

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM ADMINISTRATIVE LAW COURT

JAN 31 2018

Ralph King Anderson, III, Administrative Law Judge

S.C. SUPREME COURT

Case No. 13-ALJ-07-0056-CC
Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control Petitioners,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control..... Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 2, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in creating a new test for “constitutional standing” in South Carolina whereby unchallenged testimony from individuals describing direct injuries from a proposed new port facility – including degradation of the use, enjoyment, and value of their property; impairment of their use of nearby waterways; and reasonable personal health concerns from breathing toxic diesel soot that settles on their homes – were dismissed as “generalized grievances” insufficient to support standing?
2. Did the Court of Appeals err in creating a new test for associational standing that will prevent organizations whose members have demonstrated particularized injury to property and health from challenging state pollution permits?
3. Did the courts below err in allowing relitigation of Petitioners’ Article III constitutional standing where their Article III standing had been fully litigated before a federal Article III court, and that court ruled that Petitioners had Article III standing?
4. Did the ALC abuse its discretion by imposing sanctions on Petitioners for offering a reasonable interpretation of ambiguous statutory text in a case of first impression?
5. Was the ALC’s retroactive closure of discovery to block depositions before summary judgment an abuse of discretion where the ALC and the parties had recognized discovery as ongoing for months beyond the date retroactively announced by the ALC as having closed it?

STATEMENT OF THE CASE

This case concerns the right of South Carolina citizens to challenge permits for major polluting facilities proposed adjacent to their homes and neighborhoods – specifically, the rights of citizen groups contesting the legality of State-issued pollution permits for a large new cruise ship terminal adjacent to residential neighborhoods on the densely packed peninsula of historic downtown Charleston.

South Carolina courts have long recognized the right of citizens to challenge the lawfulness of state-authorized pollution permits. *E.g.*, *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (affirming organization’s standing to challenge state permit for wetlands development); *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (affirming organization’s standing to challenge wetland fill activities); *Ballenger v. S.C. Dep’t of Health & Env’tl. Control*, 331 S.C. 247, 256, 500 S.E.2d 183, 187 (Ct. App. 1998) (upholding citizen standing to challenge state landfill permit).

Under that precedent, the citizen groups in this case – Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control (collectively, “the Community Groups”) – plainly have standing as “affected persons” entitled to administrative review of the Critical Area Permit and Coastal Zone Consistency Certification (“the Permits”) issued by the State Department of Health and Environmental Control (“DHEC”) to the South Carolina State Ports Authority (“SPA”). *See* S.C. Code Ann. § 44-1-60(E)(2) (providing that any “affected person” may challenge DHEC-issued permits).

The Permits would allow SPA to place five large piling clusters in Charleston Harbor needed to construct a proposed new 35 million dollar, 100,000 square foot cruise ship terminal. The new terminal is three times larger than the much older one SPA now operates, and is engineered to home-base much larger vessels – which in turn burn much more diesel fuel and generate much more air and water pollution than any ships previously home-based in Charleston. The new terminal will bring cruise operations much closer to Petitioners’ members, will emit visible and hazardous diesel soot emissions, and will increase water pollution risks in the immediate area. SPA’s own documents show the terminal will bring 1,600 cars, 20 tractor-trailers, 16 trucks, 32 buses, and 90 taxis daily into a small cramped area already suffering from traffic gridlock. R.002460.

The Community Groups sought to protect their members’ property and health by challenging DHEC permits that failed – unlawfully – to include reasonable conditions that would reduce pollution impacts on the immediate vicinity. Instead of allowing Petitioners to make their case, the ALC and then the Court of Appeals adopted new standing tests that impose unprecedented limitations on the rights of property owners and others to contest unlawful government action. Most dramatically, the Court of Appeals found that sworn evidence of particularized injury to the health and property of individual citizens cut *against* standing, because, in the court’s view, it meant these individuals would need to participate in litigating whether DHEC’s permits were lawfully issued. That ruling turns this Court’s precedent on its head and would give citizen groups with the *greatest* particularized injury the *least* standing to challenge unlawful government action.

The Court of Appeals also held – inconsistently – that individuals lack standing where their injury, no matter how direct and substantial, is experienced by more than one person. In the

court's view, evidence of particularized injury could be entirely ignored on summary judgment and dismissed as a "generalized grievance" that provides no standing so long as multiple persons suffer the same or similar injury. That too contradicts years of black letter law, which plainly holds that standing is not negated where multiple people suffer similar harm. *E.g.*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 93 S. Ct. 2405, 2416 (1973) (rejecting rule that "would mean that the most injurious and widespread Government actions could be questioned by nobody").

Combined, these two standing holdings mean that citizens may not contest DHEC pollution permits where their injury is either: (1) individualized, or (2) *not* individualized. The result – that no group of citizens could challenge any DHEC permit – runs in the face of statutory text that allows any "affected person" to contest an unlawful DHEC pollution permit. S.C. Code Ann. § 44-1-60(E). This Court should grant certiorari to correct a major erroneous departure from South Carolina standing law.

The Court of Appeals committed two other major errors regarding standing that also warrant immediate review.

First, the Court of Appeals, like the ALC before it, allowed relitigation of the Community Groups' Article III standing to challenge permits for SPA's proposed cruise terminal even though their Article III standing to challenge permits for that terminal had already been litigated in an Article III federal court, which had specifically found standing to be present. *Preservation Society of Charleston v. U.S. Army Corps of Engineers*, No. 2:12-2942-RMG, 2013 WL 6488282, at *15 (D.S.C. Sept. 18, 2013). The Court of Appeals found no collateral estoppel because SPA raised slightly different legal arguments concerning Article III standing in the subsequent state litigation. South Carolina preclusion law, however, prevents relitigation where a

party could have raised an argument on the same issue, but failed to. That is exactly what happened here.

Second, the court disregarded testimony of reduced property value and business values from the terminal in contravention of black letter law requiring that such testimony, on summary judgment, be viewed in a “light most favorable to the non-moving party.” *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). The court’s rationale for ignoring that evidence – a novel and impossible-to-satisfy requirement that property owners must prove declining property values before a permitted activity begins to qualify as an “affected person” who may contest the permit – departs from years of precedent holding that a party need not “await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L. Ed. 2d 895 (1979).

Beyond standing, the ALC made, and the Court of Appeals affirmed, two rulings that were a clear abuse of discretion and warrant this Court’s review and reversal.

First, the ALC sanctioned the Community Groups for contending that a statute directing that the DHEC Board “must” conduct a review conference within 60 days of a request sets forth a mandatory duty. S.C. Code Ann. § 44-1-60(F). Although no court had ever before addressed whether the term “must” establishes a mandatory duty, the ALC disagreed with the Community Groups’ interpretation and ordered sanctions against the Community Groups for seeking to enforce the Board’s mandatory duty through remand. The order was abusive and egregious, and this Court should reverse it.

This Court should also reverse the retroactive and unfair deprivation of the Community Groups’ discovery. In March 2014, the ALC declared that discovery had closed ten months prior,

in May 2013, despite discovery requests and productions by the parties well past that date, and despite the ALC's own acknowledgement that discovery was ongoing well past that date. The ALC's retroactive discovery closure, keyed on a default discovery period that the parties and the ALC itself had earlier blown by (and that testimony showed is seldom used in these cases), was a punitive abuse of discretion.

Altogether, the actions of the ALC, affirmed by the Court of Appeals in an unpublished and largely unreasoned opinion, worked to deprive families and property owners of their right to fairly and fully contest unlawful governmental pollution permits that will cause them harm. This Court's review is needed to correct fundamental errors of law that will sow confusion in the courts below and erase the accountability of government officials when they issue unlawful permits to pollute.

ARGUMENT

I. The Court Should Review and Correct An Erroneous Decision That Removes Standing Where More Than One Citizen Has Particularized Injuries.

As a general matter, South Carolina courts have articulated a "constitutional standing" test based on Article III of the U.S. Constitution, and follow federal caselaw to conduct this standing inquiry.¹ See e.g., *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)). The Article III constitutional standing test requires a party to show: "(1) it has suffered an 'injury in fact' that is

¹ South Carolina recognizes three types of standing: "(1) standing conferred by statute; (2) 'constitutional standing'; and (3) public importance standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). In this case, the courts below erroneously used Article III standing to deprive Petitioners of their statutory right as "affected person[s]" to administratively contest unlawful DHEC permits. S.C. Code Ann. § 44-1-60(E).

(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* (“*Laidlaw*”), 528 U.S. 167, 180–81, 120 S. Ct. 693, 704 (2000) (quoting *Lujan*, 504 U.S. at 560–561(1992)).

South Carolina courts have also adopted the federal test for “associational standing” to determine whether an organization may bring suit on behalf of its affected members. Under that test, an organization must show that: (1) individual members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

To affirm the ALC’s erroneous finding that multiple sworn affidavits and documents from SPA’s own files did not raise a factual issue as to standing to prevent summary judgment, the Court of Appeals fundamentally misconstrued this Court’s decision in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n* (“*Carnival*”), 407 S.C. 67, 76, 753 S.E.2d 843, 851 (2014), to announce a new rule of law. According to the Court of Appeals, under that case, testimony from multiple individuals setting forth similar particularized injury is non-cognizable because injuries experienced by multiple persons are “only generalized grievances suffered by the public as a whole which are insufficient to establish standing.” Op. 9 (citing *Carnival*, 407 S.C. at 76, 753 S.E.2d at 851). That is a basic misreading of *Carnival*, and conflicts with long-standing precedent in this Court and the United States Supreme Court.

“Standing has never required proof that the plaintiff is the *only* person injured by the defendant’s conduct,” *Nw. Env’tl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 965–66 (D. Or. 2006), and the U.S. Supreme Court has “made it clear that standing is not to be denied simply because many people suffer the same injury.” *SCRAP*, 412 U.S. at 687. By the Court of Appeals’ reasoning, “[t]he greater the threatened harm, the less power the courts would have to intercede;” which “is an illogical proposition.” *Nw. Env’tl. Def. Ctr.*, 434 F. Supp. 2d at 965–66.

The Court of Appeals’ erroneous reading of *Carnival* may stem from its failure to look past superficial resemblances between that case and this one to see key distinctions. First, while *Carnival* was a nuisance and zoning case, where plaintiffs faced heightened standing requirements (respectively, the need to show “special injury” and “special damages”), and was brought against a cruise line for ongoing operations, here citizens are seeking administrative review of state permits pursuant to a statute that gives that right to all “affected person[s].” S.C. Code Ann. § 44-1-60(E)(2). Further, whereas this Court decided *Carnival* on a motion to dismiss after finding no allegations of “particularized harm,” *id.* at 76–77, 753 S.E.2d at 851, here, standing was presented at summary judgment, and the Petitioners offered unchallenged testimony from multiple individual members describing specific, concrete, and particularized injuries they would personally suffer from the permitted terminal, as well as documents from SPA’s own files corroborating their testimony and other evidence of localized health effects from pollution.

For example, the Community Groups submitted the declaration of Tommie Robertson, who lives close to SPA’s existing small cruise terminal but who would be adjacent to the proposed, much larger terminal engineered to home base much larger and more polluting vessels. Ms. Robertson testified to seeing, from her dwelling, “thick smoke” which “moves from the

cruise ship toward [her] home,” such that “within seconds of breathing the emissions, [her] throat immediately began to hurt and [she] was forced to retreat indoors.” *Id.* She accordingly refrains from opening her windows or using her home’s porch while cruise ships are at the existing terminal, and she is reasonably concerned that the new, much larger terminal “closer to [her] home” with “larger and more frequent ships” will “significantly increase[.]” the adverse effects she already experiences. R.002589. She testified that “interference with use and enjoyment of [her] property will be increased if SPA is allowed to construct the new cruise ship terminal as permitted by DHEC starting with the pilings.” R.02590. This testimony more than sufficiently sets forth particularized harm for “affected person” status under S.C. Code § 44-1-60.

But Ms. Robertson’s testimony was not the only evidence of standing. Marty Morganello testified that he personally swims and kayaks in affected area waterways and that increased pollution levels associated with the larger cruise terminal would cause him to alter his recreational activities. R.002751–52. Injury to recreational interests in the use and enjoyment of public lands or waters is well-established as sufficient injury-in-fact for standing, even if the injuries are shared with others who make use of such public resources. *See S.C. Wildlife Fed’n*, 296 S.C. at 190, 371 S.E.2d at 523 (injury to organization members’ personal recreational interests in public lands or waters caused by an agency decision is “sufficient to show standing” for organization); *Laidlaw*, 528 U.S. at 181–83 (upholding standing where organization member who lived twenty miles from South Carolina discharge facility limited his use of river due to reasonable concern “that the water contained harmful pollutants”).

Christina Dodd testified that she lives in close proximity to the SPA cruise terminal and experiences the deposition of “oily soot” on her home and is reasonably concerned what “this residue from burned sulphur-heavy fuel is doing to [her] lungs and overall health, as [she is]

breathing this pollution both inside and outside of [her] home,” which the larger new terminal would “only make worse.” R.002576–78. Virginia Lane testified that she lives and has a business in close proximity to the terminal and described how extreme traffic congestion and degradation of her unique neighborhood’s historic and aesthetic integrity injures her specifically and particularly. R.002581–85. Steve Gates testified that he is a nearby resident property owner who has experienced “heavier and more oily” soot deposited on his home from the advent of year-round cruise operations starting in 2010, forcing him to scrub his home “more often and more vigorously” than ever before and raising health concerns from that pollution. R.002593–97. Mr. Gates also described how extreme traffic congestion makes essential trips within his neighborhood practically impossible, and alleged that all of these impacts that would be worsened by the larger proposed terminal. *Id.*

Testimony regarding increased harm from the new terminal was bolstered by documentary evidence underscoring the reasonableness of health concerns from marine vessel air pollution. R.2608–13 (Claudia Copeland, Cong. Research Serv., RL32450, Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues 6 (2008) (cruise ships rely on marine engines that burn high sulfur diesel fuel and produce large amounts of sulfur dioxide, nitrogen oxide, and particular matter, in addition to carbon monoxide, carbon dioxide, and hydrocarbons; and noting diesel exhaust is classified as a likely human carcinogen, with emissions from vessels contributing to adverse health effects associated with ambient concentrations of particulate matter and visibility, haze, and acid deposition.)) *See also* U.S. Environmental Protection Agency, Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 75 Fed. Reg. 22,896, 22,903 (April 30, 2010) (describing the health and environmental impacts of marine diesel exhaust). Such

“evidence of a credible threat to the [testifying members’] physical well-being from airborne pollutants” is sufficient to satisfy constitutional standing’s injury requirement. *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001).

The Petitioners also cited evidence from SPA’s own files showing that the proposed terminal is intended and engineered to handle larger, more polluting cruise ships than current facilities can accommodate. *Compare* R.000124 (existing home-based *Carnival Fantasy* has “a capacity of 2,054 passengers”) *with* R.002439 (anticipating home-basing a 3,500 passenger ship visiting twice a week); R.007493 (new terminal “designed to handle ships up to 3,500 passengers”); R.002438 (design objective for new terminal includes upgrades “necessary to support the resulting increases in passenger traffic loads”); R.007461 (SPA admitting that traffic counts at existing terminal are “considerably lower” than projected levels at new terminal).

Courts have denied standing “where the harm at issue is not only widely shared, *but is also* of an abstract and indefinite nature – for example, harm to the common concern for obedience to law,” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23-25, 118 S. Ct. 1777, 1785 (1998) (internal quotations and citations omitted) (emphasis added). But it is “the abstract nature of the harm – for example, injury to the interest in seeing that the law is obeyed – [which] deprives the case of the concrete specificity” required to establish standing. *Id.* Thus, “where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” *Id.* (quoting *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449-50, 109 S. Ct. 2558, 2564–65 (1989)). *See also Covington v. Jefferson Cnty.*, 358 F.3d 626, 651 (9th Cir. 2004) (“A concrete actual injury, even though shared by others generally is sufficient to provide injury in fact.”).

As the U.S. Supreme Court has held, “environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and

recreational values of the area will be lessened by the challenged activity.” *Id.* at 183 (internal quotation marks and citation omitted). There is no requirement that the affected members be the *only* persons affected – just that they use the area and resources impacted by the challenged agency action, as alleged here.

Followed to its logical conclusion, the standing bar raised by the Court of Appeals would effectively bar any citizen from ever challenging a DHEC permit to pollute that would harm more than one person, be it a nuclear power plant or a toxic waste dump.

Construing the statutory term “affected person” to that narrow extreme would thwart legislative intent and run afoul of the South Carolina Constitution, which provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; . . . nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.” S.C. Const. art. I, § 22. Because “[a] possible constitutional construction must prevail over an unconstitutional interpretation,” *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *Curtis v. State*, 345 S.C. 557, 569-70, 549 S.E.2d 591, 597 (2001)), “affected persons” must be interpreted to provide administrative review to those, like the Community Groups’ members, whose private rights are affected by DHEC’s permitting decisions – even if they are not the *only* person injured.

II. The Court Should Grant Review to Reverse the Erroneous Holding Below that Particularized Injury to an Organization’s Members is a Barrier to Associational Standing.

The test for associational standing requires a showing that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Beaufort*

Realty Co., 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt*, 432 U.S. at 343). This prevents organizations from pursuing cases where “individualized proof” of injury to each of an organization’s individual members is required, such as claims for damages based on personal injuries. *Warth v. Seldin*, 422 U.S. 490, 515–16, 95 S. Ct. 2197, 2214 (1975). But “so long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court’s jurisdiction.” *Id.* at 511 (emphasis added).

That requirement is undoubtedly met where “the organization seeks a purely legal ruling without requesting that the [] court award individualized relief to its members.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004); see *Hosp. Council of W. Pennsylvania v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (“The Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by individual association members.”).

Here, the Community Groups seek to have state pollution permits set aside as unlawful, which constitutes injunctive (declaratory) relief. Neither resolving the merits of this administrative challenge, nor invalidating the Permits, would require “individual participation,” and individual members’ involvement would not be “indispensable to proper resolution” of the claims on the merits. *Warth*, 422 U.S. at 511, 95 S. Ct. at 2211–12. See also *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006) (because association sought “civil penalties and injunctive relief only, not money damages,” the claims did not require “individualized proof”); *Humane Soc. of the U.S. v. Hodel*,

840 F.2d 45, 53 (D.C. Cir. 1988) (holding “the declaratory and injunctive relief requested by the Society [to be] clearly not of a type that requires the participation of any individual members”).

As the Court of Appeals acknowledged, Ms. Robertson’s testimony describes personal physical impacts from existing cruise operations and alleges that such impacts would be increased by the much larger terminal that would be significantly closer to her home than the existing terminal. *Id.* at 9. While apparently accepting that this testimony may be sufficient to confer “individual standing,” the court, however asserted that the Community Groups “have not explained how the claims they have asserted or the relief they have requested can be adjudicated without the affiant’s participation in the lawsuit.” *Id.* at 10.

That is incorrect. The Community Groups repeatedly explained that very point. *See* R.002356–61 (CG Resp. to SPA Mot. Sum. J.) (reciting elements of associational standing and explaining why members’ participation not needed in substantive litigation); Appellants’ Final Reply Br. 12–13 (explaining that “the requested remedy – resolution of an issue of law – will benefit both the injured member and other injured members alike even though they don’t all participate”) (internal quotations and citations omitted); R.000237 (prehearing statement identifying central issue as “whether DHEC properly applied the Critical Area Regulations, the Coastal Zone Management Act and Coastal Management Program in issuing a permit to construct a new cruise ship terminal . . .” and listing six specific legal issues related to DHEC’s issuance of the Permits); Pet. for Reh’g, 8–11. The requested remedy is vacatur of DHEC’s authorization, not monetary damages based on the injuries to individual members. R.000237.

There is no real question that the legal issues here can be adjudicated and the Permits vacated or remanded to DHEC without the participation of Ms. Robertson or any other individual members.²

Accordingly, the Court should grant certiorari to clarify that evidence of particularized harm submitted to show member standing does not *remove* an element of associational standing in permit challenge cases.

II. The Court of Appeals Erred in Allowing Relitigation of Article III Standing.

“Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (internal quotations omitted). As this Court has stated, “[t]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Id.* (internal quotations omitted).

Prior to moving for summary judgment in this case on the Community Groups’ Article III constitutional standing, SPA moved for summary judgment on Article III standing *in an Article III court* that was considering challenges brought by several of the Community Groups to federal permits for the same proposed SPA cruise terminal. The standing issue was actually and fully litigated, and the U.S. District Court ruled on summary judgment that Article III standing was indeed present, stating “it is clear that Plaintiffs have standing under Article III to bring this

² *Warth* does not require zero participation of association members –merely that *all* affected members not be required to adjudicate the claims or requested relief. 422 U.S. at 511; *see also Bhd. of Maint. of Way Employees Div. of Int’l Bhd. of Teamsters v. Indiana Harbor Belt R.R. Co.*, 20 F. Supp. 3d 686, 692 (N.D. Ind. 2014). As Petitioners have shown, participation by all members of the Community Groups members would not be required to litigate the legal shortcomings of DHEC’s decision.

action.” *Preservation Society of Charleston*, 2013 WL 6488282 at *15. The ALC and the Court of Appeals, however, both rejected the Community Groups’ attempts to prevent relitigation of Article III standing.

The Court of Appeals found no collateral estoppel on two grounds, both mistaken. First, it reasoned that no evidence showed the standing issue was “actually litigated” in the federal proceeding. Op. 11. But the Community Groups submitted summary judgment briefing before the federal court, as well as the court’s order, showing the issue actually and fully litigated. *E.g.*, R.002523–25 (Memorandum of State Ports Authority in Support of Motion for Summary Judgment, *Pres. Soc’y of Charleston v. U.S. Army Corps of Eng’rs*, No. 2:12-2942-RMG, (D.S.C. July 15, 2013)); R.002540–42 (State Ports Authority Reply to Plaintiffs’ Response to Defendants’ Motions for Summary Judgment, *Pres. Soc’y of Charleston*, No. 2:12-2942-RMG (D.S.C. Aug. 5, 2013)).

Second, the Court of Appeals claimed that the Article III standing issue was not “actually litigated” because SPA made a more limited standing argument in federal court than it did before the ALC. Op. 11 n.12. But the briefing materials that Community Groups submitted from the federal case showed that SPA made the same arguments in both cases. Even if it had not, however, collateral estoppel – or *issue preclusion* – does not turn on whether identical *arguments* were made, but whether the same *issue* was actually litigated. *Hewins*, 409 S.C. at 106. “[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.” *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphases in original). Where a party could have made a certain argument on an issue that was actually litigated in the earlier proceeding but failed to make such argument, collateral estoppel still applies, and the party is barred from relitigating the same issue

using the new argument. *Sec. Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990).

The Court of Appeals introduced a third error by off-handedly stating that collateral estoppel should not be “rigidly applied” given reasons of unfairness or injustice. *See* Op. 10 (quoting *Carolina Renewal, Inc. v. SCDOT*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009)). SPA, however, never argued for that exception, and the court identified no “unfairness or injustice” or “public policy” that would justify ignoring the doctrine. To the contrary, disregarding collateral estoppel to force citizens who prevailed in federal court to bear the burden and cost of once again litigating its standing to challenge pollution permits for the same proposed facility by the same large, well-funded quasi-public entity is unfair and unjust. That is especially so where the result of ignoring collateral estoppel is to strip South Carolina citizens of their rights to protect themselves and their property from illegally authorized pollution in defiance of statute and the South Carolina Constitution.

In terms of public policy, ignoring collateral estoppel to remove the right of affected citizens to challenge pollution permits could jeopardize DHEC’s delegated permitting authority under the Clean Water Act, a source of one of the permits challenged here. *See* 40 C.F.R. § 123.30 (requiring states to provide “an opportunity for judicial review that is the same as that available to obtain judicial review in federal court . . .”). The Court of Appeals decision thus opens the State of South Carolina to having its water permitting program decertified as non-compliant with federal law, which could invite a level of federal agency involvement in South Carolina affairs that the General Assembly clearly did not intend.

III. The Court Should Correct the Court of Appeals' Clear Error in Requiring Proof of Declining Future Property Values and Future Lost Business Before a Permit Can Be Challenged.

The Court of Appeals held that before South Carolina citizens can seek administrative review of an illegal DHEC pollution permit as “affected persons,” they must produce “evidence of declining property values and business” attributable to the permit. Op. 9. But the Permits at issue here, as with any DHEC environmental permit, are for *future* polluting activities.

As a practical matter, it would be difficult if not impossible for any property or business owner in South Carolina to show – before any permitted activity has begun – that the activity has already resulted in “declining property values or business.” As a legal matter, the Court of Appeals’ proposed test is contrary to precedent. For Article III constitutional standing, “one does not have to await the consummation of threatened injury to obtain preventive relief.” *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (internal quotations and citations omitted). Instead, “[t]he question [is] whether any perceived threat to [plaintiffs] is sufficiently real and immediate to show an existing controversy. . . .” *Id.* In other words, allegations establishing a “realistic threat” of harm caused by the challenged activity “in the reasonably near future” merit standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7, 108 (1983). *See also Brenham Cmty. Protective Ass'n v. U.S. Dep't of Agric.*, 893 F. Supp. 665, 670–71 (W.D. Tex. 1995) (recognizing that “[p]otential injury can suffice to establish standing” and denying summary judgment on standing based on declarations of “potential injury,” including future property value impacts).

Here, multiple declarations set forth a “realistic threat” that property values and business may be negatively affected by deposition of oily soot on valuable historic homes, extreme traffic congestion, and hazardous air pollution that can be seen, smelled, and tasted. R.002584 (Lane Aff.); R.002589–90 (Robertson Aff.); R.002594 (Gates Aff.). Under these circumstances, future

property value and business impacts are not “imaginary or speculative,” but instead pose a “quite realistic” threat to the affected members. *Blum*, 457 U.S. at 1000–01. The Court of Appeals’ dismissal of this testimony as “express[ing] only concern without evidence,” Op. 9, raises “issues of credibility and fact” inappropriate for resolution on summary judgment. *Brenham Cmty. Protective Ass’n*, 893 F. Supp. at 671. It is also wrong as a matter of law: in South Carolina, a property owner may “give his estimate of its value or the damage inflicted upon it even though he is not an expert.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43-44, 691 S.E.2d 135, 146 (2010) (internal quotes omitted); *see also Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007). Thus, the testimony of Mr. Gates, R.002594, Ms. Robertson, R.002589–90, and Ms. Lane, R.002584, regarding impacts on the value of their homes and businesses is admissible evidence showing – or at minimum raising a fact issue sufficient to defeat summary judgment – that these individuals are “affected persons” entitled by the General Assembly to invoke administrative review of errant DHEC pollution permits.

IV. The ALC Abused its Discretion By Imposing Sanctions Against Litigants Who Contended that the Statutory Term “Must” Denotes a Mandatory Duty.

Sanctions under Rule 11 are an extraordinary remedy reserved for pleadings or arguments that are frivolous or offered in bad faith. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The ALC abused its discretion by imposing sanctions upon the Community Groups for interpreting statutory language requiring that the DHEC Board “must” hold a review conference within sixty days of a request as setting forth a mandatory, not discretionary, duty to hold such a conference in such timeframe upon request. *See* S.C. Code Ann. § 44-1-60(F) (“No later than sixty calendar days after the receipt of a request for final review, a *final review conference must be conducted by the board*, its designee, or a committee of three members of the board appointed by the chair”) (emphasis added); *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)

("[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

While acknowledging this statutory language, the Court of Appeals faulted the Community Groups for "disregard[ing]" other language "indicating" that ALC review is available if the Board "declines" to hold said conference. Op. 13. The Community Groups have never disregarded the additional language; rather, they have shown how the provisions can be read together to mean that the Board "must" have a conference and to provide an avenue for redress if the Board "declines" its duty to schedule the conference within the allotted 60 days. Appellants' Second Amended Initial Br. 58–59 (providing dictionary definition of "decline" as including a failure to undertake a mandatory duty).

The Court of Appeals also baselessly faulted the Community Groups for "apparent disregard of a settled rule of statutory construction," Op. 12, but the meaning of the language at issue here has never been litigated before this case, much less "settled" by any court. At base, the ALC sanctioned the Community Groups for putting forth a permissible reading of an ambiguous statute, in a case of first impression. That was a clear abuse of discretion.

It bears mentioning that one of the Community Groups' attorneys in this matter has appeared before this Court numerous times and has a strong record of success in important cases, many keying on issues of statutory interpretation. The ALC's sanctions order deserves particular scrutiny here because the motion that prompted it was plainly intended to suppress vigorous representation in the public interest.

By affirming the ALC's order with no actual analysis, the Court of Appeals endorsed sanctioning a party for putting forth a plausible and more than reasonable statutory reading of a

previously-*un*interpreted statute. The sanctions order was an extreme and arbitrary abuse of discretion that should be reversed.

V. The Court Should Grant Review of the ALC's Retroactive Closing of Ongoing Discovery.

In March 2014, the ALC declared that discovery had closed in June 2013, preventing the Community Groups' from taking critical depositions after SPA had produced tens of thousands of pages of documents between June 2013 and March 2014. Indeed, before the ALC's announcement (in March 2014) that discovery had closed in June 2013, all parties, and the ALC itself, had conducted themselves and operated with the understanding that discovery had *not* closed then. SPA, for example, propounded discovery requests long after that date and produced thousands of pages in "rolling discovery" months beyond it, and the ALC acknowledged ongoing discovery in an order issued in December 2013.

Why would the ALC announce in March 2014 that discovery had closed in June 2013 after the parties and the ALC itself had proceeded for months with understanding that discovery was ongoing? Because SPA asked it to. After slowly producing responsive documents over several months, SPA sought to avoid having its witnesses deposed by citing a 90-day discovery rule that supposedly closed discovery in June 2013, even though the ALC and all parties had been proceeding with discovery in this case for months after the 90-day procedural period for discovery had come and gone. Op. 11.

But discovery past the default 90-day rule is in fact standard practice in these types of administrative proceedings, as shown by uncontroverted affidavit,³ and so it was here, with the

³ The Community Groups submitted uncontradicted testimony from an experienced practitioner before the ALC that demonstrated that the 90-day deadline is rarely observed in environmental permitting cases. *See* Appellants' Initial Br. 52–53.

ALC itself acknowledging that “the parties were still conducting discovery” long after the 90-day purported deadline had passed. Appellants’ Initial Br. 51 (citing December 2, 2013 order).

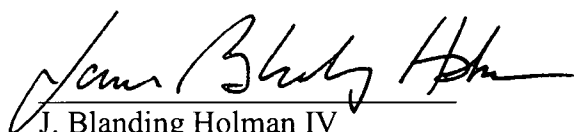
It was, accordingly, arbitrary for the ALC to later deem, retroactively, that discovery had closed by operation of a deadline that neither the parties nor the ALC itself considered to be in effect. Accordingly, the ALC abused its discretion by not allowing discovery to continue under a “good cause” standard where the Petitioners showed particularized harm from inability to conduct depositions that could not have been conducted earlier due to SPA’s rolling document production

The court should grant certiorari to affirm that the ALC abused its discretion in arbitrarily and retroactively closing discovery after the ALC and all parties had consistently participated in an ongoing discovery process.

CONCLUSION

For the foregoing reasons, the Community Groups respectfully request that this Court grant this Petition for Certiorari.

Respectfully submitted,



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January 29, 2018

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 13-ALJ-07-0056-CC
Appellate Case No. 2014-000847

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S.C. SUPREME COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control..... Petitioners,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control..... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018, I caused to be served the foregoing *Petition for Writ of Certiorari* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

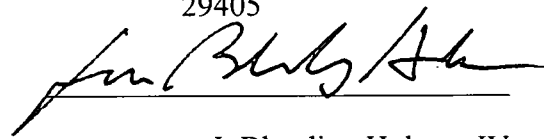
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