THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, 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.

FINAL BRIEF OF RESPONDENTS JIM YOUNG, D/B/A J. YOUNG BROILERS, AND HEATH COGGINS BROILERS

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STATEMENT OF FACTS

Because Appellant South Carolinians for Responsible Agricultural Practices' ("SCRAP" or "Appellant") Statement of Facts is dominated by conclusory statements and legal argument and omits facts important to the ALC's Order of Dismissal, Respondents Jim Young, d/b/a J. Young Broilers, and Heath Coggins Broilers (collectively, "Permittees") offer this additional supplemental Statement of Facts for the Court's consideration.

Following this Court's decision in *Blackmon v. S.C. Department of Health and Environmental Control,* 441 S.C. 342, 893 S.E.2d 578 (Ct. App. 2022), and the revision of state regulations which were central to that decision,[1] Permittees filed new applications with state regulators for agricultural facility permits (the Permits) to allow the construction of poultry barns. The proposed poultry barns used a new site design which was specifically intended to comply with statutory distance requirements set forth in S.C. CODE ANN. § 44-1-65 (later recodified to S.C. CODE ANN. § 48-6-40). (Transcript at 7; Affidavit of Adam Gaines ¶¶ 6-8, R. pp. 453 and 312-313). Specifically, the barns were configured to be 800 feet or more from the Permittees' property line, and *at least* 1000 feet from any "adjacent property owner's residence." (Order of Dismissal at 6-7, R. pp. 11-12). The actual distance of the proposed Coggins and Young barns from the closest residence was measured to be 2,901 feet and 2,454 feet, respectively. (Aff. Adam Gaines, ¶¶7 & 8,

[1] The revisions to S.C. CODE ANN. REGS. 61-9.122.23 to conform to federal regulation 40 C.F.R. § 122.23 are discussed at greater length in Respondents' Memorandum of Law in Support of Motion to Dismiss, pp 3-5.

R. pp. 312-313). There is no dispute that the proposed barns meet the statutory distances set forth in § 48-6-40.

The Permits were issued on June 4, 2024, triggering Appellant's requests for contested cases and, ultimately, this appeal. (Appellant's Initial Brief at 1, Statement of the Case). By their own express terms, the Permits are issued "for the construction and operation of a **NO-DISCHARGE** agricultural animal facility, manure and animal by-product treatment and storage system." (Page 1 of Coggins Permit and Page 1 of Young Permit in Appellant's Requests for Contested Case, R. pp. 159 and 211) (emphasis in original). The Permits further require, in Special Condition 1, that the Permittees "[o]perate and maintain the waste management system in accordance with State and Federal law so as **to prevent discharges to the environment**." (Page 2 of Coggins Permit and Page 2 of Young Permit, R. pp. 160 and 212) (emphasis added).

While Appellant's members offered affidavit testimony regarding property owned by them, it is undisputed that Appellant SCRAP does not own property within a one-mile radius of the proposed building footprints. (Transcript at 14-15; Order Denying Motion for Reconsideration at 3, R. pp. 460-461 and 20). Additionally, Appellant concedes that it is challenging the decision on behalf of its members, and not on its own behalf. (Appellant's Initial Brief, Section II).

STANDARD OF REVIEW

This Court's review of the ALC's Order is governed by S.C. CODE ANN. § 1-23-610(B), which provides:

> The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 199-200, 833 S.E.2d 451, 457 (Ct. App. 2019).

Questions of law, including questions of statutory interpretation, are subject to *de novo* review by this Court. *S.C. Dep't of Rev. v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012); *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 256, 692 S.E.2d 510, 512 (2010). With respect to evidentiary findings of the ALC, "the court's substantial evidence standard of review defers to the findings of the fact-finder." *Be Mi, Inc. v. S.C. Dep't of Rev.*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014). "In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *EAGLE v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014).

ARGUMENT

I. THE ALC CORRECTLY DETERMINED THAT APPELLANT LACKS STANDING

A. Appellant lacks statutory standing

In its Initial Brief, Appellant appears to have waived the argument that they qualify for standing under the applicable statutes, instead arguing exclusively that they have *constitutional* standing to bring a contested case. Nonetheless, the Appellant's lack of statutory standing is central to the ALC's decision to dismiss, and bears examination for its intersection with other arguments, even if Appellant has not preserved the issue for appeal.

The ALC correctly determined that the right to bring a contested case challenging an administrative agency decision is a right created by statute. (Order of Dismissal at 4-7, R. pp. 9-12). The ALC's jurisdictional authority and powers are defined, and may be amended, by statute. *See, e.g. S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186, 700 S.E.2d 468, 470 (Ct. App. 2010) (finding that the ALC lacked authority to grant a refund in a ruling on a cease and desist order issued by the Department of Consumer Affairs). Likewise, the right to bring a contested case for specific projects may be defined or amended by legislative act. *See, generally, Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585-586, 743 S.E.2d 786, 791-792 (2012). This was the clear intent of the General Assembly in passing 2018 Act No. 139 – to refine the circumstances under which a limited category of state permitting decisions could be subject to contested case challenge. (Order of Dismissal at 10, R. p. 15). Indeed, Appellant explicitly acknowledges that this was the Legislature's intent, stating:

"[i]n 2018 … the General Assembly sought to make it more difficult, if not virtually impossible, to appeal the issuance of poultry CAFO permits." (Appellant's Initial Brief at 8).

2018 Act 139 added Section 44-1-65 to the Code of Laws "to establish specific requirements for the review and appeal of" Department decisions on permits for agricultural facilities (other than swine), effective March 12, 2018. 2018 S.C. Acts 139. S.C. CODE ANN. § 44-1-65(D) and (E) (and its recodification[2] at § 48-6-40(D) and (E)) read as follows:

> (D)(1) An applicant, permittee, licensee, or *affected person* who has exhausted all administrative remedies within the department relating to a decision to issue or deny a permit, license, certification, or other approval of a poultry facility or another animal facility, except a swine facility, *and who is aggrieved by a final decision* may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act.
>
> (2) Notwithstanding any other provision of law, a final decision to issue a permit, license, certification, or other approval of a poultry facility or another animal facility, except a swine facility, *may not be contested* if the proposed building footprint is located eight hundred feet or more from the facility owner's property line *or located one thousand feet or more from an adjacent property owner's residence.*
>
> (E) *For purposes of this section, "affected person"* means a *property owner with standing* within a one-mile radius of the proposed building footprint or permitted poultry facility or other animal facility, except a swine facility, *who is challenging on his own behalf* the permit, license, certificate, or other approval for the failure to comply with the specific grounds set forth in the

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[2] As discussed in the Motion to Dismiss, the General Assembly passed 2023 S.C. Acts 60 restructuring the Department of Health and Environmental Control (or DHEC) and creating the Department of Environmental Services, effective July 1, 2024. Many of the DHEC statutes, including § 44-1-65, were recodified as part of this restructuring. The operative language cited here was effective at all times relevant to this matter in either Title 44 or Title 48 of the South Carolina Code.

> applicable department regulations governing the permitting of poultry facilities and other animal facilities, other than swine facilities.

S.C. CODE ANN. § 48-6-40(D) and (E) (emphasis added).

The plain language of the statute limits the universe of those who can bring contested cases to applicants, licensees, permittees, and *affected persons … aggrieved by a final decision*. S.C. CODE ANN. § 48-6-40(D)(1). Among other conclusions in the Order of Dismissal, the ALC determined the Appellant was not "aggrieved." (Order of Dismissal at 6-7, R. pp. 11-12). The statute further defines "affected person" for purposes of challenging this type of permit as a "property owner with standing within a one-mile radius of the proposed building footprint … who is challenging on his own behalf." S.C. CODE ANN. § 48-6-40(E). It is undisputed that SCRAP owns no real property at all, let alone within a one-mile radius, and it is self-evident that SCRAP is challenging these Permits on behalf of its members and not on its own behalf. (Appellant's Initial Brief, Section II). Finally, the statute plainly states that a final decision on permits such as these *may not be contested* if the proposed building footprint meets one or both of the statutory distance requirements set forth therein. S.C. CODE ANN. § 48-6-40(D)(2). It is undisputed that the Young and Coggins facilities meet these requirements. (Transcript at 7; Affidavit of Adam Gaines ¶¶ 6-8, R. pp.453 and 312-313).

The right to bring a contested case specifically challenging poultry facility permitting decisions is directly defined, and constrained, by § 48-6-40. Appellant lacks that right under the plain reading of the statute. While Appellant appears to have abandoned any argument to the contrary, focusing solely on its claims surrounding

constitutional standing, the ALC correctly held that Appellant "cannot establish statutory standing as an affected person under subsection 48-6-40(E) of the South Carolina Code." (Order of Dismissal at 7, R. p. 12).

B. Appellant lacks constitutional standing

The bare minimum to establish constitutional standing requires "that the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Appellant cannot meet the first element since it failed to show an injury in fact that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" (Order Denying Motion for Reconsideration, p. 2, R. p. 19, citing *Lujan,* 504 U.S. at 560).

The ALC correctly found that the "injuries" pled by Appellant's members were hypothetical and that Appellant "failed to show an invasion of a legally protected interest." (Order Denying Motion for Reconsideration, pp. 2-3, R. pp. 19-20). The only cognizable interest the ALC identified was the right to contested case review of the Permit decisions. (*Id.* at 3, R. p. 20) That right is one created by statute, and Appellant does not meet the statutory requirements to maintain such a case, and so could not support a showing of an injury in fact. (*Id.* at 3, R. p. 20). Appellant's brief nevertheless lists a number of purported legally protected rights of its members which it alleges *will be*[3]

[3] Even Appellant seems unable to maintain its conclusory position consistently throughout its Initial Brief. It states that "[t]here is a *risk* that adding more CAFOs will overrun their community, impacting their homes and denigrating their most fundamental property rights" and "[a]ll of [the members] activities and interests are *at*

invaded if the Permits are upheld: (1) the unrestricted right to use and enjoy their properties; (2) hunting and timber contracts on their properties, and the profits associated with those contracts; (3) the aesthetic and recreational interest in enjoying and observing wildlife; (4) the right to fish and hunt; (5) the right to clean air and clean water safeguarded under the public trust doctrine; and (6) the right to reasonable use of the riparian resources on their properties and to be free from unreasonable use of those resources by adjacent landowners. (Appellant's Initial Brief, pp. 16 - 18). These purported rights and the authorities cited by Appellant for each are addressed below.

Appellant's reliance on *Painter v. Town of Forest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957), in support of item (1) is inapposite. Appellant cites to *Painter* as legal authority for the assertion that "all SCRAP members have a legally protected, unrestricted right to use and enjoy their respective properties." (Appellant's Initial Brief, p. 16, citing *Painter*, *Id.* at 60, 97 S.E.2d at 73). In *Painter*, Forest Acres passed an ordinance which prohibited businesses from operating after midnight, and which facially appeared to target plaintiff's business directly. *Id.* at 61, 97 S.E.2d at 73. Contrary to Appellant's assertion, *Painter* does not stand for the proposition that private property owners are somehow guaranteed that neighboring property owners cannot use their property in a manner

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risk of harm if the Broilers construct and operate CAFOs[.]" Appellant's Initial Brief at 11 (emphasis added). Risk of harm is not the same as actual or imminent harm. *Waters v. S.C. Land Res. Conserv. Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) ("It is not enough that a threat of *possible* injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication."). These instances of Appellant's less-guarded prose acknowledge what the ALC concluded - that Appellant cannot show an injury in fact.

which they subjectively believe infringes on their "unrestricted right of use, enjoyment, and disposal of property." In *Painter*, Forest Acres enacted the ordinance because "the noise of automobile traffic, other noises, lights, etc., attendant in the usual course of carrying on a business where the public is being served constitute a nuisance and disturb the peace and rest of many of the residents of the town." *Id.* at 59, 97 S.E.2d at 72. The South Carolina Supreme Court rejected Forest Acres' argument that the ordinance was a valid exercise of its police power and found that the ordinance was so unreasonable as to be unconstitutional. *Id.* at 61, 97 S.E.2d at 73. The *Painter* case is essentially a regulatory takings case, and has no bearing on the present matter. Appellant has not alleged a taking, and the ALC would not be the appropriate venue for such a claim if one could be raised.

In support of item (2) (hunting and timber contracts on their properties, and the profits associated with those contracts) Appellant relies on *Hamilton v. Board of Trustees of Oconee County School District*, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984). Such reliance is misplaced. The language Appellant cites from that decision, reprinted in full, reads: "[t]hus, a property interest *in employment* can be found in existing state law[;] in contracts, express or implied[;] or in mutually explicit understanding." *Id.* at 525, 319 S.E.2d at 721. (emphasis added). No employment interest is involved here. Moreover, *Hamilton* is easily distinguishable since the decision being challenged in that case was the decision not to renew the plaintiff's employment contract. *Id.* at 521, 319 S.E.2d at 719. No such direct impact has been or could be pled here since no part of the Department's decision precludes the members from entering into contracts affecting their own property.

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), cited by Appellant in support of item (3) (the aesthetic and recreational interest in enjoying and observing wildlife), directly supports the ALC's determination that Appellant lacks constitutional standing. While the decision holds that aesthetic and recreational interests can support an "injury in fact," it makes clear that such injuries still must be "actual or imminent, not conjectural or hypothetical." *Id.* Moreover, "in order for the injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.* Appellant's other cited authority, *Sierra Club v. Morton*, 405 U.S. 727 (1972), similarly notes that "a mere 'interest in the problem' ... is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [federal] APA." *Id.* at 739. Standing still requires "that the party seeking review must himself have suffered an injury." *Id.* at 738. Appellant's members' asserted injuries with respect to item (3) reflect a mere interest in the surrounding environment, combined with pure speculation of possible future impacts. These are not actual, imminent or particularized harms to them personally so as to meet the requirements for constitutional standing.

Regarding item (4) (the right to fish and hunt), Appellant's supporting authority is a selective recitation of Article I, § 25 of the South Carolina Constitution which omits an important caveat in that provision: "[n]othing in this section shall be construed to abrogate any private property rights, existing state laws or regulations, or the state's sovereignty over its natural resources." S.C. CONST. art. 1, § 25. Yet, Appellant seeks to employ this provision to abrogate *Permittees'* private property rights. More to the point,

no part of the Department's decision to issue the Permits prohibits the members' rights to hunt and fish wherever and whenever they are otherwise legally allowed to conduct such activities, and there is no authority cited for the proposition that Article I, § 25 creates a private cause of action to challenge environmental permits such as those issued here.

In regard to item (5) (the right to clean air and clean water safeguarded under the public trust doctrine), Appellant relies on the South Carolina Pollution Control Act, which explicitly provides that "[n]o private cause of action is created or exists pursuant to this chapter." S.C. CODE ANN. § 48-1-250.[4] Appellant also cites to the public trust doctrine, which – again – creates no private right of action. The public trust doctrine, as the name implies, concerns the *public's* interest in navigable waterways, including marine life, water quality, and public access. *See generally Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 356, 815 S.E.2d 446, 453 (2018). Setting aside the fact that the Permits' terms prohibit any discharge that could impact waterways, the public trust doctrine does not confer to Appellant or its members the type of *particularized* interest required to establish constitutional standing.

In regard to item (6) (the right to reasonable use of the riparian resources on their properties and to be free from unreasonable use of those resources by adjacent landowners), Appellant's members' riparian rights have not and will not be impacted by

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[4] This statute was amended by 2012 S.C. Acts 198 "to specify that no private cause of action is created by or exists under the Pollution Control Act" following the South Carolina Supreme Court's decision in *Georgetown County League of Women Voters v. Smith Land Company, Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011) (interpreting the prior version of § 48-1-250).

the Permits in this matter. Again, the Permits are expressly for no-discharge facilities, and Appellant offers no evidence other than the conclusory assertions of its members that the facilities will adversely impact the riparian rights of some of its members. The *Jowers* decision cited by Appellant in support of this item upheld the dismissal of the plaintiffs' complaint in part because – precisely like the instant case – the plaintiffs had not sustained any actual injury to their riparian rights at the time they brought their challenge. *Id.* at 357, 815 S.E.2d at 453. The Supreme Court found that the riparian plaintiffs could resort to suits for injunction, declaratory judgment, or even direct damages to protect themselves against unreasonable upstream uses that adversely impacted their riparian rights – if and when such plaintiffs suffered an actual "injury in fact." *Id.* at 360, 815 S.E.2d at 455. In the absence of such injury, plaintiffs' riparian claims were not ripe. *Id.*

In regard to all of items (1) through (6), above, Appellant's legal position and the members' testimony taken together appears to assert an implicit complaint that the Permittees' facilities, once constructed, will constitute a nuisance to their own properties. Setting aside the facts that (a) such a claim is not ripe for adjudication, and (b) the members would have ample legal recourse if an actual nuisance were to occur, the policy of the State of South Carolina disfavors finding agricultural facilities to be a nuisance. *See* S.C. CODE ANN. § 46-45-10(3) ("This chapter is enacted to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural facilities and operations may be considered a nuisance."); S.C. CODE ANN. § 46-45-10(5) ("With the exception of new swine operations and new slaughterhouse operations, in the interest of

homeland security and in order to secure the availability, quality, and safety of food produced in South Carolina, it is the intent of the General Assembly that state law and the regulations of the Department of Health and Environmental Control pre-empt the entire field of and constitute a complete and integrated regulatory plan for agricultural facilities and agricultural operations as defined in Section 46-45-20[.]"). These policy findings do not support the pre-emptive denial of a permit based on Appellant's speculative assertions that a nuisance will exist.

The members' conclusory assertions of how they will be injured presumes that the barns will be operated in a manner that violates the Permits. The Permits' conditions and applicable regulations prohibit excessive odors and vectors, and any discharges to the environment,[5] meaning all of the dire environmental consequences Appellant argues will certainly occur would be a *violation* of the Department's decision, and not a product of that decision.[6] Moreover, such violations would subject the Permittees to state or federal enforcement action, possible citizen suits, and potentially third-party litigation if damages actually occur. Logically, the Department cannot make permit decisions for any

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[5] Appellant's assertions regarding the odors, vectors, and pollution discharges occurring from these facilities ignore clear regulatory and permit requirements which address each concern. *See* S.C. CODE ANN. REGS. 61-43.200.150 (Odor Control Requirements); 61-43.200.160 (Vector Control Requirements); 61-43.200.20(B) ("Permits issued under this regulation are no-discharge permits."); Permit Special Condition 4 (addressing stormwater permitting).

[6] While it is unnecessary to reach the second element of *Lujan* where Appellant has failed to establish an injury in fact, Appellant cannot establish the second element - a causal connection between the decision being challenged (the issuance of the Permits) and the harm – where the alleged harm would only occur if the conditions of the challenged decision are ignored or violated.

operation if the agency starts from the presumption that the permittee will violate permit conditions. Environmental permit conditions are, by their nature, the tool regulators utilize to prescribe the operations of regulated businesses in a manner that protects human health and the environment. In any contested case reviewing a Department permitting decision, 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. In this case, Appellant would have had the ALC start from the premise that the Permit conditions will be disregarded. That is not what contested cases are intended to review.

The ALC correctly found that Appellant "failed to meet its burden of proof to show that it possessed constitutional standing because [Appellant] has failed to show an invasion of a **legally protected interest**." (Order Denying Motion for Reconsideration at 3, R. p. 20) (emphasis in original). The ALC recognized that such interests "are defined not by the Constitution, but by independent sources, such as state law." (Order Denying Motion for Reconsideration at 6, R. p. 23, citing *James Acad. of Excellence v. Dorchester Cty. Sch. Dist. Two*, 376 S.C. 293, 657 S.E.2d 469 (2008)). The only legally protected interest identified by Appellant is that of an affected person, for which Appellant does not qualify. (Order Denying Motion for Reconsideration at 6, R. p. 23).

C. Appellant lacks associational standing

As set forth above, none of Appellant's members can establish the statutory or constitutional standing necessary to bring a contested case in their own name, and consequently, no association standing could exist in any case. *See Preservation Soc'y of*

Charleston v. S.C. Dep't of Health & Envtl. Control, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020) (finding that to bring suit an association must show that "at least one member would otherwise have standing, statutory, constitutional, or otherwise, to sue in his or her own right[.]"). Even if a member could have brought a contested case, they did not within the prescribed time period. S.C. CODE ANN. § 44-1-60(G) (establishing that a request for contested case must be filed within thirty calendar days of mailing of a board decision declining to hold a final review conference). The contested case was instead filed by Appellant – an association – which does not meet the statutory definition of an "affected person" because it owns no property and is not acting on its own behalf. S.C. CODE ANN. § 48-6-40(E). Appellant cannot elbow its way past an express statutory limitation on who can bring a contested case by invoking associational standing.

The General Assembly specifically defined "affected person" for purposes of challenging the Permits to mean "a property owner *with standing* within a one-mile radius of the proposed building footprint or permitted poultry facility or other animal facility, except a swine facility, who is challenging *on his own behalf* the permit[.]" S.C. CODE ANN. § 48-6-40(E) (emphasis added). The ALC determined that the inclusion of the verbiage "with standing" indicates that the General Assembly intended to expressly require a party meet traditional standing requirements *in addition* to meeting the other enumerated statutory requirements for an "affected person." (Order of Dismissal at 5, R. p. 10). Appellant cannot meet either set of requirements. Additionally, with respect to the "on his own behalf" provision, the ALC noted there is a legal presumption that the Legislature "must have intended 'to accomplish something by its choice of words and

would not do a futile thing.'" (Order of Dismissal at 10, R. p. 15, citing *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005)). The ALC correctly determined that the plain language of the statute "reflects a legislative intent that challenges to poultry facility permits must be brought by the property owner." (Order Denying Motion for Reconsideration at 8, R. p. 25). Despite Appellant's assertion that "the eight members of SCRAP *are* participating in this case on their own behalf," (Appellant's Initial Brief at 29) (emphasis in original), none of those individuals filed a request for contested case directly, and SCRAP does not meet the statutory definition of an "affected person."

While associational standing principles have been recognized by our courts in a number of cases, Appellant cites no authority – nor are we aware of any – supporting the proposition that the Legislature cannot specifically limit the use of associational standing if it chooses to do so. Appellant appears to concede this point in its Initial Brief when it states "[w]hile it is far from settled whether the legislature can preclude associational standing, if that were the General Assembly's goal, it would have to do so through express language stating that associational standing may not be used in that context." (Initial Brief of Appellant at 29). Such express language is precisely what the General Assembly included in § 48-6-40(E) when it required an affected person to challenge a permit "on his own behalf." Appellant's desire for the use of a specific term of art to express this legislative intent does not make the existence of that intent any less plain.

II. DISMISSAL DOES NOT DEPRIVE APPELLANT OF DUE PROCESS OR EQUAL PROTECTION

Article I, Section 3 of the South Carolina Constitution states that "[t]he privileges

and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Those interests protected by Article I, Section 3 are "defined not by the constitution but by independent sources such as state law." *James Academy*, 376 S.C. at 299, 657 S.E.2d at 472. The ALC determined that only the right to administrative review of a permitting decision, created by statute, was implicated here. (Order of Dismissal at 7, R. p. 12). As discussed above, Appellant does not even argue that it meets the requirements to bring a contested case hearing under the plain meaning of § 48-6-40, and it cannot claim that it has been deprived of a statutory right it was never afforded.

The purported property and liberty interests Appellant asserts it is being deprived of are discussed, *supra*, in Section I.B. Assuming any of those interests rise to the level implicated by Article I, Section 3, Appellant has failed to show how its members have been or will imminently be deprived of those interests by the Department's decision. Our courts have recognized that not every "interest" in a decision is protected by due process – particularly when the framework for challenging the decision is defined – and constrained – by statute. For example, in *Blue Cross and Blue Shield v. South Carolina Industrial Commission*, our Supreme Court determined that Article I, Section 22 of the South Carolina Constitution did not make an insurer a party to workers compensation proceedings, even though the decisions of the Commission would have a direct pecuniary impact on the insurer by determining some of the claims it would have to cover. 274 S.C. 204, 207-208 262 S.E.2d 35, 37 (1980). The reasoning was simple – the

statute controlling Commission proceedings limited who could participate and under what circumstances. *Id.*

The ALC specifically found that Appellant's failure to point to a legally protected interest led to the conclusion "that there were no due process rights implicated by the Department's actions." (Order of Dismissal at 8, R. p. 13). The ALC went on to say that, "the practical implications of finding otherwise would be that every statute requiring Department action would automatically give rise to a [constitutional] right to administrative review." (*Id.*).

Proof of denial of due process requires a showing of substantial prejudice. *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984). No such prejudice can be demonstrated here. Despite Appellant's contention that this is the "only tribunal" in which its members can protect their property interests, numerous judicial remedies are available to each respective member of SCRAP if the Permittees actually violate their Permits in a manner that does impact a cognizable property interest. If Permittees discharge pollutants to the Little River in violation of the Permits' no-discharge conditions, they would violate the Clean Water Act and be subject to enforcement action by the Department. If the Department fails to take timely enforcement action, the individual members may bring a citizen suit enforcement action in federal district court, subjecting the Permittees to substantial civil penalties and attorney fees. 33 U.S.C.A. § 1365(A). If Permittees' activities in the future create a nuisance or trespass which is alleged to infringe on the rights of Appellant's members, the members can avail themselves of our state courts under applicable theories of tort law. Clearly, due process

remains available to the members to protect any rights that might – at some future point – actually be invaded.

With respect to equal protection, the ALC found that Appellant's argument was "categorically without merit." (Order Denying Motion for Reconsideration at 6, R. p. 23). Since the Appellant "failed to meet its burden of proof to show that it is an affected person as defined under 48-6-40 … it has no standing to complain of the application of the statute." (Order Denying Motion for Reconsideration at 6, R. p. 23), *citing Fed. Land Bank of Columbia v. Davant,* 292 S.C. 172, 177, 355 S.E.2d 293, 296 (1987)). Moreover, it remains unclear even now what "classification" is being challenged, let alone how Appellant is treated differently than other similarly situated members of that class. *See, e.g., Amazon Servs., LLC v. S.C. Dep't of Rev.,* 442 S.C. 313, 340, 898 S.E.2d 194, 208 (Ct. App. 2024) ("[T]o establish an equal protection violation, a party must show that similarly situated persons received disparate treatment."). To the extent the statute specifically defines the class of potential petitioners seeking to challenge agricultural permitting decisions in South Carolina, it would appear to apply evenly to all such petitioners.

While the standards of § 48-6-40 may differ from those applicable to other types of contested cases challenging other agency decisions, variable standards for when and under what circumstances contested cases may be brought are nothing new and do not inherently violate constitutional protections. The ALC specifically noted that our courts "have endorsed the Legislature's authority to formulate criteria for challenging administrative actions." (Order Denying Motion for Reconsideration at 7, R. p. 24), *citing Preservation Soc'y,* 430 S.C. at 209-216, 845 S.E.2d at 485-489). And the Legislature has

created specific criteria for specific challenges. For example, under statutory provisions applicable to the former Department of Health and Environmental Control, specific, limited definitions of "affected persons" controlled who could bring a contested case for certain healthcare decisions. *See* S.C. CODE ANN. §§ 44-7-130(1), 44-7-510(1). In the context of alcoholic beverage licensing matters, a protestant bringing a challenge to a retail liquor license must reside within the county where the facility is being licensed or live within five miles of the location, or the protest will be considered invalid and no hearing will be held. *See* S.C. CODE ANN. § 61-6-185(A). While it is entirely probable that individuals or entities that do not meet these statutory limitations may have an interest in a given decision, legislative policy constrains the circumstances under which these specific contested cases may move forward. These constraints – like the provisions of § 48-6-40(D)(2) – are applied equally to all putative petitioners challenging those decisions, and such restrictions do not violate principles of Equal Protection.

The general rule with respect to equal protection claims is that so long as a statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 636, 367 (2013) (*citing Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)). "A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." *Id.* Our Courts "give great deference to the General Assembly's decision to create a classification. *Id.* (*citing Davis v. Cty. Of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994)). To the extent that the General Assembly has

created a "classification" at all by limiting the right to challenge certain agricultural permitting decisions, the classification does not implicate any suspect class or abridge any fundamental rights. Appellant's repeated references to its members' "fundamental rights" throughout its Initial Brief do not transform a statutorily defined right to administrative review of a state agency decision into one akin to reproductive rights or the right to marry, which require strict scrutiny. Nor does Appellant cite any authority demonstrating that a fundamental right deserving of such heightened scrutiny is actually implicated in this instance.

Section 48-4-60 is clearly subject to review under the rational basis test. The ALC correctly found that the statute "unequivocally relates to the legislative purpose of establishing the specific requirements that must be met in order for a person to pursue administrative review of a permit decision for a poultry facility." (Order Denying Motion for Reconsideration at 7). The effect of applying the plain language of § 48-6-40(D)(2) (i.e., specifically limiting those circumstances under which Department decisions for agricultural facilities may be contested), appears to bear a very direct and rational relationship between the legislative action at issue and the legislative purpose sought to be achieved.

As noted above, the General Assembly has elsewhere recognized the importance of agriculture to our state, and the need to protect it. *See* S.C. CODE ANN. § 46-45-10. 2018 S.C. Acts 139 would appear to reflect a similar policy determination, providing an additional layer of protection for agricultural operations. Since all putative petitioners challenging such decisions would be treated similarly under the statute, equal protection

principles are not violated by application of § 48-6-40(D)(2).

III. AS AN ADDITIONAL SUSTAINING GROUND, 2018 ACT 139 DEPRIVED THE ALC OF JURISDICTION TO HEAR THIS MATTER

Even if Appellant could establish that it has constitutional standing to challenge the Department's decision on these Permits, this contested case cannot proceed where the General Assembly has expressly limited the ALC's subject matter jurisdiction over which agricultural facility permits may be contested. While the ALC determined that § 48-6-40(D)(2) did not foreclose its subject matter jurisdiction, a plain reading of that limitation would support a determination that the Legislature intended a specified subset of agricultural permitting decisions - those which meet specified distance requirements from property lines or adjacent residences - would simply not be subject to contested case review. This appears to Permittees to be a limitation on the ALC's subject matter jurisdiction over that narrowly defined category of permitting decisions.

The ALC is a creation of statute and only has those powers statutorily granted to it. *See Foreclosure Specialists*, 390 S.C. at 186, 700 S.E.2d at 470. By statute, the ALC "shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government." S.C. CODE ANN. § 1-23-600 (Supp. 2015). "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 167, 886 S.E.2d 671, 672 (2023). Section 44-1-60 generally confers subject matter jurisdiction on the ALC for review of a "final agency decision" of the Department. S.C.

Code Ann. § 44-1-60(G). While S.C. CODE ANN. § 1-23-600 and S.C. CODE ANN. § 44-1-60 confer subject matter jurisdiction on the ALC for contested case hearings challenging many of the Department's permitting decisions, S.C. CODE ANN. § 48-6-40 specifically governs the ALC's subject matter jurisdiction for the Department's permitting decisions on poultry facilities. *See Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (more recent and specific legislation controls if there is a conflict between two statutes). Section 48-6-40(D)(1) expressly confers subject matter jurisdiction on the ALC for challenges to "a decision to issue or deny a permit, license, certification, or other approval of a poultry facility." S.C. CODE ANN. § 48-6-40(D)(1).

Significantly, while S.C. CODE ANN. § 48-6-40(D)(1) generally confers subject matter jurisdiction on the ALC for poultry facility permitting decisions, S.C. CODE ANN. § 48-6-40(D)(2) expressly defines those permitting decisions which *may not be contested*. S.C. CODE ANN. § 48-6-40(D)(2) specifically provides as follows:

> (2) Notwithstanding any other provision of law, a final decision to issue a permit, license, certification, or other approval of a poultry facility or another animal facility, except a swine facility, *may not be contested* if the proposed building footprint is located eight hundred feet or more from the facility owner's property line or located one thousand feet or more from an adjacent property owner's residence.

(emphasis added). And, it is axiomatic that "[t]he Legislature has the authority to limit the subject matter jurisdiction of a court that it has created." *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 627, 733 S.E.2d 211, 216 (2012).

It is undisputed that the Coggins and Young barns meet the distance conditions triggering this subsection. (Order of Dismissal at 6 – 7, R. pp. 11-12). The ALC interpreted

the "may not be contested" language as a procedural limitation on the circumstances under which a petitioner could bring a challenge (i.e., a limitation on who may be an *affected person* that is *aggrieved*, pursuant to subsection D(1)). Permittees submit, as an additional sustaining ground, that the statute more plainly reads as a limitation on which *decisions* may be challenged via a contested case, not on who may bring those challenges. Under that reading, the ALC lacks subject matter jurisdiction for the Department's decision to issue the Permits where the distance requirements of § 48-6-40(D)(2) are met. Consequently, even if Appellant satisfied the requirement of constitutional standing, the ALC could not hear the contested case and dismissal should be upheld.

CONCLUSION

For the foregoing reasons, Permittees respectfully request that the Court of Appeals AFFIRM the ALC's Order of Dismissal.

Respectfully submitted,

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