-2.

⁴⁹ See H.B. 100, 1st Extraordinary Sess. (W. Va. 1993) (passed May 26, 1993 and approved June 9, 1993).

⁵⁰ See, e.g., S.B. 88, 72nd Leg., 1st Reg. Sess. (W. Va. 1995) (passed March 10, 1995 and approved March 24, 1995) and H.B. 4200, 73rd Leg., 2nd Reg. Sess. (W. Va. 1998) (passed March 12, 1998 and approved March 24, 1998). According to the official website for the government of West Virginia, the following divisions and agencies are administered under the auspices of the Military Affairs and Public Services Department – Adjunct General; Division of Corrections; Criminal Justice; Office of Emergency Services; State Fire Commission; Jail and Correctional Facilities; Division of Juvenile Services; Parole Board; State Police and the Division of Veterans Affairs. See <http://www.wv.gov/sec.aspx?pgID=608&list=M>.

⁵¹ See S.B. 339, 75th Leg., 1st Reg. Sess. (W. Va. 2002) (passed March 8, 2002 and approved March 21, 2002).

through non-specific, omnibus bills”⁵² or that “*none* of the acts of the Legislature comply with the requirement of the ‘one object rule.’”⁵³ Rather, at least as of 1994, the Legislature altered its practices and the legislative rules relating to the State Fire Code were adopted as part of very limited and specific legislation.

This change, therefore, further undermines Plaintiffs’ arguments that the Section 1.5 Exemption must be subject to “special scrutiny” or is inherently invalid because adopted as part of omnibus legislation. Indeed, along these lines, it should be recalled that in 1995, 1998 and 2002, *after the change in the APA*, entirely new and restated State Fire Codes were adopted, including the Section 1.5 Exemption. As this Court stated in *Boone Memorial* “it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law.”⁵⁴ In *Appalachian Power*, this Court also explained that ““courts must presume that a legislature says in a statute what it means and means in a statute what it says there.””⁵⁵ Thus, even were earlier, pre-*Kincaid* versions of the State Fire Code, and the Section 1.5 Exemption subject to special scrutiny, this approach should *not* apply to post 1994 enactments of the State Fire Code as the problems identified in *Kincaid* had been addressed by the Legislature, and the rules of statutory construction and interpretation identified in *Boone Memorial* and *Appalachian Power* support a determination that the Legislature knew what the law was when it was adopted and plainly meant to adopt the language in the Section 1.5 Exemption.

⁵² Plaintiffs’ Br. at 18.

⁵³ *Id.*

⁵⁴ *Boone Memorial*, 196 W.Va. at 336, 472 S.E.2d at 421.

⁵⁵ *Appalachian Power*, 195 W. Va. at 586, 466 S.E.2d 437 (citing *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))).

4. AmeriGas Has Provided a Thorough Careful Scrutiny Analysis That Plaintiffs Have Not Rebutted

Even if “careful scrutiny” were required as Plaintiffs maintain, AmeriGas has provided that analysis in its Initial Brief,⁵⁶ and Plaintiffs have chosen not to respond to those points. Wishing away AmeriGas arguments, however, does not undercut their merit and AmeriGas submits that its arguments concerning, *inter alia*, the limited language of the State Fire and Control Act; the existence of other statutory and regulatory provisions that exempt one and two family homes,⁵⁷ and the other public safety statutes and acts that are not automatically applicable statewide or to all citizens, including the State Building Code, all show a specific legislative

⁵⁶ See Appellants’ Br. at 22-35.

⁵⁷ Among other things, the State Attorney General, in its *amicus* brief seeks to challenge W. Va. Code § 29-3-12(d), which provides “The state fire marshal shall inspect all structures and facilities, other than one- and two-family dwelling houses, subject to the state fire code,” on the grounds of creative re-writing. In short, the State Attorney General maintains that if the phrase “other than one- and two-family dwelling houses” is placed elsewhere in the sentence, it would indicate that the Legislature viewed such dwelling homes as subject to the state fire code. Attorney General’s Br. at 6-7. First, it should be noted that the phrase was *not* placed elsewhere in the sentence and that a change in placement of a word or phrase can impact the meaning of the full sentence. Second, this language should be looked at in historical context. Since 1979, subsection (d) read “The state fire marshal shall inspect all state, county and municipally owned institutions, all public and private schools, theaters, churches and other places of public assembly as to fire exits and reasonable safety standards and report his findings and recommendations to the proper administrative heads.” See, e.g. S.B. 146 (1976) (in effect from July 1, 1976) and H.B. 4042 H.B. 4042, 73rd Leg., 2nd Reg. Sess. (W. Va. 1998) (in effect from May 1998) at § 29-3-12(d). In 2002, pursuant to S.B. 488, this subsection was amended to provide that “The state fire marshal shall inspect all structures and facilities, other than one and two family homes, subject to the state fire code and this article, including but not limited to [publicly owned buildings, schools, health care facilities, and places of public assembly] to determine whether the structure or facilities are in compliance with the state fire code.” S.B. 488, 75th Leg., 1st Reg. Sess. (W. Va. 2002). In short, the change expanded the fire marshal’s inspection authority to include, for example, apartment buildings and other multi-family dwelling units, but the legislature made sure to continue to clarify that one and two family dwellings were *not* to be included within that expanded authority. Thus, the purpose of the change cannot be said to have been to indicate that one and two family dwellings are covered by the State Fire Code, but rather to ensure that the special treatment of such structures continued even as the Legislature expanded the State Fire Marshal’s inspection authority. Once more, this change demonstrates a conscious choice by the Legislature to exempt one and two family homes from regulation.

intent and approach that favors and validates the Exemption.⁵⁸ Moreover, as described earlier⁵⁹, the actual history of the development of the first State Fire Code under the 1976 Act further supports a determination that the Section 1.5 Exemption was developed consistent with the legislative process and provided opportunity for legislative review and oversight.

E. That Other States Have Adopted Similar Laws Further Shows that the West Virginia Legislature Was Not Out of Step With Public Policy Determinations

Plaintiffs wrongly attribute to AmeriGas a nefarious purpose in citing to other states' law, which like West Virginia's, exclude one and two family homes from their state fire codes.⁶⁰ AmeriGas's point in highlighting these other states' statutes and regulations is to demonstrate that a decision by West Virginia's legislators to exclude one and two family homes from the

⁵⁸ Plaintiffs also argue that this Court should disregard the letter from present State Fire Marshal Lewis, which references the Section 1.5 Exemption and then goes on to discuss which national standards incorporated in the 1998 State Building Code would apply to one and two family homes. *See* Plaintiffs' Br. at 20-22. These arguments are easily dismissed. First, Fire Marshal Lewis (like former Fire Marshal Smittle before him – *see Smittle Letter*) simply acknowledges the existence of the Section 1.5 Exemption and that it has never applied to one and two family homes. This is not a matter of "opinion," but historic fact as far as the State Fire Marshal's Office is concerned. *See* Smittle Dep. at 178. lines 10-15 ("As far as during my tenure [as Fire Marshal] to my understanding one and two family dwellings was off limits for the fire marshal regardless. That was my understanding.") Second, the bulk of Fire Marshal's Lewis's letter deals with interpretations of the 1998 State Building Code; however, the questions that were raised to him were addressed and are superseded by the changes, amendments and exceptions incorporated in the 2002 State Building Code. Third, while it may be true that the Fire Commission itself has not issued an opinion regarding the effect of the Section 1.5 Exemption, there is no evidence showing that it has ever sought to eliminate or alter the language of the Exemption, indicating that it has accepted its impact, including *after Redden* was decided. Fourth, Plaintiffs refer to Fire Marshal Lewis's letter as "parroting" the opinions of former Fire Marshal Smittle. Plaintiffs' Br. at 21-22. However, there is nothing to suggest that Fire Marshal Lewis's statements were somehow not his own or were coerced from him in some improper manner. Finally, Fire Marshal Lewis's letter should not be dismissed because it was prepared for litigation, given that Mr. Smittle's letter did not mention litigation and there is no indication that Fire Marshal Lewis was aware that any pending litigation existed.

⁵⁹ *See supra* discussion at 8-12.

⁶⁰ *See* Plaintiffs' Br. at 32.

State Fire Code was in keeping with, not out of step with, a legislative philosophy adopted in various other locales that favors limiting regulatory oversight on conduct that occurs at individual residential structures. Plaintiffs' limited arguments do not overcome the examples set by these other states and shared by West Virginia's Legislature.

First, Plaintiffs are forced to acknowledge that the other states cited by AmeriGas do, indeed, include such an exemption in their statutes or regulations. Second, whether or not North Carolina (or any other state for that matter) has separate regulations or statutes addressing propane gas installations – and how those laws or regulations are interpreted in light of the one and two family exemption is not the point.⁶¹ Rather, what is important is that these other states have, indeed, included such an exemption in their state laws, thereby indicating an intention to carve-out one and two family homes from various regulatory provisions. This is precisely what West Virginia's legislators have done, thereby showing a consistent approach to this issue.

F. *Redden* Is Controlling Precedent and the Doctrine of *Stare Decisis* Supports Applying its Holding to the Instant Case

In arguing that this Court's 1997 decision in *Redden* is not controlling precedent for this case, Plaintiffs try to ignore that the sole question briefed and considered in that case is precisely the same issue raised here – *i.e.*, whether the Section 1.5 Exemption is valid or whether it is

⁶¹ For example, the precise regulatory scheme in North Carolina is not immediately apparent, nor is it necessary for purposes of this appeal for there to be an in-depth examination of North Carolina law. What is clear is that North Carolina's State Building Code, which includes the State Fire Prevention Code exempts one and two family dwellings. North Carolina Fire Prevention Code at Section 102A (2002) (available at website of North Carolina Fire Marshal, www.ncdoi.com). Chapter 38 of the Fire Prevention Code states that propane installations shall be made in accordance with NFPA 58. *Id.* at Section 3801.4. The Liquefied Petroleum statute cited by Plaintiffs states that "This Article does not apply to the design, construction, location, installation or operation of equipment or facilities covered by the Building Code." NC Statutes, Article 5, Liquefied Petroleum Gases, § 119-54(4)(b). This would suggest that the statute does not deal with installation matters, that the Building Code/Fire Prevention Code addresses the installation standards, but that such provisions do not apply to one and two family homes.

invalid as contrary to the enabling statute. This Court answered these questions simply and decisively finding the Exemption both valid and dispositive.⁶²

Somehow, Plaintiffs maintain that *Redden* did not “specifically address[] the issue of whether the one- and two-family dwelling Exemption violated the purpose of the enabling statute.”⁶³ Although Plaintiffs acknowledge, begrudgingly, that the *Redden* briefs raised the issue,⁶⁴ Plaintiffs seek to undermine the result in *Redden* by essentially criticizing this Court for not including “any detailed analysis of the Exemption, its adoption and its consistency with the purposes and public policies set forth in the enabling statute.”⁶⁵ On these grounds, Plaintiffs argue that the holding in *Redden*, a *per curiam* opinion, is nothing more than *dicta*.⁶⁶

As AmeriGas pointed out in their initial brief, any argument that *per curiam* opinions are merely *dicta* and of no precedential value was decisively rejected in *Walker v. Doe*, 210 W. Va. 490, 496, 558 S.E.2d 290, 296 (2001), in which this Court stated that considering a *per curiam* opinion to contain merely *dicta* “is . . . incorrect as a matter of law”; that “*per curiam* opinions . . . have precedential value as an application of settled principles of law . . .”; and that “we hereby renounce any prior statement of this Court to the effect that *per curiam* opinions are not legal precedent.” Plaintiffs literally ignore this ruling, and just continue to argue an outdated interpretation that soundly has been rejected.

⁶² *Redden*, 200 W. Va. at 213, 488 S.E. 2d at 488.

⁶³ Plaintiffs’ Br. at 24.

⁶⁴ *Id.* Plaintiffs state that only the *Redden* Appellant’s brief raised the issue. *Id.* As a review of the *Redden* briefs shows, however, both parties almost exclusively briefed the issue of the validity of the Exemption, with the *Redden* Appellants raising the identical arguments raised here by Plaintiffs, all of which this Court rejected.

⁶⁵ *Id.* Plaintiffs then go on to inform the Court of what would have been the better analysis. *Id.* at 25.

⁶⁶ *Id.* at p. 25.

Plaintiffs' other main argument is equally unavailing and unpersuasive. They maintain that because the *Redden* opinion did not deal with a situation of a third-party vendor, its ruling concerning the validity of the Section 1.5 Exemption is inapplicable here and cannot be regarded as precedential.⁶⁷ This argument, however, overlooks what this Court was asked to consider in *Redden* – *i.e.*, whether the Fire Commission had the authority to exempt one and two family homes from the State Fire Code and whether the Exemption could be deemed valid in light of the State Fire Control and Prevention Act read in its entirety.⁶⁸ These were straightforward questions going to the validity of the exemption from both a regulatory and statutory perspective and were not qualified in any sense whatsoever based on the facts of the case. The Court's answer to these questions was equally straightforward and unequivocal – “Clearly, the State Fire Commission was authorized by statute, to create a State Fire Code. That Code, as adopted, contained a clear exemption regarding ‘buildings used wholly as dwelling houses for no more than two families[.]’”⁶⁹ Nothing about this answer can be read to suggest that the result would have been different had the case involved a third-party service provider to a homeowner. The point is that this Court found the Section 1.5 Exemption to have been validly enacted and enforceable. The difference in the facts here cannot change that result or otherwise weaken it as the *Redden* Court's decision was not fact driven.

In sum, Plaintiffs' arguments are no arguments at all and *Redden* must be viewed for what it is, an immediately applicable and controlling precedent.

⁶⁷ Plaintiffs' Br. at 23

⁶⁸ See *Redden* Appellant Brief at 7 (listing Questions for Review).

⁶⁹ *Redden*, 200 W. Va. at 213, 488 S.E.2d at 488.

G. Contrary to Plaintiffs' Contention, the Section 1.5 Exemption is Applicable to AmeriGas as a Third-Party Vendor

Plaintiffs seek to provide a variety of reasons why the Section 1.5 Exemption cannot be applied to a third-party service vendor -- but none of the arguments made is valid or sustainable.

First, Plaintiffs argue that the Exemption cannot apply here because AmeriGas's propane installations are neither a one or two family building or the owner of a one or two family building.⁷⁰ This reasoning is patently absurd. Certainly, if the Exemption only applied to "buildings" then the landlord defendant in *Redden*, a human being, could not have relied on the Section 1.5 Exemption. Obviously, this Court in *Redden* found such reliance valid.

Moreover, although the propane installation may not be a building, it is located on the building property (usually in the yard immediately adjacent to the building structure -- what the Plaintiffs refer to as the curtilage) and physically connects to the building at the second stage regulator attached to the exterior wall. Thus a propane installation is not an isolated, distant stand-alone unit that communicates to the building through radio waves or some other intangible means, and has no physical connection either to the building or the building's property.⁷¹ Rather, it is physically installed on the property; it services and connects with the home; and is the source of energy to operate the home's heating system or various appliances located inside the

⁷⁰ See Plaintiffs' Br. at 26.

⁷¹ Notably, former Fire Marshal Smittle regarded the Exemption as applying both to the building and the general premise of the property, which would include the exterior portions. See Smittle Depo. at p. 165, line 24 -- p. 166, line 5 ("that it's my opinion as almost 26 years as state fire marshal that one and two family dwellings are exempt under the code, and therefore the fire marshal can't enforce any provisions of the code on the one and two family dwellings, the premise of the property included . . .") and p. 172, lines 9-14 (Q: But you're saying that if once [a third party provider] step[s] foot on the property line of a single family or two family residence that basically as far as the fire marshal was concerned you couldn't enforce anything even if you knew they were doing it totally improperly? A: That's my understanding, yes, sir.).

structure. In short, a propane installation is an integral part of the home property itself and cannot be regarded as separate and distinct.⁷²

As to the purported necessity of being an owner of a one or two family home before the Exemption could apply, the only way to arrive at such a conclusion is to read in words to the Exemption that literally are not there. The plain language does not support the addition of these invisible words.

The remainder of Plaintiffs' arguments on this subject consists of a somewhat hysterical and lengthy diatribe about "how could this be" and "why would the Legislature have so acted" and that all of the safety provisions contained in NFPA 58 would be for naught, with such an interpretation supposedly meaning that no manufacturer of any product used in a home would be

⁷² Appellants also strongly contest Plaintiffs' argument that AmeriGas maintains ownership of the lines and regulators that are installed on its customers' property. See Plaintiffs' Br. at 26-27 and 32. To the contrary, AmeriGas has long maintained and argued that while it leases the propane storage tank to its customers (other than those relatively few customers who own their own tanks), the underground lines are the property of the customer. See Memorandum in Support of Defendants' Motion for Partial Summary Judgment, dated August 15, 2001. For example, AmeriGas offers to its customers a "Line Guard" program to provide coverage and repair services to customers for a fixed fee should a propane line be damaged or need repair. If AmeriGas owned the lines, such a program would not be necessary. In addition, if AmeriGas installs a customer's line and that customer then chooses to go to another propane supplier, AmeriGas removes that storage tank, which it owns and leases to the customer, but does *not* remove the propane lines. Similarly, if the property is sold and a new homeowner chooses to go with another propane company, AmeriGas has no control over what the customer chooses to do with the lines and does not seek any compensation upon the sale of the house for the lines that previously were installed. These issues were all previously presented to the Circuit Court, which deferred any ruling on the grounds that "material factual questions exist . . . including whether AmeriGas or its customers own the propane lines at issue." See Order of June 19, 2002. In short, the issue has not been resolved, and it is entirely improper for Plaintiffs to present the ownership issue as a decided fact on which this Court can rely when they know full well the issue has not been decided and remains contested.

subject to the State Fire Code, thereby leaving the citizens of West Virginia vulnerable and unsafe.⁷³

In response, once more, AmeriGas must answer that Plaintiffs fears and questions about “how” and “why” should be directed to the Legislature – that is, to the Legislature that has seen fit to include the one and two family exemption in every State Fire Code since 1979 and that in more recent years chose to enact legislation making the State Building Code, which also addresses citizens’ safety concerns, non-mandatory and subject to local jurisdictional discretion.

In terms of the dire consequences that Plaintiffs foresee, it must be recalled that merely because the State Fire Code does not apply to one- and two-family dwellings, does *not* mean that AmeriGas (or any other propane supplier) could install propane lines with complete disregard for the safety of customers living in one and two family homes.⁷⁴ Rather, the effect of the Exemption is that a plaintiff(s) would not be able to rely on a rebuttable presumption of

⁷³ See generally Plaintiffs’ Br. at 26-31. By way of example only, Plaintiffs emotionally argue that if the Exemption were interpreted as AmeriGas desires, it would not have to comply with the State Fire Code when delivering to a home, but would if it were delivering to a kennel housing dogs. *Id.* at 27. AmeriGas acknowledges that the State Fire Code is immediately applicable to a myriad of types of buildings and establishments that AmeriGas serves, including apartment buildings, restaurants, churches, schools, office buildings, retail establishments, State-owned structures and other similar types of buildings. Hence, it is not Appellants’ position that the State Fire Code is a nullity and puts animals over people.

⁷⁴ In a typical scare tactic, Plaintiffs set forth a litany of all the provisions of NFPA 58 that they maintain propane suppliers would be free to ignore were the Exemption enforced. See Plaintiffs’ Br. at 28-29. They also point to various other provisions of the State Fire Code concerning building materials and the like that they say manufacturers could avoid. *Id.* at 30-31. *Amicus* West Virginia Trial Lawyers Association takes the same tact. See *Amicus* Br. of West Virginia Trial Lawyers Association at 4-5. These arguments are specious and ignore the requirements of other codes, such as the State Building Code, or the risk of negligence suits under a common law theory. Moreover, neither Plaintiffs nor the *Amicus* have pointed to one example of their dooms day predictions having come to pass – even though the State Fire Marshal’s Office has long regarded itself as having no authority over third-parties who provide services to one and two family homes. See *Smittle Depo.* at pp. 170-172; pp. 177-178.

negligence⁷⁵ arising from a statutory violation by the company providing a service to a homeowner. This would not, however, prevent a homeowner customer plaintiff from bringing a case on the basis of common law negligence or some other theory that might be applicable.⁷⁶

Thus, the applicability of the Exemption does not, as Plaintiffs (and the two *amici*) argue, leave the home-owning citizens of West Virginia with no avenues for legal redress or left to the mercies of unscrupulous third-party providers whose conduct cannot be challenged. Other legal theories can be pursued and AmeriGas has not said otherwise.

H. Only Prospective Application Would Be Appropriate if the Exemption Were Determined to be Invalid

Plaintiffs' arguments against prospective application of an ultimate ruling invalidating the Section 1.5 Exemption are of no merit. First, Plaintiffs argue that AmeriGas essentially are precluded from seeking prospective application because AmeriGas argued in favor of the NFPA 58 standard adopted in the State Fire Code during the 2001 hearing to the Circuit Court. What should be kept in mind is that the issue at hand during that hearing was whether the provisions of the State Fire Code or the provisions of the State Building Code prevailed regarding underground propane line depth standards, with Plaintiffs arguing in favor of the Building Code standards (*i.e.*, the BOCA and CABO standards incorporated therein) and AmeriGas arguing in favor of

⁷⁵ As this Court has explained, in West Virginia, a violation of a statute is *prima facie* negligence and not negligence *per se*. *Gillingham v. Stephenson*, 209 W. Va. 741, 748, 551 S.E.2d 663, 670 (2001). *See also Kizer v. Harper*, 211 W. Va. 47, 52, 561 S.E.2d 368, 373 (2001) (proof of statutory violation does *not* establish negligence, but only creates rebuttable presumption of negligence, with the plaintiff maintaining the burden of persuasion).

⁷⁶ The distinction between the instant case and *Redden* is that there was no common law duty applicable to landlords concerning the installation of smoke detectors. *Redden*, 200 W. Va. at 213, 488 S.E.2d at 488. Thus, the *Redden* plaintiffs could not have proceeded on such a theory. Likewise, the facts of that case would not have supported a claim under contract law. *Id.* Here, Plaintiffs purport to be able to proceed under negligence, breach of warranty, the Consumer Protection Act, nuisance, and the tort of outrageous conduct. *See generally* Amended Compl., filed April 10, 2000.

the NFPA 58 standards incorporated in the State Fire Code in light of that fact that the State Building Code states that conflicts between the two shall be resolved in favor of the State Fire Code.⁷⁷ This was a narrow question and did not deal with situations where one code or the other would not apply at all. For example, Plaintiffs in making their arguments to the Circuit Court certainly never stated or acknowledged that the State Building Code standards were not applicable throughout the State to all citizens – a fact that now is recognized by all parties. Similarly, the Section 1.5 Exemption was not discussed or considered. Thus, the arguments made at the time of the 2001 hearing provide no insight or guidance concerning AmeriGas's position regarding the applicability and/or effect of the Section 1.5 Exemption.

Similarly, Plaintiffs have nothing to support their contention that AmeriGas never relied on the Exemption until after this litigation had begun.⁷⁸ It should be recalled that there is no time limitation imposed as to who falls within the class definition, although AmeriGas sought to invoke the ten year statute of repose limitation.⁷⁹ Thus, to what extent AmeriGas did or did not rely over the course of the last ten, fifteen, or twenty years, etc., on a regulatory scheme in West Virginia that did not involve Fire Marshal oversight of underground propane lines at one and two family homes has not been established.

Moreover, whether or not the particular party advocating prospective application relied on the challenged law is not a factor in *Kincaid*, the leading decision on when new legal decisions should be applied prospectively. Rather, one of the many factors *Kincaid* teaches

⁷⁷ W. Va. C.S.R. § 87-4-3.1.

⁷⁸ Plaintiffs' Br. at 36.

⁷⁹ Memorandum in Support of Defendants' Motion for Partial Summary Judgment, dated August 15, 2001. As explained above (*see supra* note 72), the Circuit Court denied this motion on the grounds that material questions of fact remained to be resolved. *See* Order of June 19, 2002.

should be considered is whether the new decision “overrul[es] clear past precedent on which *litigants may* have relied. *Kincaid*, 189 W. Va. at 413, 432 S.E.2d at 83. Thus, the rule neither speaks to the precise parties in the pending action or requires that there had been any reliance.

As to the other factors in *Kincaid*,⁸⁰ Plaintiffs essentially ignore them and their silence is telling. However, as explained in AmeriGas’s Initial Brief, by any fair reading, the factors outlined in *Kincaid*, either individually or taken together as a whole, support but one outcome, and that is prospective application of a change in the law as it has existed in West Virginia since 1979 and which this Court affirmed in *Redden*.

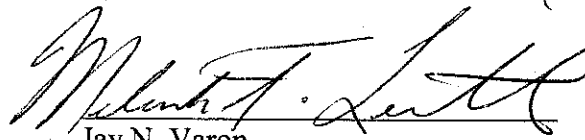
III. CONCLUSION

For all the foregoing reasons, as well as those set forth in AmeriGas’ Initial Brief, AmeriGas respectively request this Court to reverse the answers submitted by the Circuit Court with its Certified Questions and hold: (i) consistent with the ruling in *Redden* that the Section 1.5 Exemption is valid and not contrary to public policy; (ii) that the Section 1.5 exemption is applicable to AmeriGas and to all work or service performed at one- and two-family dwellings regardless of who performs the work; and (iii) in the unlikely event it is necessary to respond to the third certified question, that any decision invalidating the Section 1.5 Exemption be given prospective effect only.

⁸⁰ These factors, discussed in detail in AmeriGas’s Initial Brief are: 1) when the issue involves “a settled area of law” and the new rule was “not clearly foreshadowed”; 2) whether the overruled decision or statute deals with “procedural law” or “substantive law,” with the latter favoring prospective application; 3) whether the overruling was of “common law issues,” which tends to favor retroactive application; 4) whether “substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent,” a consideration which supports prospective application; and 5) whether and how other courts have determined the retroactive/prospective question in the same area of law in their overruling decisions. *Kincaid*, 189 W. Va. at 414, 432 S.E.2d at 84 (citing *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 336, 256 S.E.2d 879, 882-889 (1979)).

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Respectfully submitted,



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ADDENDUM REGARDING FACTUAL MISREPRESENTATIONS

The following discussion explores in detail the factual misrepresentation made by Plaintiffs in their Brief and provides a more complete and accurate description of the record in this matter.

- **West Virginia Law Does Not Requires Underground Propane Lines to be Buried 18”¹**

Contrary to Plaintiffs’ claim, the actual language of NFPA 58,² which is adopted as part of the State Fire Code, has for some time made clear that underground propane lines may be buried 12 inches in depth,³ or less if protected with shielding, and that 18 inches is required only where there is a likelihood of external damage to the lines, such as where vehicular traffic occurs. In fact, in 2003, NFPA issued a formal interpretation making this distinction clear, and as of 2004 revised the language of NFPA 58 to ensure that there was no question that a 12 inch standard was regarded as the norm. While it is true that the most recent State Fire Code adopts the 1998 version of NFPA 58, the actual language itself and the subsequent clarifications issued by NFPA 58 make plain that West Virginia law does not mandate a minimum 18 inch burial depth.⁴

¹ See Appellee’s Br. at 2.

² Plaintiffs also refer occasionally to NFPA 54, known as the National Fuel Gas Code. However, based on a change introduced in 1996, the external portions of an underground propane gas system – such as the underground line – were covered by NFPA 58, the Liquefied Petroleum Gas Code. Hence, NFPA 54 is not particularly applicable to this matter.

³ Plaintiffs hide their concession of this point in footnote 5 of their Brief. Plaintiffs’ Br. at 3, n.5.

⁴ Appellants also note that Plaintiffs state – without any citation – that natural gas lines “are normally buried with a minimum of 24” of cover.” Surely if there were any support for this bald assertion, Plaintiffs would have supplied it. In any case, to the extent that there are special rules of the installation of natural gas lines in West Virginia, there is no question that those rules are *not* applicable to propane gas line installations – and no party or state official has ever claimed otherwise. Accordingly, the standards for natural gas installations are irrelevant here.

- **AmeriGas's 2001 Re-Burial Efforts Were *Not* Undisclosed to Plaintiffs⁵**

Plaintiffs refer to AmeriGas's 2001 line re-burial efforts as *inter alia* "undisclosed," "clandestine" and "secret." Quite the opposite is true. AmeriGas's counsel informed Plaintiffs' counsel in June 2001 that AmeriGas was embarking on an effort to re-bury the lines of various of its customers, and further explained how the process would proceed and that records of these efforts would be maintained. Plaintiffs' counsel acknowledged this information in a letter of June 28, 2001, stating that he "appreciate[d]" [counsel] advising him early" and that AmeriGas's conduct was "commendable." Plaintiffs counsel also referred to this information during a hearing before the Circuit Court.⁶ In short, there was nothing secret or untoward about AmeriGas's 2001 line replacement efforts.

Plaintiffs also state that AmeriGas's effort included "an attempt to alter or destroy material evidence." Again, this statement is simply not true. The facts are that during the 2001 replacement project, AmeriGas's instructions were that the old lines to be left in place.⁷ While it may have come to pass that some old lines were removed – including if the customer specifically requested it or if the customer personally removed the lines, the truth is there was absolutely no directive or systematic effort on AmeriGas's part to remove such lines and/or otherwise to destroy evidence.

⁵ See Plaintiffs' Br. at 3-4.

⁶ See Hearing Tr. of September 5, 2001 at p. 46, line 7 (AmeriGas informed Plaintiffs' counsel in June 2001).

⁷ See Deposition of Ira Mills, dated March 13, 2003 at p. 616, line 4 – p.617, line 9.

- **AmeriGas Has *Not* Changed Its Position Concerning the Applicability of NFPA⁸**

In reciting the history of the Circuit Court's decision on the applicability of the standards adopted in the State Fire Code versus those in the State Building Code, Plaintiffs seek to intimate – if not say directly – that AmeriGas has changed its views about the appropriate application of the NFPA standards adopted in the State Fire Code. This is an untrue accusation.

AmeriGas argued – rightfully so – to the Circuit Court that between the standards adopted in the State Fire Code and the State Building Code, the State Fire Code standards, including its adoption of the NFPA standards, prevail if there is a conflict between the two. What was *not* discussed during the hearing on this matter in September 2001 (or in the briefs preceding that hearing) was the existence of or the effect of the Section 1.5 Exemption. Nonetheless, AmeriGas's position remains consistent – to wit: the State Fire Code and the NFPA standards, as opposed to the Building Code standards, *do apply* to structures that are not one and two family dwellings (or the other structures listed in the Exemption). Thus, the State Fire Code and the NFPA standards are applicable to businesses, churches, apartment buildings, schools, and any other of a host of structures that are not one and two family homes. Nothing about later events altered AmeriGas's position regarding these types of structure and the fact that the standards in the State Fire Code prevail over the standards in the State Building Code to the extent that: i) a jurisdiction has adopted the State Building Code; and ii) there is a conflict between the Fire Code and the Building Code standards.

⁸ See Plaintiffs' Br. at 5-7.

- **AmeriGas's Agreement to the Protocol Did *Not* Constitute a Concession on the Appropriate Burial Depth of Underground Propane Lines⁹**

As they do with the Section 1.5 Exemption, Plaintiffs ignore plain and unambiguous language to argue that AmeriGas “essentially conceded” that its lines were improperly buried and thereby agreed to the Protocol, which calls for lines to be buried to an 18 inch depth. As AmeriGas pointed out in its Initial Brief, the Protocol itself clearly states “The parties’ agreement to this Protocol shall not constitute . . . an admission by either party of what the pertinent legal standards are or were”¹⁰ Thus, nothing came be made of AmeriGas’s agreement to proceed in 2002 forward by way of the Protocol, other than the Company was seeking a way to continue with its line replacement project in a way that would not engender Plaintiffs’ complaint or second-guessing.¹¹

Moreover, it is misleading to claim that AmeriGas refused to “return and remedy” the 1,500-1,800 customers addressed during 2001.¹² A decision not to rebury these lines was made because no further remedy was needed given that it is AmeriGas’s position – and changes to NFPA confirm – that twelve inches is the general burial standard. In any case, it was *Plaintiffs* who did not want to include in the Protocol Project those 2001 customers who had either signed waivers or whose 2001 documentation was incomplete, although Plaintiffs later relented.¹³ Such customers subsequently have been addressed (unless they continued not to authorize any work on their property).

⁹ See Plaintiffs’ Br. at 7-8.

¹⁰ June 2002 Protocol Order at 2.

¹¹ See Hearing Tr. of May 30, 2002 at p. 14, line 21- p. 15, line 3.

¹² See Plaintiffs’ Br. at 8.

¹³ See Hearing Tr. of September 12, 2002, at p. 4, lines 13-22; Order of December 6, 2002.

- **AmeriGas Did *Not* Wait Until November 2002 to Inform the Circuit Court of the Section 1.5 Exemption¹⁴**

Plaintiffs mislead this Court and state that it was “not until November 2002 that AmeriGas’s attorneys “conjured up” the idea that no safety laws controlled their conduct in the State.”¹⁵ First, it is *not* AmeriGas’s position that no safety laws control its conduct (or the conduct of other propane distributors) in West Virginia.¹⁶ Second, in terms of timing, the facts are that in October 2001, shortly after the hearing at which the Circuit Court determined that the State Fire Code prevails over the State Building Code, AmeriGas’s counsel wrote to the Circuit Court informing the Court of the existence of the Section 1.5 Exemption and that in light of that Exemption, the State Building Code standards would apply to residential customers with one and two family homes, at least where the Building Code had been adopted. At a May 30, 2002 hearing, AmeriGas’s counsel once again brought up the Exemption to the Circuit Court and explained that the Exemption might impact the oral ruling that the Circuit Court had made in September 2001.¹⁷ The Circuit Court took the position that it nonetheless would issue a written Order to reflect what it had been decided the prior September, but made clear that the Court was amenable to hearing additional arguments on the subject and to “reopen” consideration.¹⁸

At the end of the May 30, 2002 hearing, the Circuit Court set September 12, 2002 for a hearing to address AmeriGas’s arguments concerning the burial depth standards, although

¹⁴ See Plaintiffs’ Br. at 8 and 36-37.

¹⁵ *Id.*

¹⁶ See *discussion supra* at _____.

¹⁷ See May 30, 2002 Hearing Tr. at p. 12, lines 4-7.

¹⁸ *Id.* at p. 12, lines 8-13; p. 16, lines 10-12; *see also* June 2002 Standards Order at 3-4.

AmeriGas had requested that the hearing be held earlier, during the Summer of 2002.¹⁹ AmeriGas was prepared to and looking forward to proceeding when Plaintiffs, on August 7, 2002, filed a Motion for a Continuance, on the grounds that an expert that they thought would be called was ill.²⁰ Accordingly, a new hearing date was set for December 9, 2002, with briefs submitted prior thereto.²¹

In sum, AmeriGas alerted the Circuit Court to the Section 1.5 Exemption as early as October 2001, and sought from there out to have the Circuit Court consider the impact of that Exemption. That the issue was not set for hearing until December 2002, with briefs filed the month before, resulted from the Court's own schedule and *Plaintiffs'* request for a continuance.

- **AmeriGas Has *Not* Argued that it Can Install Underground Propane Lines Without any Fire Safety or Legal Restraints**

Plaintiffs incorrectly insist that AmeriGas have taken the position that because of the Section 1.5 Exemption that they are free to install underground propane lines with no concern for safety.²² This is a complete misrepresentation of AmeriGas' position. AmeriGas have always recognized that even if the State Fire Code is not applicable to one and two family homes, the State Building Code, where adopted, provides for underground line burial standards.²³

¹⁹ *Id.* at p. 24, line 24 – p. 26, line 14.

²⁰ *See* Pls.' Motion For Continuance Of Hearing Scheduled For Sept. 12, 2002 and Order, dated August 7, 2002.

²¹ *See* September 12, 2002 Hearing Tr. at p. 78, line 20 – p. 79, line 12.

²² *See, e.g.,* Plaintiffs' Br. at 22.

²³ Plaintiffs argue that most propane users live in rural areas outside of municipalities that have adopted the State Building Code, thereby leaving them without fire and safety regulations. To the extent that this is true, rural citizens who believe that there should be various safety regulations in their locations always have the option of pursuing relief from their country representatives and governments and seek to have the State Building Code adopted. This is the method that the Legislature chose for the people of West Virginia to pursue in terms of implementing safety standards where they live and work.

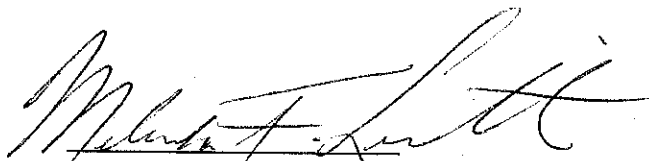
Moreover, as AmeriGas pointed out in their initial brief, § 29-3-14(a) of the Fire Prevention and Control Act provides that it is unlawful for any person to engage in conduct that results in a fire hazard and gives the Fire Marshal authority to issue reasonable orders to rectify the situation. There also remains the possibility of private suit, such as was brought here, on theories of common law negligence. In short, the enforcement of the Section 1.5 Exemption as adopted by the Legislature for twenty-five years does not mean that AmeriGas can disregard issues of safety or that the citizens of West Virginia are left with no options for seeking redress.

CERTIFICATE OF SERVICE

I, Melinda F. Levitt, an attorney, hereby certify that on October 27, 2004, I caused the foregoing **APPELLANTS' REPLY BRIEF** to be served on Plaintiff Class Members, via overnight, next business day delivery to:

David J. Romano, Esq.
Romano Law Office
363 Washington Avenue
Clarksburg, West Virginia 26301

Michael J. Romano
Romano & Miley
128 South Second St.
Clarksburg, West Virginia 26301

A handwritten signature in cursive script, appearing to read "Melinda F. Levitt".

Melinda F. Levitt

AMENDED CERTIFICATE OF SERVICE

I, Melinda F. Levitt, an attorney, hereby certify that on October 27, 2004, I caused the foregoing **APPELLANTS' REPLY BRIEF** to be served on Plaintiff Class Members, via overnight, next business day delivery to:

David J. Romano, Esq.
Romano Law Office
363 Washington Avenue
Clarksburg, West Virginia 26301

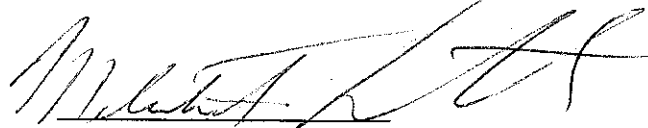
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EXHIBITS

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