

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph K. Anderson, III, Chief Administrative Law Judge  
Case No. 13-ALJ-07-0056-CC

Appellate Case No. 2018-000137

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,

v.

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

**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

Respondent South Carolina State Ports Authority opposes the Petition for Writ of Certiorari to the Court of Appeals (“Petition”) filed by Petitioners. As more fully explained below, the Ports Authority would respectfully submit the following as reasons to deny the Petition:

- I. This Court has already declined a request for certification of this appeal under Rule 204(b), SCACR, prior to the Court of Appeals’ consideration of the appeal, on the presumed basis that the appeal did not satisfy the Court’s certification standard of presenting an issue of significant public interest or principle of major importance, which decision the Ports Authority contends should inform the Court’s consideration of the Petition under Rule 242, SCACR.
- II. Petitioners have appealed only the respective adverse “injury-in-fact” holdings of the Court of Appeals and Administrative Law Court, leaving the adverse “causation” and

“redressability” holdings unappealed and unaddressed in the Petition. Consequently, the two-issue rule precludes the Court’s consideration of the challenged standing holding because, even if the Court agreed with Petitioners that they have presented a cognizable “injury-in-fact,” which the Ports Authority disputes, the adverse holdings on the remaining two prongs of Constitutional standing were not challenged and are the law of the case.

- III. Courts of this state are not precluded from determining the standing of associations who file substantive challenges to state environmental permits, issued under state law, based on a federal court’s determination that certain (but not all) of those associations had standing to assert deficiencies of process in the issuance of a concurrent federal authorization, which was issued pursuant to procedural, non-substantive federal statutes.
- IV. The Court of Appeals applied the correct standard to its determination of whether the Petitioners lacked standing to challenge the DHEC Permit.
- V. The Court of Appeals correctly determined that the Administrative Law Court did not abuse its discretion in imposing sanctions against Petitioners for advancing a frivolous motion unsupported by the pertinent statute.
- VI. The Court of Appeals correctly determined that Petitioners are not entitled to relief from the denial of the motion to re-open discovery.

## STATEMENT OF THE CASE

### A. Introduction

Petitioners have gone to extraordinary lengths in three separate legal challenges and in the press to turn the challenged Permit and construction of a new cruise terminal into a judicial referendum on the cruise industry in Charleston.<sup>1</sup> But it’s not. Despite Petitioners’ efforts to make it so, this case is not about the cruise industry generally and whether cruise ships can continue to

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<sup>1</sup> This case is one of three filed by many of these same Appellants against the cruise industry in Charleston. This Court has already heard one of these cases, accepting in its original jurisdiction an action alleging nuisance and zoning claims that attacked the cruise terminal and its perceived effects on the Charleston peninsula based on the very same allegations of injury. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014). The other case was a challenge to the federal authorization for the Project filed in United States District Court, C/A No. 2:12-cv-02942-RMG (“NEPA Challenge”), which is currently under consideration for issuing an individual permit by the United States Army Corps of Engineers.

call on Union Pier Terminal (UPT) in downtown Charleston. Contrary to the picture that Petitioners attempt to present, cruise ships have called on UPT continuously since 1973 and passenger ships have called on UPT and the Charleston peninsula for over 100 years.

In sum, cruise ships call on UPT today, and cruise ships will continue to call on UPT in the future, regardless of whether the Ports Authority renovates an existing warehouse within the UPT boundary into a new cruise terminal. But it also should be noted that these cruise ships do not call unchecked on UPT. The Ports Authority has long-sought to be a good partner with the City of Charleston and steward of the City's ambiance that was built on the back of the maritime industry. To that end, the Ports Authority worked with the City of Charleston to self-impose and establish a cruise management plan that voluntarily limits the number of cruise vessel calls to 104 per calendar year, as well as the size and profile of the cruise ships that call on Charleston to a maximum 3,500 passenger design capacity, consistent with the passenger capacity of ships that have previously called on UPT. (R.p.000153)

Thus, this case is not about the authorization of cruise ships to call on UPT, which is settled, but about the implementation of a capital improvement project within the existing boundaries of a Ports Authority marine terminal. In light of the broad criticism advanced in the Petition against the cruise industry in Charleston, it is critical that the very narrow legal question before the Court be put in the proper context because, stripped of the calculated exaggerations, the truth about the capital infrastructure project which precipitated the challenged Permit is straightforward and uncontroversial.

#### **B. Factual Background**

Current cruise operations in Charleston occur on UPT, which is a 63-acre property on the Charleston peninsula located along the Cooper River and which is owned and operated by the Ports

Authority as a fully operational marine terminal. **(R.pp.001544-46; 001631)** As currently configured, the northern end of UPT can and has accommodated upwards of 200 cargo ships annually, in addition to the trains and trucks necessary to service those cargo ships, while the southern end of UPT consists of a designated cruise passenger terminal. **(R.pp.001107-1110; 001492-98)** The remainder of UPT consists of a number of warehouses used by the Ports Authority for its operations, as well as paved, surface parking. *Id.* Since its dedication, UPT has accommodated roll-on/roll-off cargo facilities used for automobiles, trucks, and heavy equipment, in addition to passenger cruise operations. *Id.*

As a part of this capital improvement project, the Ports Authority has proposed improvements to portions of UPT, which would involve renovating existing buildings and warehouses within the terminal footprint, relocating certain port operations to other Ports Authority-owned terminals, and shifting passenger cruise operations less than 600 yards—but still within the existing terminal footprint—from their current location at the southern end of UPT to the northern end (“Project”). **(R.pp.001182; 001184; 001544-46; 001631)** The improvements would include upgrading cruise facilities in order to modernize and streamline the facilities and maintain compliance with terminal security requirements of the United States Customs and Border Protection and the Americans with Disabilities Act, 42 U.S.C.A: §§ 12101 *et seq.*

For perspective on the basis for this permit challenge and protracted litigation, the only action proposed by the Ports Authority which implicates DHEC’s permitting jurisdiction for the Project is the installation of *five* additional pile clusters, *see* **(R.pp.003216, 003232)**, amongst the existing approximately 1,008 existing pile clusters that are currently a part of the support structure under Building #322, which the Ports Authority proposes to renovate, *id.* The additional five pile clusters are the only activity being permitted by DHEC, as the remainder of the work occurs above-

ground to Building #322<sup>2</sup> within the existing footprint of an already developed and fully-functioning marine terminal.<sup>3</sup> In fact, the purpose of the additional five pile clusters is to support the construction of three elevators and two escalators in the renovated Building #322 in order to make the terminal more easily accessible to handicap patrons. Petitioners' assertion that the Ports Authority is using the Project and the challenged Permit as a means to greatly expand the scope of cruise operations in Charleston, including the size ships that UPT can accommodate, *see* Pet. at 4, *is simply not correct*. In truth, the Ports Authority *today* can accommodate the larger ships that Petitioners identify, and nothing in the Permit or this litigation impacts the Ports Authority's ability to do so now or in the future.

In anticipation of the permitted upgrades, the Ports Authority has already ceased existing rail operations to UPT through relocating cargo operations to other facilities, as well as implemented a successful overall traffic management plan that will result in a net neutral impact, if not a reduction, in traffic from the renovated cruise. As a result of relocating cargo activities away from UPT, emissions at and around the terminal have and will continue to decrease, including for the areas represented by Petitioners. **(R.pp.001230; 001706-1715; 001717-24; 001726-27)** Finally, once cruise operations have been moved to the northern end of UPT, the Ports Authority has proposed selling the southern end of UPT, consisting of approximately 35 of the 63 total acres, for redevelopment and devotion to public green space at and around the historic United States Customs House. **(R.pp.001107-1110; 001492-98)**

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<sup>2</sup> The UPT Project also includes other activities not subject to the DHEC Permit challenged in this appeal.

<sup>3</sup> As DHEC, and its Office of Ocean & Coastal Resource Management notes in the Technical Summary of Review for the Project, the "existing commercial pier is a [Ports Authority] pier. [Building #322] is also a permitted/grandfathered structure with permitted/grandfathered activities (including cruise ship operations), that will be modified within the existing pier footprint." **(R.pp.000175)**

### C. Procedural History

Following the issuance by DHEC of the critical area Permit approving the installation of the five pile clusters, Petitioners filed a request for final review conference of the Permit with the DHEC Board. **(R.pp.000106-18)** Pursuant to S.C. Code Ann. § 44-1-60(F), the DHEC Board declined in writing to conduct the final review conference. **(R.pp.000006-7)** Thereafter, Cruse Opponents challenged the Permit through the filing of a contested case with the ALC, **(R.pp.000119-56)**, but then immediately sought to delay the proceedings, filing a motion to remand the Permit to the DHEC Board on the basis that a final review conference by the Board is mandatory under § 44-1-60(F). **(R.pp.000157-81)** The ALC disagreed, denying the motion to remand (“Remand Order”), and later finding that Petitioners’ motion was frivolous under Rule 72 of the Rules of Procedure of the Administrative Law Court (“RPALC”) and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (“Sanctions Order”). **(R.pp.000097-105)** The Sanctions Order is one of three orders challenged in the Petition.

Thereafter, the parties participated in extensive discovery and motions;<sup>4</sup> however, under Rule 21.A, RPALC, the deadline for completing discovery expired 90 days after the notice of assignment of the contested case request, as no party sought to expand the discovery period by motion. In response to the Ports Authority’s notice that it intended to file a motion for summary judgment for lack of standing, Petitioners filed a belated motion to re-open and substantially

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<sup>4</sup> In one particular motion, Appellants sought to remand the Permit to DHEC a second time through the filing of a motion to vacate the Permit as a result of the decision reached in the companion federal case. **(R.pp.000761-801)** This motion was likewise denied by the ALC (“Vacatur Order”). **(R.pp.000056-63)** Petitioners appealed Vacatur Order to the Court of Appeals, *see* Notice of Appeal (filed April 21, 2014), but the Court declined to address the merits of the denial based on its disposition of the standing issue. **(App.p.11)** Petitioners have abandoned the issue of the Vacatur Order before this Court, however, because they did not raise the issue in the Petition. *E.g., Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (holding that a failure to challenge a ruling is an abandonment of the issue and precludes consideration on appeal).

expand discovery. The ALC found that Petitioners were unable to satisfy the good cause standard in the belated request to re-opening discovery and denied Petitioners' motion ("Discovery Order") (**R.pp.000064-68**); however, the ALC later vacated the Discovery Order and alternatively found it to be moot in light of its decision on the Ports Authority's motion for summary judgment on standing. (**R.p.000095**) Notwithstanding its vacatur, the Discovery Order is the second of the three orders challenged in the Petition.

Finally, the Ports Authority filed a motion for summary judgment alleging Petitioners lacked standing to challenge the Permit. The ALC agreed, finding Petitioners could not demonstrate any of the three elements of constitutional standing (or statutory or public importance standing) and granted the Ports Authority's motion ("Standing Order"). (**R.pp.000077-96**) As explained below, Petitioners have challenged only portions of the Standing Order, which is the third of the three orders challenged in the Petition.

On April 21, 2014, Petitioners filed a Notice of Appeal challenging Vacatur, Discovery, Sanctions, and Standing Orders. After the issues were fully briefed, the Ports Authority sought certification of the appeal to this Court on June 5, 2015, but the Court declined to exercise its discretion under Rule 204, SCACR. Oral argument before the Court of Appeals was held on February 15, 2017, and on October 18, 2017, the court issued Unpublished Opinion 2017-UP-403 ("Opinion"), affirming the Orders of the ALC. (**App.pp.1-13**) Following denial of the motion for reconsideration, (**App.pp.75-76**), Petitioners then sought review by this Court.

### **SUMMARY OF ARGUMENT**

The Petition should be denied for a number of procedural and substantive reasons. As an initial matter, there are no special or important issues in this case that justify the exercise of the

Court's discretion under Rule 242, SCACR,<sup>5</sup> particularly in light of the Court's prior decision to decline certification of the appeal for immediate review and the fact that the Opinion conforms to this Court's holdings in the *Carnival* decision, which involved many of the identical parties alleging identical injuries. Further, Petitioners have failed to appeal from the adverse holdings on the causation and redressability prongs of the test for Constitutional standing, warranting the application of the two-issue rule to the ALC's standing holding. Additionally, Petitioners have abandoned their argument for public importance standing before this Court. Finally, the determinations on the issues of discovery and the imposition of sanctions were well within matters committed to the ALC's discretion and do not independently warrant review.

### ARGUMENT

- I. **Because this Court has already declined a request for certification of this appeal once and because the Opinion correctly and faithfully applies this Court's precedent, the Petition should be denied.**

The Ports Authority respectfully asserts that the Court's prior rejection of its motion to certify the appeal should inform the Court's decision to deny the Petition. Although this Court declined to certify the appeal without explanation, the denial of certification was made after *Carnival* was decided and further demonstrates that this Court already has concluded that this case does not "involve[ ] an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. Nothing has occurred in this case to change that conclusion because the Court of Appeals correctly and faithfully applied *Carnival* to this case.

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<sup>5</sup> While not exhaustive, Rule 242, SCACR sets forth certain categories or issues and cases which might warrant the exercise of this Court's jurisdiction to review a decision of the Court of Appeals. None of the categories are present in this case (Petitioners make no argument to the contrary), and the Court of Appeals directly (and correctly) applied the precedent of this Court in its decision.

To be sure, Petitioners assert that the Court of Appeals “fundamentally misconstrued” and “erroneous[ly] read[s] *Carnival*,” Pet. at 8, 9. However, this Court flatly rejected the assertion that Petitioners’ alleged injuries were sufficient to satisfy the initial prong of the standing argument—albeit for different causes of action—holding that “the public nuisance cause of action does not obviate the requirement of a particularized injury” and that “[r]ather, for a private party to bring a public nuisance cause of action, the private party must have suffered a particularized injury.” *Carnival*, 407 S.C. at 78, 753 S.E.2d at 852.<sup>6</sup> In short, the injuries alleged by Petitioners in this case are the exact same injuries, alleged by many of the exact same parties, and for the exact same activities, that the *Carnival* Court expressly rejected as establishing standing. Consequently, in affirming the ALC’s determination that Petitioners lacked standing, the Opinion properly applied this Court’s holdings to this case.

**II. The two-issue rule precludes the Court’s consideration of the standing issue given that Petitioners have failed to seek this Court’s review of the adverse “causation” and “redressability” holdings of ALC, rendering those issues the law of the case.**

In order to satisfy Constitutional standing, a plaintiff must show all three elements of the test throughout the litigation: “[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must

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<sup>6</sup> Further, Petitioners draw the wrong conclusions from comparing the *Carnival* court’s evaluation of standing at the motion to dismiss stage with the ALC’s evaluation of the issue at the summary judgment stage. Contrary to Petitioners’ suggestion that this procedural distinction inures to their benefit, the burden of a party to prove standing in a case becomes progressively *more* demanding as the litigation progresses. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 464 (1992). It therefore stands to reason that this Court’s dismissal of Petitioners’ claims at the motion to dismiss stage in *Carnival*—when Petitioners’ burden was at its lowest—means that those same allegations of injury would likewise be deficient at the summary judgment stage when Petitioners’ burden is greater. Consequently, the *Carnival* decision properly informed the ALC’s rejection of standing at the summary judgment stage.

be likely that a favorable decision will redress the injury.” *Carnival*, 407 S.C. at 75, 753 S.E.2d at 850 (citing *Sea Pines Ass’n for the Prot. of Wildlife v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001) (“The party seeking to establish standing carries the burden of demonstrating each of the three elements.”)). Even if a party shows a concrete and particularized injury, that is not enough. Instead, the party must also show that those injuries are traceable to the challenged conduct of the defendant, as well as put forward a good faith basis for the proposition that a favorable decision of the court would redress the injuries.

Before this Court, Petitioners do neither, because they did not appeal the ALC’s analysis and express holdings regarding the traceability and redressability of their alleged injuries *at all*. See ALC Order at 11-13 (**R.pp.000087-89**) Consequently, even if this Court were to agree with Petitioners that they have presented a cognizable injury-in-fact, Petitioners’ failure to appeal from the ALC’s additional holdings on causation and redressability precludes this Court from reaching the issue of standing. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.”); see also Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”). Significantly, the two-issue rule “is applicable under [c]ircumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds required affirmance.” *Anderson v. S.C. Dep’t of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

Here, the ALC's finding that Petitioners lacked standing was based alternatively upon the independent grounds and holdings listed in the Order, namely that Petitioners failed to demonstrate any of the three elements of standing.<sup>7</sup> Petitioners' failure to appeal the remaining standing prongs from the ALC's Order means that those grounds independently support the Order and this Court is precluded from addressing Petitioners' standing arguments. Certiorari on the issue of standing should be denied.

**III. The Court of Appeals applied the correct standard to its determination of whether the Petitioners lacked standing to challenge the DHEC Permit.**

a. Constitutional Standing

On the merits, both the Court of Appeals and the ALC correctly determined that the Petitioner-associations failed to satisfy the injury-in-fact requirement of Constitutional and, by extension, associational standing. Moreover, the ALC and the Court of Appeals correctly applied this Court's precedent from *Carnival* in reaching the exact same result on allegations of the exact same injuries, alleged by many of the exact same parties, and for the exact same activities.<sup>8</sup> Op. at 9 (holding that injuries alleged by Petitioners, "even if actually suffered by individual

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<sup>7</sup> Although not challenged in the Petition, the ALC correctly ruled against Petitioners on the elements of causation and redressability, and the Ports Authority relies on its prior filings before the Court of Appeals and ALC on those issues.

<sup>8</sup> Rather than address the issue of standing and associational standing separately, the Court of Appeals collapsed its analysis and analyzed straightaway the first prong of the test for associational standing, which is essentially the same as a traditional Constitutional standing analysis, *i.e.*, that one or more of the association's members is able to demonstrate an injury-in-fact, causation, and redressability in their own rights. *See Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) ("An organization has standing to bring suit on behalf of its members when [1] its 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.") (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

complainants, are ‘only generalized grievances suffered by the public as a whole which are insufficient to establish standing.’”) (quoting *Carnival*, 407 S.C. at 76, 753 S.E.2d at 851).

Because the Court of Appeals correctly applied this Court’s precedent, Petitioners are left to disparage, *see* Pet. at 7 (calling the Opinion “unreasoned”), and mischaracterize the Opinion’s holdings. Contrary to Petitioners’ incorrect assertion that the Opinion stands for the proposition that “individuals lack standing where their injury ... is experienced by more than one person,” Pet. at 4, the Opinion correctly holds that Petitioners failed to allege or identify any particularized injury and, instead, alleged or identified only speculative claims shared by the public at large and incident to living in Charleston’s urban environment that do not amount to actual or imminent harm. Op. at 9. And because all of the alleged injuries derive from cruise operations that already occur at UPT today, the ALC and Court of Appeals were correct to find that Petitioners never established a cognizable injury-in-fact that was actual and concrete, not conjectural or hypothetical as it relates to a proposed, but un-built, cruise terminal. *See Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590 (holding that a “[p]rospective concern falls far short of the standard of ‘concrete and particularized and ... actual or imminent’ harm set forth in *Lujan*”).

The affidavits Petitioners use to support their standing arguments are deficient. For example, the affidavit of Tommy Robertson, Pet. at 9, conveys nothing more than general grievances that allegedly exist today as a result of *current* cruise operations and that have no established connection to a future cruise terminal or cruise ships, or any activity licensed by DHEC.<sup>9</sup> *See* Op. at 3, Standing Order at 10 (**R. p. 000086**); Rule 56(e), SCRPC; *see also, e.g.*,

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<sup>9</sup> Petitioners also continue to display a misapprehension of the concept of their statutory standing argument as “affected persons” under § 44-1-60, essentially arguing a hybrid Constitutional/statutory approach to standing that would be satisfied if a plaintiff demonstrated only an injury-in-fact. *See* Pet. at 10 (“[Tommie Robertson’s] testimony more than sufficiently sets forth particularized harm for ‘affected persons’ status under S.C. Code § 44-1-60.”). However,

*Bailey v. S.C. Dep't of Health & Env'tl. Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) (holding no causation because “potential of having boats mooring at the dock would still exist” regardless of the permitting decision).

Nor do any of Petitioners' other affidavits establish standing. Christina Dodd, *see* Pet. at 10-11, complains that she is concerned about breathing pollution from cruise ships, but she is not qualified to opine as to any connection between her concerns about alleged present medical diagnoses and assumed injuries related to future cruise operations at UPT. *See* Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the license), (R. pp. 000399); *see also* Standing Order at 8 n.9 & 9 n.12. Marty Morganello's complaints, *see* Pet. at 10, about cruise ship practices regarding waste are inadmissible personal opinion and unfounded speculation because there is nothing to show he is qualified to testify on these issues. Standing Order at 10-11 & n.15, (R. pp.000086-87). Virginia Lane's affidavit, *see* Pet. at 11, consists only of speculative harm along with unfounded opinion testimony regarding traffic issues and property valuation. Standing Order at 8 n.9, 9 & n.11, (R. pp. 000084-85). Finally, Stephen Gates' affidavit, *see* Pet. at 11, also consists of inadmissible personal opinion, legal conclusions, unsupported speculations, and hearsay repetition of purported medical opinions on which he is not qualified to testify. Standing Order at 7-8, 10 & n.13, (R. pp. 000083-84; 000086) The ALC and the Court of Appeals correctly determined that these affidavits do not show an injury-in-fact<sup>10</sup> because *Carnival* held that identical generalized allegations do not establish standing.

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they have no support for this argument and the Supreme Court has concluded otherwise with respect to another statute governing DHEC. *Smiley v. S.C. Dep't of Health & Env'tl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007) (concluding that a person “adversely affected” by a permitting decision pursuant to former S.C. Code Ann. § 48-39-150 must satisfy the requirements of “constitutional standing” set forth in *Lujan*).

<sup>10</sup> It also should be noted that, without a single expert affidavit, Petitioners tried to connect allegations of present-day health problems resulting from existing cruise operations to future

Similarly, Petitioners misconstrue the Opinion in suggesting that the Court of Appeals held that it is necessary to “produce ‘evidence of declining property values and business’ attributable to the permit.” Pet. at 19 (quoting Op. at 9). Rather, the Court of Appeals correctly held that Petitioners’ assertions regarding alleged impacts to their properties and businesses, unsupported by expert testimony, were nothing more than the expression of generalized concerns that were wholly unsupported by actual evidence supporting those concerns: “We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses.” Op. at 9; *see also Carnival*, 407 S.C. at 76–77, 753 S.E.2d at 851; *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

Beyond the analysis of Petitioners’ alleged injuries-in-fact, the Court of Appeals also correctly affirmed the ALC’s holding that Petitioners were unable to “satisfy the third required element of associational standing, namely that ‘neither the claim asserted nor the relief sought requires the involvement of individual members.’” Op. at 9 (quoting *Hunt*, 432 U.S. at 343). Simply put, the nature of the claims as *framed by Petitioners* require participation of their individual members. *See Warth v. Seldin*, 422 U.S. 490 (1975) (denying associational standing because individualized proof was required). Here, none of the alleged injuries identified by Petitioners have anything to do with or derive from the respective affiants’ membership in the organizations. *Id.* at 511 (“[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members’ associational ties.”). In essence, Petitioners are critical of the Opinion’s application of the associational standing standard to their

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exacerbations from the shift 600 yards to the north through the submission of generalized information concerning health issues that were wholly unconnected to the Cruise Terminal. Contrary to Petitioners’ assertions, *see* Pet. at 11, this was insufficient to meet their burden under Rule 56(e), SCRCF.

alleged injuries despite the fact that Petitioners chose to bring this action as associations, rather than individually. But the Court of Appeals and this Court are constrained to evaluating the claims Petitioners' actually advanced, not the claims they now wish they had advanced.

Finally, the Petition's arguments on associational standing continue Petitioners' misapprehension of the distinction between particularized or generalized injuries for the purposes of an injury-in-fact determination and the standard for associational standing. Associational standing looks at the question of who is the proper party to bring an action; if the allegations are specific to the individual, rather than germane to or deriving from the organization, then the individual is the proper party. Here, the alleged injuries advanced by Petitioners and relied upon for standing are specific to the respective affiants, not the associations that are parties to this challenge. Certiorari of the Opinion's Constitutional Standing analysis is therefore not warranted.

b. Statutory Standing

Similarly, although they never expressly say so, Petitioners effectively seek to change how courts evaluate a party's standing to challenge permitting decisions of DHEC. Petitioners assert that S.C. Code Ann. § 44-1-60 provides statutory standing to any "affected person." Pet. at 10-13. However, this argument runs contrary to the plain language of the statute, its implementing regulation, and numerous opinions of the ALC, Court of Appeals, and this Court. *See, e.g., Smiley*, 374 S.C. at 329, 649 S.E.2d at 32 (concluding that a person "adversely affected" by a permitting decision pursuant to former § 48-39-150 must satisfy the requirements of "constitutional standing" set forth in *Lujan*); *O'Sullivan v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0491-CC (Jan. 18, 2002) (Geathers, J.) ("The requirement that a person bringing a contested case be 'adversely affected' by the agency's decision is essentially synonymous with traditional standing requirements."); S.C. Code Ann. Regs. 30-6.A ("A [DHEC] decision involving the

issuance, denial, suspension, or revocation of a permit or certification may be appealed by *an affected person with standing* pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39.”) (emphasis added).

Contrary to Petitioners argument, the concepts of statutory and Constitutional standing in this setting are one and the same. In order to be an “affected person” under § 44-1-60, a petitioner must meet the three-part standing test adopted by this Court in *Sea Pines*. Under Petitioners’ argument, standing in the context of a permit challenge would be meaningless, as a person in Alaska, for example, would have standing to challenge a permit in South Carolina if they timely submitted a request for review by DHEC and filed a contested case. *See Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (holding that this Court will reject an interpretation of a statute which leads to an absurd result that could not have been intended by the General Assembly). Certiorari of the Opinion’s statutory standing analysis is therefore likewise unwarranted.<sup>11</sup>

**IV. State courts are not precluded by a federal court’s determination of standing from independently determining the justiciability of claims before them.**

The Court of Appeals correctly affirmed the ALC’s rejection of Petitioners’ collateral estoppel claim as to standing. Contrary to Petitioners’ argument, the Opinion correctly holds that the issue of standing as it pertains to this case was not actually litigated before the federal district court. Standing is not a separate, stand-alone issue whose determination is transferable from one case to another. Instead, standing is a prefatory justiciability consideration that depends on the

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<sup>11</sup> Because Petitioners do not seek certiorari of public importance standing, they have abandoned the issue. *See, e.g., State v. Stone*, 290 S.C. 380, 383, 290 S.E.2d 517, 518 (1986) (holding that an exception not argued in the brief is deemed abandoned on appeal). And having omitted it from the Petition, they cannot cure the omission in a reply. *See, e.g., Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992).

nature of the underlying challenge. The question before the federal court in the NEPA Challenge was standing to challenge the agency's adherence under federal law to the *procedural* requirements of NEPA and the Rivers and Harbors Act utilized in the federal authorization. *Northwest Envtl. Defense Ctr. v. Rumsfeld*, 2002 WL 1906883, (3rd Cir. April 11, 2002) ("The procedural requirements for NEPA are applicable only to federal agencies."); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) (holding that the injury in a NEPA inquiry is a procedural, not substantive, injury).

By contrast, the question before this Court is Petitioners' standing under state law to challenge the *substantive* terms of DHEC's Permit. The distinction is significant. *See, e.g., National Resources Defense Council v. Lujan*, 768 F.Supp. 870, 875-76 (D.D.C. 1991) (holding that a prior court ruling finding a party has standing to challenge an agency's procedural deficiencies under NEPA does not bar re-litigation of that party's standing to challenge the substance of the agency's action). Recognizing this distinction, both courts correctly determined that issue preclusion was not applicable under these circumstances because the federal court's inquiry only addressed Petitioners' standing to challenge the inadequacy of "the federal process," not substantive issue in the state-issued permit. Because both the Court of Appeals and the ALC correctly recognized this difference and correctly determined that the issue of standing as it pertains to this case was not "actually litigated" in the federal court, certiorari on this issue should be denied.<sup>12</sup>

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<sup>12</sup> Petitioners had the burden of establishing that the federal court actually litigated the issue of their Article III standing to seek redress for both procedural and substantive injuries, but Petitioners failed to make any showing to meet that burden.

**V. The Court of Appeals correctly determined that the ALC did not abuse its discretion in imposing sanctions against Petitioners for advancing a frivolous motion.**

For a number of reasons, certiorari of the Opinion's determination that ALC did not abuse its discretion in sanctioning Petitioners is not warranted.

- a. Petitioners' arguments regarding the merits of their motion to remand are unpreserved, as Petitioners did not appeal from the Remand Order.

Petitioners' appeal of the ALC's imposition of sanctions is based entirely on the claimed reasonableness of the arguments that they advanced in the motion to remand. Pet. at 20-22. However, Petitioners did not appeal the Remand Order that denied the motion to remand—or the ALC's construction of § 44-1-60(F)—despite the fact that the Order expressly rejected the reasonableness of Petitioners' construction of the statute. **(R.pp.000009-11)** Petitioners were required to appeal the Remand Order because the findings in that order formed the basis of the Sanctions Order that they now want to challenge. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). Because they did not, the Remand Order's findings now are the law of the case. *See Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 (“[A]n unappealed ruling, right or wrong, is the law of the case.”). Petitioners are therefore unable to challenge the ALC's construction of § 44-1-60(F), which determined, *inter alia*, that subsection (F) “obviously recognizes the existence of discretion,” and the DHEC “Board could not decline to do a mandatory act,” **(R.p.000011)**, thus requiring affirmance of the ALC's imposition of sanctions.

- b. The motion to remand was unreasonable and warranted the imposition of sanctions.

Even if the Court were inclined to allow Petitioners to make arguments contrary to the ALC's holdings from the unappealed Remand Order, Petitioners' argument that § 44-1-60(F) requires a mandatory final review conference is patently unreasonable given the plain language of

the statute and Petitioners' deliberate omission of contrary portions of the statute in their motion to the ALC. The statute provides as follows:

No later than sixty calendar days after the date of 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. **If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court.** The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference.

§ 44-1-60(F) (Emphasis added). Not only does the statute contemplate the DHEC Board's discretion to decline review of a staff decision, it specifically provides for it. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (“[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.”).<sup>13</sup>

Further, although Petitioners now assert that “the meaning of the language at issue here has never been litigated before this case,” Pet. at 21, that statement is demonstrably false. Both the ALC and the appellate courts of this state have expressly recognized the Board's discretion to decline to conduct a final review conference. *See, e.g.,* Resp. to Motion to Remand (**R.pp.000191-92**) (collecting ALC orders and opinions of Court of Appeals and Supreme Court). Likewise, Petitioners' assertion that they “have never disregarded the additional language [of § 44-1-60(F)],” Pet. at 21, is also false, as a cursory review of the motion to remand reveals that Petitioners quoted only the first sentence of subsection (F), and did not cite, *at all*, the language referencing the DHEC

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<sup>13</sup> S.C. Code Ann. § 44-1-60(G)(1) also expressly recognizes the DHEC Board's discretion to decline to conduct a final review conference, providing the notice procedures that are required when “the board decline[s] to hold a final review conference.”

Board's discretion to decline to conduct a final review conference. *See* Motion to Remand (R.pp.000157-58)<sup>14</sup>

Accordingly, the ALC was correct to find that Petitioner's motion to remand was unreasonable. In support of its determination, the ALC made three factual findings supported by reference to the statute, case law, and other pertinent materials: "Given [1] the clear statutory language, [2] the case law directly recognizing the discretionary nature of DHEC Board review and [3] prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand." Sanctions Order at 6 (R. p. 000074) None of these findings is challenged by Petitioners on appeal. Accordingly, the only question presented is whether the ALC abused its discretion in awarding sanctions based on the unchallenged facts. *See Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Similarly, Petitioners did not appeal from either the ALC's determination that a monetary sanction was the appropriate remedy for their frivolous filing, or the amount—\$9,300.00—of attorneys' fees awarded. Accordingly, those rulings are the law of the case and beyond the scope of review. *See Atl. Coast Builders, supra*.<sup>15</sup> Certiorari of the Opinion's affirmance of the imposition of sanctions should be denied.

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<sup>14</sup> Given the assertion of "a strong record of success in important cases" by "one of [Petitioners'] attorneys ... before this Court," Pet. at 21, it is also worth mentioning that the Coastal Conservation League (a Petitioner in this case and represented by identical counsel) has previously affirmatively represented to this Court in a different case that a final review conference was discretionary. (R.p.000218) (arguing that "***Board has the option of conducting a conference or not after a request for review is made.*** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision' ... § 44-1-60(F).") (emphasis added).

<sup>15</sup> Regardless, the ALC's award of the attorneys' fees was reasonable, as it is directly related to the sanctioned conduct. *See Balloon Plantation v. Head Balloons*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (holding that a sanction should be aimed at the specific misconduct of the party sanctioned).

**VI. The Court of Appeals correctly determined that Petitioners are not entitled to relief from the denial of the motion to re-open discovery.**

As an initial matter, Petitioners' challenge to the ALC's denial of their motion to re-open and expand discovery is not reviewable because the ALC expressly vacated the order. Standing Order at 19 n.23 (**R. p. 000095**) ("Therefore, the Order denying Petitioners' Motion to Expand Discovery is vacated."). Consequently, there is no order from which Petitioners can appeal. *See Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice "was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father"). The attempted appeal from the Discovery Order should therefore be dismissed. *Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding that the Court of Appeals should have dismissed an appeal from a void order). Petitioners wholly ignore the ALC's vacatur of the Discovery Order and additional finding that the discovery issue was moot. Standing Order at 19 n.23 (**R. p. 000095**) ("[I]n light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied."). Thus, Petitioners have abandoned the discovery issue by limiting their argument to the Discovery Order alone and failing to address the subsequent actions by the ALC. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).<sup>16</sup>

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<sup>16</sup> Moreover, in light of Petitioners' affirmative representation that they needed discovery only for trial, *see* Standing Order at 19 n.23. (**R. p. 000095**) ("In response to the Court's e-mail inquiry on March 24, 2014, counsel for Petitioners represented to the Court that Petitioners sought expanded discovery in order to prepare for the hearing on the merits and not for purposes of responding to the Motion for Summary Judgment."), any attempt to challenge discovery issues in relation to the summary judgment motion is waived. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (holding that appeal of motion to compel discovery was not preserved where party did not request a continuance or ask the court to hold in abeyance any ruling on the motion for summary judgment).

On the merits of the challenged Discovery Order, under Rule 21.A, RPALC, parties have 90 days to complete discovery in a contested case proceeding, or timely seek leave of the Court for an extension by presenting a good faith basis for enlarging the discovery period. In this case, the 90-day discovery period expired on May 20, 2013. Discovery Order at 2 **(R.p.000065)** Petitioners served interrogatories and requests for production during this 90-day period, *but never asked the ALC to expand discovery before the period expired. Id.* In fact, Petitioners did not file their motion to re-open or expand discovery until December 23, 2013, more than seven months *after* the 90-day period expired. **(R.pp.001041-1045)**<sup>17</sup> In the Petition, Petitioners advance only mistaken beliefs as to how the other parties and the ALC were conducting themselves in accordance with the Rules as an excuse for their failure to do likewise. Pet. at 22.

In sum, Petitioner's argument boils down to the proposition that the motion to expand should have been granted because the ALC's discovery rules are "observed mainly in the breach," Br. of Appellants at 53-54, and that it is "standard practice" in the ALC to ignore the discovery deadline, Pet. at 22.<sup>18</sup> However, Petitioners' beliefs that the ALC's adherence to the Rules was somehow arbitrary does not satisfy their burden of demonstrating good cause for filing a motion to re-open and expand discovery seven months late. Petitioners instead contend that the good cause

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<sup>17</sup> Petitioners also largely miss the point that the ALC's denial of their motion resulted in large part from their failure to timely comply with the rules of procedure. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired); *see Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) (holding that litigant must show excusable neglect rather than good cause for untimely motion to extend discovery deadlines).

<sup>18</sup> Petitioners cite to the "uncontroverted testimony" of its affiant of Leslie Riley, which does not address Cruise Opponents' failure to make a timely motion. **(R. pp. 0002950-52)** Ms. Riley's affidavit should not be considered in any event because Petitioners first submitted it with their motion to reconsider the Discovery Order even though it clearly pertains to the issues raised in their original motion. *See* Rule 6(d), SCRCF. But even if it were timely, Ms. Riley's practice of also ignoring the ALC Rules hardly acts as good cause for sanctioning Petitioners to do likewise.

standard is satisfied because they have suffered “particularized harm from [sic] inability to conduct depositions,” as a result of the ALC’s decision. This argument is misleading on several counts, however. First, Petitioners did not serve deposition notices until after the Ports Authority had filed its motion for summary judgment and did so while their motion to re-open discovery was pending before the ALC. (R. pp. 02274, 2972) And second, as discussed above, Petitioners represented to the ALC that they only sought expanded discovery in order to prepare for the hearing on the merits, not for purposes of responding to the Ports Authority’s motion for summary judgment on standing grounds; therefore, Petitioners waived any argument that they were adversely affected by the denial of the motion to re-open/expand discovery. In the end, Petitioners do not provide any adequate explanation for their failure to comply with the ALC’s procedural rules, and certiorari of the Opinion’s affirmance of the ALC on this point is not warranted.

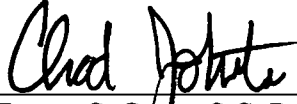
#### **CONCLUSION**

For these reasons, the Petition for Writ of Certiorari should be denied.

[SIGNATURE PAGE FOLLOWS]

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February 28, 2018  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph K. Anderson, III, Chief Administrative Law Judge  
Case No. 13-ALJ-07-0056-CC

S.C. SUPREME COURT

Appellate Case No. 2018-000137

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,

v.

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

**PROOF OF SERVICE**

This is to certify that I, Laura Lee Andrews, a paralegal with the law firm Willoughby & Hoefler, P.A., have caused to be served on February 28, 2018, one (1) copy each of Respondent South Carolina State Ports Authority's Return to Petition for Certiorari by placing the same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed respectively as follows:

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February 28, 2018