SUPREME COURT
STATE OF GEORGIA

CONSTANCE TONDRA HENRY, individually; as representative of the estate of PATRICIA ANN HENRY, deceased as the surviving biological daughter of PATRICIA ANN HENRY, deceased; as representative of the estate of SAMUEL CHRISTOPHER HENRY, deceased; and as the surviving biological sister of SAMUEL CHRISTOPHER HENRY, Petitioners-Plaintiffs, v. ATLANTA GAS LIGHT COMPANY, Respondent-Defendant.	Supreme Court No. S20C1580 Court of Appeals No. A19A1990 Civil Action File Nos. 2017-SV-1428, 2017-SV-1430

Georgia Watch's *Amicus Curiae* Brief In Support Of Petitioner-Plaintiffs Constance Tondra Henry

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Georgia Watch joins in support of the petition for a writ of *certiorari* made by Petitioners-Plaintiffs Constance Tondra Henry.

IDENTITY AND INTEREST OF AMICI CURIAE

Georgia Watch is a 501(C)(3) tax exempt, non-profit corporation, and Georgia's leading consumer advocacy organization working "to help give consumers a strong ally to level the playing field with powerful special interests in the state."[1] With a mission to protect and inform consumers so all Georgians prosper and communities thrive," Georgia Watch advocates for consumer-friendly policies that enhance the quality of justice in civil legal matters in Georgia. *Id.*

ARGUMENT

Georgia Watch has a strong interest in this case because if the Court of Appeals' decision and Atlanta Gas Light Company's conduct are ratified, the safety of millions of Georgians will be jeopardized. No family should ever suffer like the Henry family suffered and no person should ever endure the emotional and psychological scars that will be with Constance the rest of her life. So long as it is compatible with statutory and common law, judicial policy should minimize the risk of the unimaginable tragedy that befell the Henry family from happening to another family.

[1] https://georgiawatch.org/about/

Even more troubling is that the gas explosion that killed Ms. Henry's mother and her disabled brother was preventable had Atlanta Gas Light Company ("AGL") taken simple and reasonable precautions. Among other things, AGL could have simply kept the gas supply to the house turned off until the dangers it first identified were properly remedied. Indeed, AGL is capable of quickly shutting off gas to a home when a customer is late on their bills. The same should also be true when AGL identifies hazards on gas systems that put lives at risk.[2]

With AGL providing natural gas to over 1.6 million households in Georgia, it simply cannot be the law of this state that AGL is permitted to turn on the gas and wash its hands of dangerous situation that can lead to a gas leak.[3] AGL is one of the oldest corporations in Georgia **with over 160 years of experience in natural gas delivery service** and billions of dollars in resources [Atlanta Business Chronicle reporting on August 24, 2015 that "Southern Co. (NYSE: SO) announced…it will buy AGL resources (NYSE: GAS) for $12 billion"].[4] Therefore, AGL—and only AGL—is best-suited to ensure the dangers it identifies are properly remedied before turning on the gas, thereby avoiding unnecessary risk to life and safety. This is especially true given that AGL is well-aware that these dangers are "quite often" not

[2] https://www.ajc.com/news/state--regional/ban-being-lifted-georgia-power-and-some-natural-gas-cutoffs/8Y2NZGjFFKCJBRhOevr71I/

[3] https://www.atlantagaslight.com/company/about-us.html

[4] https://www.bizjournals.com/atlanta/morning_call/2015/08/southern-co-to-acquire-agl-resources-in-12-billion.html.

properly remedied by third parties.[5]

Georgia Watch has serious concerns with the Court of Appeals' decision in this action and the threat to public safety posed by the decision. In particular, the Court of Appeals overlooked several legal and factual issues when it held that:

> AGL had no knowledge of Houser's improper repair when AGL first visited the property to turn on the gas – that hazard was later caused by Houser. Further, the specific hazard identified by West and communicated to Henry was actually remedied by Houser when it installed the hard gas pipe into the furnace.

Henry v. Atlanta Gas Light Co., 354 Ga. App. 368, 372 (2020).[6]

First, the Court of Appeals disregarded the fact that there is a triable issue whether AGL had *actual knowledge* of a dangerous and defective condition relating to the very same furnace and flex connector, which ruptured leading to the explosion on June 12, 2016.[7]

When arriving at the residence on September 12, 2015, AGL's field specialist, Ray West, gained first-hand knowledge that a prior HVAC company had improperly installed and routed the subject flex connector allowing it to rub against the furnace,

[5] V-16, T-52-53 (R. West Dep.).
[6] Compare, for example, *Garvin v. Atlanta Gas Light Co.*, 334 Ga. App. 450, 454, which affirmed a finding of no liability where it was undisputed that AGL "had no actual knowledge of a dangerous and defective condition on the property" when AGL turned on the gas. In contrast, in this case it was undisputed that AGL did have actual knowledge of a dangerous and defective condition when it turned on the gas.
[7] V-16, T-144-45 (R. West Dep.).

which AGL is aware is a code violation that can lead to a gas leak.[8] Rather than keep the gas off – as it was when he first arrived at the residence – West elected to turn on the gas to the residence and simply turn off the furnace.[9] AGL thus made a dangerous situation significantly more dangerous.

Turning on the gas was the proximate cause of the explosion in this case. With no gas flowing into the residence there can simply be no leak from the furnace or its flex connector:

> Q. And if the meter is locked and off, gas can't be cycled through the furnace, right, through a gas-powered furnace?
>
> **A. No**
>
> Q, And, if the meter is locked and off, gas wouldn't be able to travel through the furnace's flex connector either; is that right?
>
> **A. That's correct.**
>
> Q. And, also, gas wouldn't be able to leak through the flex connector either, right?
>
> **A. No.**[10]

AGL turned on the gas meter to a house where it knew there was a hazard that could cause the house to explode. AGL knew about that hazard because its own employee West was the person who identified it. Once the gas meter was on,

[8] V-16, T-144, T-94 (R. West Dep.); V-18, T-36-37 (R. Wood Dep.).
[9] V-16, T-148, T-144, T-67 (R. West Dep.).
[10] V-13, T-17 (R. Hawkes Dep.).

improper HVAC work (or even someone unknowingly turning the furnace valve) could cause a gas leak and explosion.[11] Of course AGL knew that the next HVAC repair could easily be faulty. Not only did its employee testify such repairs often were faulty, but also the hazard that West identified was itself the product of improper HVAC work. In other words, improper HVAC work was not only foreseeable—***it was actually foreseen*** in this case, by this AGL employee, in this house, at the source of the explosion. Unfortunately, the tragic explosion that later ensued was as predictable as it was preventable.

Second, and just as important, a jury could find that AGL's own conduct proves it has a duty to repair dangerous and defective flex connectors, and that a failure to do so was the proximate cause of the explosion. The record shows that AGL can skillfully identify improper HVAC repairs because AGL trains all of its field specialists on the proper inspection, repair and installation of flex connectors, and on the proper installation of grommets and hard pipe, which help protect flex connectors from rubbing against a furnace cabinet.[12] Not only does AGL train its field specialists on these items, it supplies them these items along with all the proper tools to install them.[13]

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[11] V-16, T-67-68,, T-81-82 (R. West Dep.); V-21, T-47 (R. Gray Dep.).
[12] V-16, T-93,129 (R. West Dep.); V-13, T-9-10 (R. Hawkes Dep.).; V-15, T-40-42 (R. Hopper Dep.).
[13] V-15, T-37-40 (R. Hopper Dep.).; V-13, T-54-58 (R. Hawkes Dep.).

Moreover, it would have taken AGL a matter of minutes to correctly install the necessary hard pipe during its visit to the residence.

> Q. So I guess the field rep will have the hard pipe on the truck, too, right?
>
> **A. Yeah, we've got a kit that's got some 8-, 10-inch to get it outside the cabinet.**
>
> **********
>
> Q, And how long does it take to install the hard pipe you're talking about that comes out of the furnace?
>
> **A. 10, maybe 15 minutes.**
>
> Q. And the field rep will have flex connectors on his truck?
>
> **A. Yes.**
>
> Q. And wrenches?
>
> **A. Oh, yes.**[14]

AGL had everything it needed to repair the hazard related to the flex connector. But West decided not to spend the extra 10-15 minutes to ensure it was done properly.

Third, AGL had a duty to warn of the defective and dangerous condition it found, and it failed to properly provide that warning. Neither West, nor anyone from

[14] V-15, T-37 (R. Hopper Dep.).

AGL communicated to anyone the specific hazards West first identified. No one was home when West visited the residence and he merely left a card containing hand scribbled notes of "flex line thru top of furnace," never speaking to anyone, ever, about the danger or the fact that it could cause an explosion.[15]

AGL, through West, then carelessly and incorrectly assumed that the owner and residents would (1) see the card; (2) understand what West's handwritten notes meant; (3) understand what exactly needed to be fixed and why it presented a serious danger; (4) understand that gas had been turned on to the residence; and (5) an HVAC contractor would properly remedy the danger related to the flex line despite AGL knowing they "quite often" fail to do this:

> Q. And does the warning card…Does it explain what a flex line is?
>
> **A. It doesn't explain what it is. It just mentions it.**
>
> Q, Does it explain that the flex line is part of the customer piping?
>
> **A. No.**
>
> Q. Does it explain that the flex line carries flammable gas into the crawl space of the home?
>
> **A. It does not explain that.**
>
> Q. Does it explain what flex line through top of furnace means?
>
> **A. It states it. It doesn't explain it.**

[15] V-16, Ex. 4 (R. West Dep.).; V-16, T-93, T-145 (R. West Dep.).; V-18, T-32, T-34 (R. Wood Dep.).; V-2, R-784

> Q. Does the warning card explain why a flex connector routed through the top of the furnace is a safety hazard?
>
> **A. It doesn't.**
>
> **********
>
> Q. Does the warning card explain what items written on it – as far as Mr. West's handwriting, does it explain what items he wrote on here are more likely to lead to a gas leak?
>
> **A. No. No.**[16]

The Court of Appeals failed to recognize that neither the owner, Andrea Wood, nor the Henrys were ever provided these crucial details by AGL. Like any rational homeowner, Ms. Wood would have expected to receive this important safety information before AGL turned on the gas to her residence, "[N]ot once did AGL explain to me the safety hazards found on my home's gas system, why they needed to be repaired and which of the safety hazards, if any, could lead to a gas leak."[17]

Furthermore, Ms. Wood never received or saw AGL's Warning Card **until her deposition in the case – two years after the incident.**[18]

Fourth, AGL would have acquired knowledge of Houser's improper repair had AGL performed a reinspection, which was often its practice.[19] AGL's own expert testified that Houser's improper repair related to the flex connector would

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[16] V-9, T-135-137 (R. Drake Dep.).
[17] V-2, T-784
[18] V-18, T-38, 43 (R. Wood Dep.)
[19] V-16, T-52-53 (R. West Dep.); V-12, T-43-44 (R. Hobbs Dep.)

have been obvious to AGL had it revisited the residence; AGL's re-inspections follow the same safety checks of the appliances as the initial inspection.[20]

There is a compelling and poignant contrast when reflecting on the timing of AGL's revisit to the Henry home. In the hours following the explosion, AGL's West saw fit to revisit the residence when it was clearly too late to do anything to save Ms. Henry's family members; however, had West revisited the residence to perform a reinspection after Houser's work and before the explosion their lives would have likely been saved.[21]

The Court of Appeals Opinion will incentivize AGL to maintain turn-on policies that maximize profits at the expense of public safety—an issue which is of paramount importance to Georgia Watch.

On average, AGL's field specialists perform eight (8) gas system turn-ons a day; are graded on the amount of time they take to perform these turn-ons; are given an efficiency rating in their biannual performance reviews with regard to the amount of time they take to perform them; and this efficiency rating plays a factor in whether a field specialist receives a pay increase for that year. V-16, T-74 (R. West Dep.); V-13, T-48, T-51-52 (R. Hawkes Dep.). Once AGL completes a turn-on, it charges a customer a turn-on fee in addition to a variety of other fees that show up on the

[20] V-12, T-43-44 (R. Hobbs Dep.); V-9, T-147 (R. Drake Dep.)
[21] V-16, T-108 (R. West Dep.);

customer's gas bill each month; these monthly fees amount to what AGL refers to as the "base charge." V-8,T-26-27 (R. Lonn Dep.). However, AGL is unable to make money off a customer if it keeps its meter locked off. V-8, T-28-29 (R. Lonn Dep.). AGL's revenue model and its goal of minimizing use of its resources is a model that places the bottom line over public safety.

Despite these facts, the multiple options available to AGL to prevent the explosion, and AGL's actions setting this tragedy in motion, the Court of Appeals held that "[t]he fact that Houser performed a negligent repair cannot be attributed to AGL because "[a] gas company is not an insurer of the safety of its customers and their agents and invitees, but is liable only for [its] acts of negligence." *Henry*, 354 Ga. App. at 372.

Georgia Watch does not expect AGL to be "an insurer of the safety of its customers" for every gas leak and explosion. However, AGL does have a duty – with its vast resources and as gas distributor to millions of Georgia consumers – to exercise reasonable care when it is aware of potential dangers on residential gas systems. And enforcing that duty protects the millions of people that rely on natural gas. It defies logic and common sense to immunize AGL when it turns on a gas meter to a house with a known risk of explosion, especially when that risk has not been communicated to its customer. A jury can and should find that AGL's conduct fails to satisfy or meet the standard of care.

The simple and reasonable steps available to AGL – steps it has been accustomed to taking when addressing known dangers – would have prevented the explosion. These precautions are especially vital to life and safety when AGL is aware the dangers it first identifies on residential gas systems are "quite often" not properly repaired by companies like Houser.

It is beyond argument that AGL had a duty to protect people like Henry once it had actual knowledge of the hazardous flex fuel connector that ultimately caused the explosion. This law is well established. *See, e.g., Garvin v. Atlanta Gas Light Co.*, 334 Ga. App. 450, 454, 779 S.E.2d 687, 690 (2015) ("whenever such electrical current or gas is supplied with actual knowledge on the part of the one supplying it of the defective and dangerous condition of the customer's appliances he is liable for injuries caused by the electricity or the gas thus supplied for use on such defective and dangerous appliances" (quoting *Young v. Blalock Hauling Co.*, 106 Ga. App. 590, 594–595, 127 S.E.2d 689 (1962)).

The Court of Appeals' analysis failed to review the evidence (and/or the reasonable inferences drawn therefrom) in the light most favorable to Henry, as required on summary judgment.

Further, the misguided judicial appraisal of the issue would afford broad legal immunity to companies like AGL. The Opinion assumes there is only one way of defining the "hazard" of which AGL had actual notice. The Opinion construes the

"hazard" exclusively as Houser's failure to repair properly the flex fuel line left uncorrected by AGL. So defined, it is almost inevitable that AGL would be exonerated on account of the simple fact that Houser's failure postdated AGL's awareness of the hazard. But there is another reasonable way to define the "hazard" that cannot be dismissed without undermining the right to trial by jury.

The Opinion's narrow definition of "hazard" leaves no room for the reasonable view that the "hazard" was one and the same throughout: a flex fuel line that AGL actually knew posed a danger. The Opinion overlooks the dueling, and earnestly debatable, definitions of "hazard" that could be used for purposes of factually evaluating AGL's "actual" knowledge. "The debatable quality of that issue, the fact that fair-minded [people] might reach different conclusions, emphasize the appropriateness of leaving the question to the jury." *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353 (1943). In failing to recognize the factual issue presents a triable issue, the Opinion trespasses on the prerogatives of a jury.

This mistake will cause lingering confusion amongst the precedent of this State. The value of certiorari to this case is manifest in the importance of this issue to both the general public and the gas industry. *See Norfolk Southern Ry. Co. v. Zeagler*, 293 Ga. 582, 597 n. 10 (2013) (approving review on certiorari of "question of law that would be dispositive of the case and is important to the public and the railroad industry"). The writ of certiorari exists to avoid confusion, decide conflicts,

and to clear traps for the unwary.

The last time this Court confronted this area of the law was in 1876, in *Chisholm v. Atlanta Gas Light. Co.*, 57 Ga. 28. Nearly 150 years later, millions of Georgians now use natural gas and consumption has doubled in Georgia since the market was deregulated in 1998.[22]

In *Chisholm*, this Court wrote that "in its conduct of its business as a gas producer and furnisher thereof to its customers, [AGL] is bound to use such ordinary skill and diligence as is proportioned to the delicacy, difficulty and nature of that particular business." *Chisholm*, 57 Ga. at 31. If *Henry* is upheld, Georgia Watch fears the decision will serve to endanger gas consumers and insulate AGL from liability. This would only fuel AGL's bottom-line-driven approach at greater expense of proper safety and due diligence.

The public would be well-served to have this Court provide more detailed and clarifying authority on the duties of natural gas distributors in Georgia. Since this Court's decision in *Chisholm*, Georgia's appellate courts have refrained from exploring a specific and relevant standard of care for AGL *once it acquires knowledge* of potential hazards. While this may be true for Georgia, supreme courts in other jurisdictions have more recently waded into this area of law and have created

[22] http://www.psc.state.ga.us/gas/ngdereg.asp; https://www.eia.gov/dnav/ng/hist/na1490_sga_2a.htm

more detailed duties for gas distributors. *See, e.g.*, *Mobile Gas Serv. Corp. v. Robinson*, 20 So.3d 770, 779, 780 (2009); *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 751 (1980) ("Liability for damages caused by a gas leak exists where the gas supplier, having reasonable notice of an existing or potential danger…fails to inspect, repair, or shut off the gas."); *Fore v. United Natural Gas Co.*, 436 Pa. 499, 504 (1970) ("If the gas company knows that there are defects in such a pipe…it then becomes its duty to investigate the safety of the pipe…the company's duty to keep the gas turned off **continues until such time as it is satisfied that the repairs have properly made.**") (emphasis added).

Georgia needs more detailed authority on the duties of gas distributors that will better serves the public's safety and hopefully prevent tragedies, like what happened to the Henry family, from happening again. Since the time of *Chisholm*, gas consumption in Georgia has increased exponentially; and what happened to the Henry family is not a rare occurrence:

> From 1998 to 2017, 15 people a year, on average, died in incidents related to gas distribution in the U.S. "Significant incidents" – those that do things such as cause an injury or death, results in at least $50,000.00 of damage, or lead to a fire or explosion, **happen about 286 times a year**.[23]

Moreover, those that are fortunate to survive a natural gas explosion often suffer

[23] https://www.theatlantic.com/science/archive/2018/09/massachusetts-explosions-fire-gas/570361/; https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends

horrific, life-changing injuries.[24]

AGL is a provider of natural gas—an explosive substance that Georgia consumers use every day, despite their lack of expertise on how to avoid the enormous risks it can pose. AGL has sought—and the Court of Appeals has provided—legal authority from the Courts for AGL to turn on gas to homes with dangerous and defective conditions where an explosion can result. While recognizing AGL is not an insurer of gas safety, the public would be better protected if AGL is not immunized for failing to repair known dangers on residential gas systems, failing to require a reinspection, and failing to require the homeowner or residents be present during its inspections. Or if all of those are unavailable, then AGL should shut off the gas until it is satisfied those dangers have been properly repaired. This is not an unreasonable imposition for a company that has been in the natural gas delivery service for over 160 years; has a wealth of training, expertise and resources to ensure safe delivery of gas to consumers; and has millions of Georgian families relying on it for the safe delivery of natural gas. Supreme courts in other jurisdictions have recognized the need to impose a similar, sensible rule; the time is now for Georgia to do the same.

[24] https://www.ajc.com/news/breaking-news/just-gas-leak-dryer-caused-roswell-home-explosion-officials-say/jnICjiqXIakoZfFi2fr7dM/; https://www.walb.com/2019/05/07/gas-company-responds-accusations-homerville-coffee-shop-explosion/

CONCLUSION

For those reasons, Georgia Watch requests that this Court grant *certiorari*.

Respectfully submitted this 28th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a true and correct copy of the foregoing **Georgia Watch's *Amicus Curiae* Brief In Support Of Petitioner-Plaintiffs Constance Tondra Henry** by filing same with the Court's electronic case management system and also via United States first class mail upon the following counsel of record:

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