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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2025-000294

South Carolinians for Responsible Agricultural Practices, Appellant,

v.

South Carolina Department of Environmental Services, Jim Young, and d/b/a J. Young Broilers, Respondents.

AND

South Carolinians for Responsible Agricultural Practices, Appellant,

v.

South Carolina Department of Environmental Services and Heath Coggins Broilers, Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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This case asks whether South Carolinians can be denied judicial review when a state agency disregards its own regulations and allows industrial pollution to threaten their homes, health, and quality of life. In its brief, Appellant South Carolinians for Responsible Agricultural Practices ("SCRAP") detailed how the Administrative Law Court's ("ALC") dismissal of its permit challenges precluded them from seeking review of permits that will injure its members' property and liberty interests.

When it issued the permits at issue, Respondent South Carolina Department of Environmental Services ("DES") disregarded site-specific risk factors and omitted safeguards essential to protecting water quality, air quality, public health, and neighboring landowners that are required by state regulations. These deficient permits pose direct and imminent harm to SCRAP's members, each of whom owns property directly adjacent to or within one mile of the proposed concentrated animal feeding operations ("CAFOs") and each of whom uses the surrounding environment, including the impaired Little River, for recreation, wildlife observation, and other daily activities. Their injuries, such as diminished property values, degraded environmental quality, and interference with the recreational use and enjoyment of their property, are directly traceable to the CAFO permits issued by DES and redressable by the reversal of the permitting decisions or modification of the permits.

In contesting standing, Respondents Jim Young, d/b/a J. Young Boilers, and Heath Coggins Broilers (collectively "the Broilers") rely upon a statute which, as applied here, unconstitutionally denies affected neighbors the opportunity to be heard. The statutory provision in question, S.C. Code Ann. § 48-6-40(D)(2), precludes landowners beyond a fixed setback from challenging a permit decision even if that decision directly harms their property interests. This

denies those landowners a meaningful opportunity to be heard, in violation of due process protections afforded under the South Carolina Constitution in Article I, Section 3 and Section 22. The statute also draws arbitrary distinctions between similarly situated landowners, violating the equal protection guarantees set forth in Article I, Section 3 of the South Carolina Constitution. This Court should reject the Broilers' effort to shield unlawful permitting decisions from constitutional scrutiny. Instead, this Court should reverse the rulings of the ALC and hold that S.C. Code Ann. § 48-6-40(D)(2) is unconstitutional as applied to SCRAP.

In the final section of its argument, the Broilers claim that the ALC lacks subject matter jurisdiction. This contention rests on a circular premise: that the constitutionally defective statute precludes review and therefore may not be challenged. As the ALC correctly held, it maintains jurisdiction to review the statute, and its ability to adjudicate contested cases involving legal rights, duties, or privileges—particularly those protected by Article I, Section 22 of the South Carolina Constitution—is firmly rooted in South Carolina law. *See, e.g.*, S.C. Code Ann. §§ 1-23-310(3); 1-23-505(3).

For the reasons explained in SCRAP's Initial Brief and this Reply, Appellant has established both constitutional and associational standing and properly represents members whose protected property and liberty interests are at stake. This Court should reject the Broilers' attempt to bypass meaningful review of the CAFO permits, hold that Appellant has standing, reverse the ALC's dismissal of the challenges, and remand this matter so that SCRAP may vindicate its constitutionally-protected interests in a consolidated contested case hearing on the merits.

I. Because Appellant's Members Presented Extensive Evidence that They Would Be Injured by the Proposed CAFOs and Administrative Review Could Reduce or Avoid Their Injuries, the ALC's Dismissal Was Erroneous.

SCRAP's members have constitutional standing to bring this consolidated administrative appeal based on unrebutted evidence in the form of several affidavits. The ALC failed to apply the correct legal standard and failed to analyze SCRAP's standing under any of the three required elements. Instead, the ALC improperly required statutory eligibility as a prerequisite for constitutional standing, a legal error warranting reversal. *See* Appellant's Initial Brief, pp. 14–25; (Order of Dismissal, pp. 7–10); (Order Denying Motion for Reconsideration, pp. 2–3). Unfortunately, the Broilers repeat the same mistakes made by the ALC by conflating the tests for statutory standing and constitutional standing even though those are separate inquiries that examine different elements altogether. The Broilers also misapply the standard articulated in *Lujan v. Defenders of Wildlife*, which requires a concrete injury that affects the litigant in a personal and individual way, not a certain or already realized harm. 504 U.S. 555, 112 S.Ct. 2130 (1992).

The Broilers open their argument and spend multiple pages of their brief examining whether Appellant has statutory standing—an issue that is not before this Court—and claim that this determination "is central to the ALC's decision to dismiss, and bears examination for its intersection with other arguments." *See* Broilers' Initial Brief, p. 5. This is an admission that the ALC mixed the statutory standing and constitutional standing analyses together, contrary to decades of precedent. Under the Broilers' theory, the General Assembly could preclude judicial review of even flagrant violations of constitutional rights simply by omitting statutory standing, thereby rendering Article I protections hollow. That is not the law in South Carolina.

South Carolina courts apply the *Lujan* test to determine constitutional standing and a litigant must demonstrate injury in fact, causation, and redressability. *See Lujan v. Defs. of*

Wildlife, 504 U.S. at 560–61, 112 S.Ct. at 2136; *see also Youngblood v. S.C. Dep't of Soc. Serv.*, 402 S.C. 311, 317–18, 741 S.E.2d 515, 518 (2013) ("To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Finally, it must be likely that a favorable decision will redress the injury.") (internal citations omitted). While statutory standing is an independent vehicle by which a party may establish standing, constitutional standing is *separate* and *distinct* from statutory standing. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' **or** (3) under the "public importance" exception.") (emphasis added).

As explained in Appellant's Initial Brief and in summary below, Appellant's members face imminent and concrete harms from the issuance of CAFO permits to the Broilers. These harms arise imminently because they are authorized by the issued permits and are traceable to DES' failure to impose required protections under governing law. Further, the ALC can redress these injuries by vacating or amending the permits to ensure they meet appropriate regulatory requirements. Because Appellant has shown its members face real, particularized injuries traceable to the permitting decisions and redressable through administrative review, this Court should reverse the ALC's dismissal.

A. Appellant's Members Face Concrete, Particularized, and Imminent Invasions of Their Legally Protected Interests Due to Issuance of the CAFO Permits.

Each of SCRAP's eight members submitted sworn affidavits detailing concrete and particularized harms that would result from the construction and operation of these CAFOs. (SCRAP Response to Motion to Dismiss, Ex. 1, Aff. of Charles Blackmon; Ex. 2, Aff. of Jean Revis; Ex. 3, Aff. of Mary Basel; Ex. 4, Aff. of Margaret Sparrow; Ex. 5, Aff. of Ross Stewart;

Ex. 6, Aff. of Randy Piontek; Ex. 7, Aff. of Richard Heald; and Ex. 8, Aff. of Christina Heald). The CAFOs present imminent invasions to SCRAP members' legally protected interests that are created and defined by independent sources in state law, including: (1) interference with the right to use and enjoy their property;[1] (2) injury to economic interests such as hunting leases and timber contracts, and the profits associated with them;[2] (3) interference with aesthetic and recreational use of land, including enjoying and observing wildlife;[3] (4) interference with the right to hunt, fish, and conduct other similar outdoor activities on their land;[4] (5) degradation of air quality, water quality, and public health;[5] and (6) interference with riparian rights.[6] *See* Appellant's Initial

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1 *See, e.g.*, *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 141, 747 S.E.2d 468, 474–75 (2013) ("[I]ncluded in the value of property are the rights of exclusive possession and use and enjoyment."); *Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) ("[P]roperty consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal."); *see also Gwynette v. Myers*, 237 S.C. 17, 24, 115 S.E.2d 673, 676 (1960).

2 *See, e.g.*, 16C C.J.S. Constitutional Law §§ 1894 (Dec. 2024) ("Protected property interests . . . are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as state law, which may include statutes, regulations or rules, **contracts**, or mutually explicit understandings.") (emphasis added); s*ee also Hamilton v. Bd. of Trustees of Oconee Cnty. School Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (Ct. App. 1984).

3 *See, e.g.*, *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res*., 345 S.C. 594, 601–02, 550 S.E.2d 287, 291–92 (2001) ("South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact.").

4 *See* S.C. CONST. ART. I, § 25 ("The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued . . .").

5 *See* S.C. Code Ann. § 48-1-20 (guaranteeing clean air and safe water); *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) (As part of the public trust doctrine, "everyone has the inalienable right to breathe clean air, to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks."); *see also McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 120 (2003).

6 *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 355–56, 815 S.E.2d 446, 452–53 (2018) ("[R]iparian property owners . . . hold special rights allowing them to make 'reasonable use' or the water adjacent to their property. . . [I]f a riparian owner unreasonably interferes with another riparian owner's right of reasonable use, the injured owner's remedy is to bring an action for damages, or for an injunction, or both.").

Brief, pp. 16–18 (listing these legally protected interests, explaining their dimensions as defined in state law, and citing the sworn testimony of each SCRAP member detailing these activities and interests).

With 57 industrial poultry barns already located in the small town of Mountville—all within the Little River watershed—SCRAP's members are exceedingly familiar with CAFOs and the harms that these large-scale operations wreak on nearby properties. Based on their lived experience, SCRAP's members know that they will face concrete, particularized, and imminent invasions of their legally protected interests. The proposed CAFOs heighten the imminence of harm because they are located much closer to SCRAP's members' properties than any existing facility. *See* Appellant's Initial Brief, pp. 18–20 (listing each imminent invasion of legally protected interests, describing which interests will be invaded by each impact associated with CAFOs, and citing the sworn testimony of each SCRAP member describing these known and lived experiences with CAFOs in the Mountville area).

Contrary to the Broilers' claims that these injuries are hypothetical or speculative, the evidence in the record establishes the "injury in fact" element of constitutional standing. Appellant has explained what protected interests will be invaded and how those invasions will occur. Because DES has issued the permits and construction may begin at any time, SCRAP's members face imminent injury and are "in immediate danger of sustaining prejudice therefrom." *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012). These harms are not "conjectural," "hypothetical," "pure speculation," or "fantasy." *Lujan*, 504 U.S. at 560, 567, 112 S.Ct. at 2136, 2140. They are rooted in the firsthand experience of SCRAP's members with CAFOs in Mountville and their knowledge that the Broilers' facilities, which are significantly closer, will impose even more direct and personal harm. The threat to SCRAP's members is "certainly

impending," and there is a "substantial risk" and "realistic danger" that the injuries will occur. *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 152 (3rd Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 2341 (2014) and *Pennell v. City of San Jose*, 485 U.S. 1, 8, 108 S.Ct. 849, 855 (1988)).

The Broilers argue that the injury in fact must have already occurred for a party to meet the injury in fact element of constitutional standing. *See, e.g.*, Broilers' Initial Brief, p. 11 ("Standing still requires that the party seeking review must himself have suffered an injury.") (internal quotation marks omitted). This is a misstatement of the first element of constitutional standing, which requires "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual **or** imminent." *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136 (emphasis added); *see also Clemens*, 48 F.4th at 152 ("That 'actual or imminent' is disjunctive is critical: it indicates that a plaintiff need not wait until he or she has *actually* sustained the feared harm in order to seek judicial redress, but can file suit when the risk of harm becomes imminent.") (emphasis in original). Appellant has established the imminence of harm to its members' legally protected interests. Standing jurisprudence from federal and state courts authorizes SCRAP to bring this action *before* the harms asserted in its members' unrebutted affidavits inflict irreparable damage to the surrounding environment and each of their property rights.

The Broilers also downplay the legally protected interests asserted by Appellant's members by attempting to distinguish cited case law and claiming that some statutory provisions and doctrines do not create a private cause of action. *See* Broilers' Initial Brief, pp. 9–13. This is a thinly-veiled attempt to assert that Appellant does not have protected legal interests in this case, which is untrue.

Far from being "inapposite," the decision in *Painter v. Town of Forest Acres* recites, in a passage that is tantamount to hornbook law, that "property consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal." 231 S.C. 56, 60, 97 S.E. 2d 71, 73 (1957). Appellant's members, as property owners, certainly enjoy all of those property rights within the proverbial "bundle" at their disposal. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 141, 747 S.E.2d 468, 474–75 (2013) ("A well-known principle of property law is that property consists of a bundle of rights" which includes "the rights of exclusive possession and use and enjoyment.").

Similarly, the Broilers' attempt to distinguish *Hamilton v. Board of Trustees of Oconee County School District* is beside the point because there can be no real dispute that one may alienate certain property interests by contract, including the right to sell timber or hunting privileges. *See, e.g.*, *Flagler v. Atlantic Coast Lumber Corp.*, 89 S.C. 328, 71 S.E. 849, 854–55 (1911) (analyzing contract for sale of timber). Activities that affect the ability to use these rights or diminish their value of it affect legitimate property interests.

The Broilers concede, as they must, that *Sea Pine Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources*, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001) recognizes aesthetic and recreational interests can support an "injury in fact." Broilers' Initial Brief, p. 11. The Broilers also concede, albeit in a backhanded manner, that Appellant's members, as South Carolina citizens, have a constitutional right to hunt and fish but, again, the Broilers miss the point that Appellants' members seek to exercise their constitutional right to hunt and fish as part of the use and enjoyment of their private property. These are, again, protected property interests harmed by the Broilers' operation of CAFOs under deficient permits.

When discussing Appellant's members' constitutional right to hunt and fish, the Broilers state, "no part of the Department's decision to issue the Permits prohibits the members' rights to hunt and fish wherever they are otherwise legally allowed to conduct such activities." Broilers' Initial Brief, p. 12. The imminent harm that SCRAP's members are facing to their constitutional rights to fish and hunt is that the odors, vectors, stormwater problems, air and water pollution, and application of manure from these CAFOs will harm, drive away, or destroy the habitat of wildlife and aquatic life, which impedes hunting and fishing activities and enjoying and observing wildlife. In this same section of their brief, the Broilers also suggest that Appellant is trying to "abrogate *Permittees'* private property rights." Broilers' Initial Brief, p. 11. This argument obscures the real property rights that are at issue in this action—those of Appellant and its members. The Broilers' property rights are not in question in this administrative appeal, and importantly, "[n]o one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 97, 596 S.E.2d 917, 923 (2004).

The authority cited by Appellant in its Initial Brief and Reply Brief explain the dimensions of their legally protected property and liberty interests. South Carolina law recognizes protected property and liberty interests through case law, constitutional provisions, and statutory frameworks, including the right to use and enjoy property, the right to contract, the right to clean air and water, the constitutional right to hunt and fish, and the right to use riparian resources. These sources of law define the scope of Appellant's members' legally protected interests that are at stake in this administrative appeal of the CAFO permits issued to the Broilers, which form the basis of Appellant's injuries in fact.

B. These Concrete, Particularized Harms Are Directly Traceable to DES' Decision to Issue the CAFO Permits to the Broilers.

Without these permits, the Broilers could not lawfully construct or operate the CAFOs. Each permit authorizes confinement barns and waste treatment and storage systems that will directly cause the imminent invasions of Appellant's members' legally protected interests as discussed previously. But for DES approving the permits for the Broilers' proposed CAFOs, the concrete, particularized, and imminent harms to Appellant's members' legally protected interests would not occur, and that should be sufficient for this element. *See Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 433 S.C. 405, 415–16, 859 S.E.2d 263, 268 (Ct. App. 2021) ("Establishing a 'but for' causal connection or showing a substantial likelihood that the challenged action caused the injury is sufficient."). The Supreme Court has confirmed that the issuance of a permit can directly cause environmental harm. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 184–85, 120 S.Ct. 693, 705–06 (2000) (holding that plaintiffs had standing to challenge a discharge permit where foreseeable violations stemming from unattainable permit limits caused nearby residents to curtail use of the river and affirming that injury arose from the agency's issuance of a permit authorizing noncompliance). South Carolina courts hold similarly. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 426 S.C. 236, 826 S.E.2d 595, 605 (2019) (recognizing a defective permit renewal with known environmental risks gives rise to judicial review).

Nevertheless, the Broilers argue that Appellant's case boils down to "an implicit complaint that the Permittees' facilities, once constructed, will constitute a nuisance to their own properties." Broilers' Initial Brief, p. 13. This contention ignores DES' role in this administrative appeal and the fact that the issued permits fail to meet the statutory and regulatory requirements that apply to poultry CAFOs in South Carolina. As a result, this administrative appeal does *not*, as the Broilers

assert, "[presume] that the barns will be operated in a manner that violates the Permits." *Id.* at p. 14. This administrative appeal challenges DES' decision to issue permits that did not meet all appropriate mandatory standards and conditions included in relevant statutes and regulations. Appellant's injuries will arise purely because the CAFO permits issued to the Broilers do not protect against the harms associated with CAFOs—harms that are all contemplated in the regulatory law surrounding CAFOs that DES was required to consider.

DES failed to follow the required site-specific protections mandated by applicable statutes and regulations. The Broilers plan to build their CAFOs on a parcel that contains the Little River, its tributaries, and wetlands. In many areas, the barns and waste storage structures sit just one hundred feet from these surface waters and wetlands. *See* SCRAP's Request for Contested Case Hearing for Coggins/Young, Ex. 3 to Request for Final Review Conference (maps showing the distance of the CAFOs and their structures from surface water and wetlands). Importantly, the Little River and its tributaries have been on the South Carolina § 303(d) list for impaired waterbodies due to violations of the fecal coliform standard, and a Total Maximum Daily Load ("TMDL") for fecal coliform has been in place for the Little River since 2004. The proposed CAFOs are also located adjacent to the 100-year floodplain, on high-runoff soils and unstable topography, and surrounded by 57 other industrial poultry barns in the area. *See* SCRAP's Request for Contested Case Hearing for Coggins/Young, Ex. 4 to Request for Final Review Conference (FEMA Flood Map for this area); Ex. 5 (excerpts from the Custom Soil Resource Reports attached to each Comprehensive Nutrient Management Plan ("CNMP")).

All these features make environmental degradation a predictable outcome, and DES was bound by statutes, case law, and its own regulations to take these site-specific characteristics into account when permitting the CAFOs. Given the CAFOs extremely close proximity to an already-

impaired water body, DES had a legal duty to evaluate the site and impose stricter requirements and setbacks where needed to protect water quality. *See Blackmon v. Dep't of Health & Envtl. Control*, 441 S.C. 342, 808 S.E.2d 829 (Ct. App. 2022) (holding that proximity to impaired waters mandates a site-specific permitting approach); S.C. Code Ann. Regs. 61-43.200.70(E); 61-43.200.140(A), (C)(2); 61-43.400.70(B)(2). Performing this evaluation was particularly necessary given that the Broilers failed to acknowledge the impaired status of the Little River or propose individualized protective measures in their CNMPs, but DES failed to do so. Further, the site's hydrological and topographical risks triggered DES' mandatory duty to impose special conditions that accounted for proximity to wetlands and impaired waters, groundwater recharge zones, unstable soils, steep and dangerous slopes, cumulative development, and floodplain risks. *See* S.C. Code Ann. Regs. 61-9.122.21; 61-9.122.23; 61-9.122.42(e); 61-43.200.20; 61-43.200.50; 61-43.200.70(F); 61-43.200.140. DES ignored these requirements and failed to include enhanced setbacks, vegetated buffers, limitations on waste application during high-rainfall events, stormwater controls, or any other measures based on the site's specific features. Each of these omissions violate regulatory law.

DES failed to incorporate both the site-specific conditions required by law and the standard regulatory provisions that apply to all CAFO permits. Regulations 61-43.200.130, .150, and .160 require CAFO permits to include conditions to address odor, vector control, and dead animal management, conditions that are even more vital when given the size of these proposed CAFOs and their proximity to neighboring properties. The permits did not include conditions to control these issues.

Further, many regulations require that the Department impose conditions, including monitoring and reporting requirements, to ensure that no discharges of pollutants into the waters

of the state occur. *See* S.C. Code Ann. Regs. 61-9.122.21; 61-9.122.23; 61-9.122.42; 61-43.200.140; 61-43.200.180; *see also* S.C. Pollution Control Act, S.C. Code Ann. §§ 48-1-10, *et seq.* Section 46-45-80 of the South Carolina Code requires poultry CAFOs to maintain evergreen vegetative buffers, which are essential for reducing odor, dust, and visual intrusions on neighboring landowners, including SCRAP members. Additionally, S.C. Code Ann. Regs. 61-43.200.100 requires CAFO permits and CNMPs to include information regarding manure utilization areas and develop constituent loading rates for those areas. The CAFO permits issued to the Broilers did not include any of these required measures. The Broilers' CNMPs failed to address these issues as required under the appropriate statutory and regulatory provisions, yet DES permitted them without any of the necessary modifications.

The regulatory failures cited above and in Appellant's Initial Brief are not minor oversights. These are precisely the types of omissions that predictably lead to environmental harm and are the exact injuries that SCRAP's members have established will occur, making SCRAP's injuries directly traceable to DES' unlawful permitting decisions. Contrary to the Broilers' attempt to frame this as a simple nuisance case, or a case that presumes the permits will be violated, Appellant brings this administrative appeal *because of* these foreseeable, imminent harms, as detailed in the unrebutted affidavits of its members, all of which were not adequately addressed by DES during its review and issuance of the CAFO permits. (*See* SCRAP Prehearing Statements for Coggins/Young, Section 3, pp. 2–7) (identifying the regulatory and statutory deficiencies cited in this subsection as issues to be determined at the contested case hearing).

C. These Concrete, Particularized, and Imminent Injuries Are Also Redressable.

A favorable ruling from the ALC would void or amend the permits to impose missing protections. As shown above, DES failed to include mandatory conditions for CAFOs, which

require special site-specific safeguards where a facility is located near wetlands, in floodplains, or on unstable soils. It also omitted mandatory evergreen buffers and failed to address odors, vectors, deceased animals, stormwater, groundwater protection, water quality monitoring, manure management, and nutrient loading limits. These omissions will cause the harms alleged by SCRAP's members. An order from the ALC could either reverse the permitting decisions or could alter the permits themselves to comply with governing law which would reduce or prevent those harms. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 1547 (2016).

The Broilers again mischaracterize the relief Appellant seeks and how it would redress the harms to its members. They claim Appellant seeks a "pre-emptive denial" of the CAFO permits based on an assumption that a nuisance will occur. Broilers' Initial Brief, p. 14. This is incorrect. SCRAP is asking for its members to be afforded the contested case hearing they requested, which the Broilers themselves acknowledge is the forum where "the ALC must necessarily determine if the permit conditions, in light of the record as a whole, are sufficient to meet the applicable legal requirements for environmental protection." *Id.* at p. 15. The record, including the uncontroverted affidavit testimony of SCRAP's members, shows that DES has *not* met the applicable legal requirements necessary for protecting air quality, water quality, public health, and neighboring landowners. Enforcement of these controlling statutes, regulations, and case law through a contested case hearing before the ALC would redress Appellant's injuries, and the ALC is the only forum in which Appellant may seek review of the permitting decisions.

D. Because Appellant Established the Elements of Constitutional Standing, Appellant is Entitled to a Contested Case Hearing on the Merits.

SCRAP has established constitutional standing and is entitled to a contested case hearing on the merits. The ALC erred by concluding SCRAP's members lack standing. As discussed above, that conclusion rested on multiple legal errors. The Broilers repeat many of the same legal errors

in their brief, including conflating statutory and constitutional standing. When applying the three elements of constitutional standing to SCRAP and its members, each of whom submitted uncontroverted testimony into the record, the analysis leads to the conclusion that Appellant has satisfied the injury in fact, causation, and redressability requirements.

It also bears mentioning that at this stage, SCRAP need not prove the merits of its claims. Instead, "general factual allegations of injury resulting from the [Respondents'] conduct" are sufficient to establish standing and overcome the motion to dismiss. *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2137; *see also Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 437 S.C. 258, 260, 878 S.E.2d 861, 862–63 (2022) ("[A]ny discussion of the three elements required for constitutional standing . . . is not an analysis of the merits of the underlying action. Rather, an analysis of constitutional standing is solely an analysis of the allegations the [Appellant] made in the [pleadings]."); *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009) **(**"If the facts and inferences drawn from the facts alleged in the [pleadings], viewed in the light most favorable to the [Appellant], would entitle the [Appellant] to relief on any theory, then the grant of a motion to dismiss . . . is improper."). Appellant has sufficiently alleged injuries as a result of the permitting decisions which would entitle it to relief and a contested case regarding the merits is when the proof will be put to the test, not at an initial inquiry about standing. (*See, e.g.*, SCRAP Prehearing Statements for Coggins/Young).

II. Because Appellant Satisfied Every Element of Associational Standing, the ALC's Dismissal Was Erroneous.

Appellant satisfies the requirements for associational standing under *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977)). First, all of SCRAP's members have standing in their own right through constitutional

standing. Second, SCRAP's mission focuses on protecting its members' air, water quality, and property rights and defending its members' rural community from industrial-scale agricultural pollution. These are the precise issues raised in this administrative appeal. Finally, the contested-case hearing does not require participation by any individual member to resolve whether DES complied with regulatory requirements. These are purely legal questions suited to organizational litigation. *See* Appellant's Initial Brief, pp. 25–27 (describing these elements and how Appellant meets each in detail).

The ALC and the Broilers improperly substituted statutory standing for constitutional and associational analyses and wrongly claim that S.C. Code Ann. § 48-6-40(E) bars associational standing in CAFO permit cases regardless of the source of standing. (Order of Dismissal, p. 10); (Order Denying Motion for Reconsideration, pp. 8–9); Broilers' Initial Brief, pp. 16–17. Any purported statutory limitation would not bar Appellant from using associational standing to bring this administrative appeal because SCRAP and its members have invoked *constitutional* standing, not *statutory* standing. Since S.C. Code Ann. § 48-6-40(E) only governs the parameters of statutory standing, it is inapplicable to Appellant and its members here. SCRAP's members face concrete, imminent, and redressable harms from a state action that affects their legally protected property rights, this Court should reverse the ALC's Order of Dismissal.

III. Because S.C. Code Ann. § 48-6-40(D)(2), as Applied to Appellant, Violates Appellant's Constitutional Right to Due Process of Law, the ALC's Ruling was Erroneous.

The South Carolina Constitution guarantees SCRAP's members due process of law, including notice, an opportunity to be heard, and judicial review, before the State can bind them to a DES decision that deprives them of protected property and liberty interests. *See* S.C. Const. Art.

I, §§ 3, 22.[7] SCRAP's members' property rights at issue include: (1) the unrestricted right to use and enjoy their properties; (2) contractual rights related to hunting and timber production and the associated income; (3) the right to clean air and clean water safeguarded under the public trust doctrine; and (4) the right to reasonable use of the riparian resources on their properties and the right to be free from unreasonable use of those riparian resources by adjacent landowners. Further, SCRAP's members' liberty interests at stake include: (1) the right to fish and hunt safeguarded by the South Carolina Constitution, and (2) the right to use and enjoy clean water and clean air capable of sustaining human life. As applied to SCRAP, S.C. Code Ann. § 48-6-40(D)(2), violates its members' due process rights by binding them to DES' permit decisions affecting their protected property and liberty interests without any opportunity to be heard.

The Broilers argue that S.C. Code Ann. § 48-6-40(D)(2) is a permissible limitation upon participation in permit appeals based on a landowner's distance from the proposed facility. This defense ignores the core constitutional defect in the statute. The statute violates due process by preventing anyone within the one-mile radius provided by S.C. Code Ann. § 48-6-40(E) but outside 800 feet of the CAFO's footprint or the 1,000-foot residence radius of S.C. Code Ann. § 48-6-40(D)(2) from challenging the operating permit despite being harmed or threatened with imminent harm. This exclusion violates both procedural due process protections under Article I, § 3 and § 22 of the South Carolina Constitution. In *Kurschner v. City of Camden Planning Commission*, the South Carolina Supreme Court reaffirmed that procedural due process requires notice, a meaningful opportunity to be heard, and judicial review when a government action affects a

[7] In their brief, the Broilers focus on Appellant's due process rights afforded under Article I, § 3 of the South Carolina Constitution, and largely fail to address Article I, § 22. That is telling as Article I, § 22 squarely addresses the situation SCRAP's members are in—they are bound by the decision of an administrative agency (DES) that impermissibly tramples upon their protected property and liberty interests.

protected property interest. 376 S.C. 165, 656 S.E.2d 346 (2008). The Court emphasized these protections are mandatory where constitutional rights are at stake. Section 48-6-40(D)(2) denies affected landowners these basic procedural rights, not based on any showing of a lack of impact, but solely on their distance from the CAFO footprint.

The Broilers rely on the ALC's mistaken view that Appellant raised no protected interest beyond the right to seek administrative review. *See* Broilers' Initial Brief, p. 18. That conclusion stemmed from the ALC's improper substitution of a statutory standing analysis for the required constitutional inquiry. The Broilers further argue, without support, that "Appellant has failed to show how its members have been or will imminently be deprived of those interests by the Department's decision." Broilers' Initial Brief, p. 18. Section I of SCRAP's Initial Brief and this Reply Brief make clear that the threatened injuries to Appellant's members are "certainly impending" and there is "a substantial risk" and "a realistic danger" harm will occur. *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 152 (3rd Cir. 2022).

The Broilers' reliance on *Blue Cross and Blue Shield v. South Carolina Industrial Commission*, the only case they connect to Article I, § 22, is unavailing. The decision in not on point because it involves Workmen's Compensation benefits and hinged on the preclusion of participation of insurers to commission proceedings. 274 S.C. 204, 207–08, 262 S.E.2d 35, 37 (1980). In short, Article I, § 22 was "not applicable to the facts in [that] case." *Id*. at 208, 37. In this matter, however, SCRAP's members' legally protected interests at stake encompass some of the most fundamental property rights conceivable.

The Broilers also argue that "[p]roof of denial of due process requires a showing of substantial prejudice" and "[n]o such prejudice can be demonstrated here." Broilers' Initial Brief, p. 19. The case cited by the Broilers, along with several predecessors, draw a distinction between

situations in which prejudice is found and when it is not. For example, the case relied on by the Broilers found a lack of substantial prejudice when the litigant failed to avail itself of pretrial discovery and was denied surrebuttal. *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435–39, 319 S.E.2d 695, 698–701 (1984). A case cited by that one found no substantial prejudice when a continuance was not granted and the litigant failed to allege that an ex parte communication between the court and a deportation officer prejudiced the merits of the case. *Ka Fung Chan v. Imm. & Nat. Serv.*, 634 F.2d 248, 258 (5th Cir. 1981). In contrast, when a federal agency violated its own pretrial order regarding notification about witnesses and documentary evidence, it resulted in substantial prejudice and violated due process. *Pacific Molasses Co. v. F.T.C.*, 356 F.2d 386, 390 (5th Cir. 1966).

Unlike the relatively minor issues in *Ka Fung* and *Palmetto Alliance, Inc.*, here, Appellant has been afforded *no opportunity to be heard*, which is the ultimate substantial prejudice to it and its members. This goes well beyond the substantial prejudice shown in in *Pacific Molasses* as the aggrieved party in that case was at least allowed some opportunity to present its case.

The ALC's application of S.C. Code Ann. § 48-6-40(D)(2) precludes any review or any opportunity to be heard. This deprives Appellant and its members of due process under both Article I, § 3 and § 22 of the South Carolina Constitution. The ALC's decision concluding otherwise should be reversed.

IV. Because S.C. Code Ann. § 48-6-40(D)(2), as Applied to Appellant, Violates Appellant's Constitutional Right to Equal Protection of the Laws, the ALC's Ruling was Erroneous.

The South Carolina Constitution also guarantees SCRAP's members equal protection of the laws. *See* S.C. Const. Art. I, § 3; *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). S.C. Code Ann. § 48-6-40(D)(2) draws an arbitrary line in its

legislative classification: even though all landowners within a mile of a CAFO are deemed "affected" under § 48-6-40(E), only those within a more limited setback distance may challenge a CAFO permit. Landowners just outside that boundary are excluded, even when they face more serious impacts due to topography, drainage, or prevailing winds. *See Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006) ("A crucial step in the analysis of any equal protection issue is the identification of the pertinent class, i.e., exactly who is included in the group of persons allegedly being treated differently under similar circumstances and without any rational basis.").

This classification irrationally favors proximity over substance. Landowner A, just inside the line, may contest the permit even if unscathed by the CAFO. Landowner B, just outside the line, cannot contest the permit even if directly downwind or downstream and facing substantial harm. That is not rational policy but arbitrary line-drawing that disregards real-world impacts. The statute creates two classes of similarly situated landowners based solely on an arbitrary distance, not on actual exposure to harm. That violates the Equal Protection Clause of the South Carolina Constitution. *See City of Laurens v. Anderson*, 75 S.C. 62, 55 S.E. 136, 137 (1906) ("Equality in right, privilege, burdens, and protection is the thought running through the Constitution and laws of the state, and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the Constitution.").

The Broilers argue S.C. Code Ann. § 48-6-40(D)(2) "appears to bear a very direct and rational relationship between the legislative action at issue and the legislative purpose sought to be achieved." Broilers' Initial Brief, p. 22. In *Marley v. Kirby*, the South Carolina Supreme Court struck down a similar bright-line but ill-considered rule, holding that a statute precluding a

contributory negligence bar only as to motor vehicle personal injury plaintiffs lacked a rational basis. 271 S.C. 122, 125, 245 S.E.2d 604, 606 (1978). Section 48-6-40 draws the same kind of arbitrary line by both recognizing the affected status of landowners within a certain distance but then restricting permit challenges if additional setbacks are met by the CAFOs—regardless of odor, runoff, and other detrimental effects that can extend much farther depending on terrain, wind, or drainage. That exclusion does not rationally relate to actual environmental risk and cannot withstand equal protection scrutiny. Advancing agriculture may be a legitimate goal, but this setback line neither rationally nor reasonably serves that purpose.

The Broilers further assert that "all putative petitioners challenging such decisions would be treated similarly under [S.C. Code Ann. § 48-6-40]." Broilers' Initial Brief, p. 22. This is incorrect. As previously discussed, members of the class of persons "affected" by DES's decision to permit a CAFO under § 48-6-40(E) may or may not be able to bring the case forward if they do not meet the setback requirement of § 48-6-40(D)(2). This causes unequal treatment of similarly situated landowners, even though they belong to the same class and face the same risks. *See Lee v. S.C. Dept. of Nat. Res.*, 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). As discussed in SCRAP's Initial Brief, § 48-6-40(D)(2) also draws unjustified distinctions between landowners affected by poultry CAFO permits and those affected by other types of CAFOs, such as swine. The latter can proceed under the more inclusive standard in S.C. Code Ann. § 48-6-30. *See Jenkins v. Meares*, 302 S.C. 142, 147, 394 S.E.2d 317, 319 (1990); Appellant's Initial Brief, pp. 37–38.

Last, the Broilers note the General Assembly crafted S.C. Code Ann. § 48-6-40(D)(2) to provide "an *additional layer* of protection for agricultural operations" beyond the benefits that these operations already enjoy under other laws, such as S.C. Code Ann. § 46-45-10. Broilers' Initial Brief, p. 22 (emphasis added). This language exposes the inequity of the classification

created by § 48-6-40(D)(2). The Supreme Court of South Carolina stresses that there is a difference between striking a balance between the interests involved in a situation and going *too far* in favor of one group, at another group's detriment. *See, e.g.*, *U.S. Fidelity & Guaranty Co. v. City of Newberry*, 257 S.C. 433, 441, 186 S.E.2d 239, 242 (1972) ("[A]lways holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to *hostile and discriminating legislation* is to make the protecting clauses of the fourteenth amendment a mere rope of sand.") (emphasis added); *Sirine v. State*, 132 S.C. 241, 128 S.E. 172, 175–76 (1925) ("Recourse to the law by all alike *without partiality or favor*, for the vindication of rights and the redress of wrongs is essential to equality before the law.") (emphasis added); *Standard Oil Co. v. City of Spartanburg*, 66 S.C. 37, 44 S.E. 377, 380 (1903) ("We are irresistibly forced to the conclusion that the exemption was intended as a *mere favor* to those included within the classification, and that it was therefore unconstitutional.") (emphasis added). Here, S.C. Code Ann. § 48-6-40(D)(2) impermissibly tips the scale in favor of industrial poultry operations at the public's expense and should be declared unconstitutional as applied to SCRAP and its members.

V. The ALC Retains Jurisdiction to Adjudicate Appellant's Challenge to the CAFO Permits Issued to the Broilers by DES.

In the alternative, the Broilers argue that the ALC lacks subject matter jurisdiction over challenges to CAFO permits that meet the setbacks contained in S.C. Code Ann. § 48-6-40(D)(2). This argument is constitutionally infirm and circular. It presumes the validity of the very statute under challenge and, if accepted, would immunize unconstitutional laws from judicial review. Courts have a constitutional obligation to determine whether legislative enactments exceed constitutional limits. *See Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). If § 48-6-40(D)(2) violates constitutional rights as applied, the ALC must retain jurisdiction to decide the

claim. A statute cannot divest courts of the power to determine whether it is itself unconstitutional. *See School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. 1560, 1573 (1963).

As the ALC correctly concluded, it has jurisdiction over this administrative appeal despite the statutory language. (Order of Dismissal, pp. 2–4). Under S.C. Code Ann. § 1-23-310(3), a "contested case" includes agency proceedings involving permitting decisions that affect a party's legal rights. This definition encompasses proceedings like this one, where the Broilers' CAFO permits implicate the rights of neighboring landowners protected by Article I, § 22 of the South Carolina Constitution. *See also* S.C. Code Ann. § 1-23-505(3). SCRAP's challenge to the Broilers' CAFO permits issued by DES are part of this general class of cases which the ALC has jurisdiction to hear. *See Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 167, 886 S.E.2d 671, 672 (2023).

The Broilers claim that the General Assembly may limit a court's jurisdiction under *Howard v. S.C. Department of Corrections*. Broilers' Initial Brief, p. 24. The decision in *Howard* supports jurisdiction, however, because the Court concluded that dismissal was only proper as to portion of the case in which the inmate did not show a state-created liberty interest. 399 S.C. 618, 629–30, 733 S.E.2d 211, 217–18 (2012). The Court further held that, as applicable here, "a matter is reviewable by the ALC where an inmate's appeal *also* implicated a state-created liberty or property interest." *Id*. at 630, 218. The Court concluded that since the appellant's "claim constitutes an as-applied constitutional challenge to the policy, the ALC could have ruled on this claim." *Id*. (citing *Travelscape, LLC v. SC. Dep't of Rev*., 291 S.C. 89, 108–09, 705 S.E.2d 28, 38–39 (2011)). Reading § 48-6-40(D)(2) as a jurisdictional bar would strip SCRAP and its members of their ability to vindicate protected property and liberty interests by challenging a permitting decision and improperly deprive the ALC from reviewing an as-applied constitutional challenge.

Finally, the South Carolina Supreme Court has recognized the General Assembly's legislative intent to protect public interests, including environmental and community health, in analogous cases. Specifically, the Court has found:

> The General Assembly surely intended [DES] to receive input from all persons affected by a project with potentially harmful environmental impacts. Such input, which continues until the administrative process concludes with a contested case hearing, allows the agency's permit review process to fully assess the project's impact.
>
> [. . .]
>
> If nearby property owners who have made individualized assertions of real, anticipated harm cannot satisfy the statutory standard . . . to acquire 'affected person status,' it does not appear that anyone in this state could qualify to seek review of permits for the [project]. This could not have been the intent of the General Assembly.

Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control, 430 S.C. 200, 216–18, 845 S.E.2d 481, 489–91 (2020). Likewise, S.C. Code Ann. § 48-6-40(D)(2) cannot operate in the way the Broilers suggest. Instead, South Carolina Supreme Court precedent requires courts to interpret statutes to allow participation by property owners who have shown they will suffer real and anticipated harm from a permit issued by DES, as SCRAP and its members have shown in this case.

The ALC was correct in holding that it retains subject matter jurisdiction over SCRAP's constitutional claims. Holding otherwise would shield unconstitutional laws from review and leave affected citizens without legal recourse, contrary to due process and judicial review principles.

CONCLUSION

For the foregoing reasons, SCRAP respectfully requests that this Court reverse the ALC's Order of Dismissal and Order Denying Reconsideration and remand for a contested case hearing. The ALC erred as a matter of law by conflating constitutional standing with statutory eligibility and by upholding a statute that deprives landowners of due process and equal protection. SCRAP's

members alleged concrete, particularized, and imminent harms that are directly traceable to the legally deficient permits. These harms establish constitutional standing and require a meaningful hearing under settled law.

Respectfully submitted,

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June 20, 2025

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2025-000294

South Carolinians for Responsible Agricultural Practices, Appellant,

v.

South Carolina Department of Environmental Services, Jim Young, and d/b/a J. Young Broilers, Respondents.

AND

South Carolinians for Responsible Agricultural Practices, Appellant,

v.

South Carolina Department of Environmental Services and Heath Coggins Broilers, Respondents.

PROOF OF SERVICE

I hereby certify that on this date I served Appellant South Carolinians for Responsible Agricultural Practices' Initial Reply Brief upon counsel for the Respondents by AIS registered electronic mail and U.S. Mail with notification distributed to the following:

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Our Mission We use our legal expertise to protect land, water and communities across South Carolina.

June 20, 2025

VIA U.S. MAIL AND ELECTRONIC MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Appellant's Initial Reply Brief
South Carolinians for Responsible Agricultural Practices v. South Carolina Department of Environmental Services, Jim Young, & d/b/a J. Young Broilers
AND
South Carolinians for Responsible Agricultural Practices v. South Carolina Department of Environmental Services and Heath Coggins Broilers
Appellate Case No. 2025-000294

Dear Madame Clerk:

Please find enclosed Appellant South Carolinians for Responsible Agricultural Practices' Initial Reply Brief and Proof of Service in the above-referenced matter for filing. By copy of this letter, I am serving counsel for all parties by regular mail and AIS registered electronic mail. Thank you for your kind consideration and assistance with this matter.

Respectfully,

Emily Poole

Emily S. Poole

Enclosures
cc: Stephen P. Hightower, Esq.
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