THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

APR 10 2018

S.C. SUPREME COURT

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge
Case No. 13-ALJ-07-056-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,

vs.

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

PETITIONERS' CONSOLIDATED REPLY TO RETURNS TO PETITION FOR CERTIORARI

This Court should grant certiorari to review important and novel issues regarding citizen standing in South Carolina. The Court of Appeals' decision conflicts with the General Assembly's explicit mandate that every "affected person" be allowed to contest unlawful Department of Health and Environmental Control ("DHEC") permits ("the Permits"), S.C. Code § 44-1-60(F), and would restrict the rights of South Carolinians to protect their health, businesses, and property from industrial pollution. The decision contravenes clear legislative intent and conflicts with this Court's precedent giving injured citizens the right to challenge state-issued permits to pollute. This Court should grant review and reverse.

The Returns filed by DHEC and the South Carolina State Ports Authority ("SPA") (collectively, "the Agencies") underscore the need for review. Rather than rehabilitate the

erroneous legal rulings below or offer principles cabining them, they instead condone the erasure of rights from neighboring property owners – such as Tommie Robertson, who testified to intensified thick black diesel soot enveloping her home and injuring her person – to challenge unlawful state action as an "affected person[s]" under S.C. Code § 44-1-60. The Agencies reason that harm to multiple persons is too generalized to support individual standing, but that harm to one person is too particularized to support group standing to challenge a DHEC permit. The end result – that no individual or group could challenge an unlawful DHEC permits – departs from established case law, thwarts clear statutory intent and language, and violates basic due process.

The Agencies' attempt to cast this Court's decision in *Carnival Corporation v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), as a departure from established standing law is wrong. *Carnival* did not render state agencies unaccountable for their actions; it was a case brought against a private defendant asserting nuisance and zoning claims with specialized standing elements. The expansion of *Carnival* into the administrative law realm to thwart the General Assembly's mandate that every "affected person" be allowed to challenge DHEC permits that injure them warrants immediate review. Indeed, the need for that review is confirmed by a recent ALC decision applying *Carnival* and rejecting "affected person" standing under S.C. Code § 44-1-60 on similar grounds. *See S.C. Coastal Conservation League v. SCDHEC & DBBO, LLC,* Dkt. No. 15-ALJ-07-0405-CC (2017), *on appeal*, S.C. App. Case No. 2017-001977. Lower courts need clarification of *Carnival*'s correct scope.

The Agencies fail to defend the other standing errors below. For example, instead of justifying the Court of Appeals' novel and erroneous requirement that "affected person" standing evidence be proved by expert testimony, they adopt it, claiming that ordinary people are not "qualified" to opine about their own experiences and reasonable concerns. SPA Ret. 13; DHEC

Ret. 10. But lay witnesses can offer opinions or inferences "rationally based on [their] perception." Rule 701, SCRE. The Agencies do not attempt to show that witness concerns were irrational, and also fail, as the courts below failed, to even address SPA documents showing that a new terminal will expand cruise operations and increase pollution causing activities and traffic in a severely congested neighborhood. Pet. for Cert. 4, 12; R.002460. Further, instead of refuting the fact that SPA litigated – and lost – the same Article III standing issue litigated here in an Article III court, SPA claims that a different *sub*-issue was litigated there. That too is wrong. The *same* sub-issues were litigated in federal court, and collateral estoppel would still apply even if they had not been litigated.

On the whole, the errors committed below served to insulate two powerful state agencies from being questioned by citizens directly injured by those agencies' actions. If "affected person" in S.C. Code § 44-1-60(F) does not encompass adjacent neighbors specifically harmed by a large proposed polluting ship terminal, then no citizen would ever have standing to protect themselves or their families from illegal DHEC permits. The Agencies are evidently at peace with this unlawful result. No court should be. Indeed, as the Agencies say, this case is not a referendum on the cruise industry. It is instead a case about restoring the right of South Carolinians to challenge unlawful state issued pollution permits that injure them. That right, granted by statute and guaranteed by Article 22 of the South Carolina Constitution, was unlawfully usurped by the Court of Appeals. Review is warranted to restore it.

I. The Court of Appeals' Egregious Standing Decision Warrants Review

Whether neighboring citizens in South Carolina can challenge a government decision permitting pollution that injures their health, homes, families, property, and quality of life is an issue of both significant legal importance and substantial public interest that merits certiorari.

A. The Erroneous Expansion of *Carnival* to Limit "Affected Person" Standing Where Injury is Suffered By More than One Person Justifies Review

The Agencies embrace the Court of Appeals' erroneous expansion of *Carnival* to all but eliminate the right of South Carolinians to challenge unlawful DHEC permits as "affected persons" under S.C. Code Ann. § 44-1-60(F). But *Carnival* did not arise as an administrative appeal, and this Court's review is needed to return *Carnival* to its proper context and avoid disrupting decades of settled law.

This Court took great care in *Carnival* to focus on the lack of allegations of individualized harm to support standing for nuisance and zoning claims against a private cruise line. Reviewing the complaint on a motion to dismiss, the Court found that while impacts to "citizens," "neighborhoods," "the environment," and "human health" were asserted, lacking were allegations that the plaintiffs "suffer these harms in any personal, individual way." 47 S.C. at 77. The absence of particularized harm proved fatal for the complaint's nuisance claim (which required a "special injury" to the plaintiff's "real or personal property" that is "distinct and different from the injuries suffered by the public generally"), and for the zoning claims (which required a "specially damaged" property owner with injury "distinct from that suffered by the public generally"), and required dismissal. *Id.* at 79.

The case here, however, did not arise from the Circuit Court world of nuisance and zoning claims, but pursuant to the General Assembly's directive that all "affected person[s]" may pursue *administrative review* of DHEC permits in the ALC, which then issues the final agency decision. S.C. Code Ann. § 44-1-60(F); *cf. Carnival*, 407 S.C. at 81 (noting that "legality of government action" was not at issue for standing). The injuries cognizable in this context are broader than in nuisance or zoning cases, and include injuries to health, aesthetic, and

recreational interests cognizable for Article III standing. *See e.g. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* (*Laidlaw*), 528 U.S. 167, 180–88 (2000).

Carnival does not overrule cases so holding, and it cannot be read – as the Agencies suggest – as limiting access to a legislatively-established remedy (ALC review) where statutory standing is present. *ATC South Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("***Standing may be acquired***: (1) ***by statute***; (2) through the rubric of 'constitutional standing;' ***or*** (3) under the 'public importance' exception") (emphases added).[1]

Reading *Carnival* to automatically convert injuries experienced by more than one person into "generalized grievances" that do not support standing was clear error. No individual harms were alleged in *Carnival*, while here Petitioners submitted multiple sworn affidavits detailing specific harms to individuals' health, homes, property, business, and aesthetic and recreational interests. Pet. for Cert. 9-11; *see* R.002576–78 (Dodd); R.002581–85 (Lane), R.002587–91 (Robertson), R.002593–97 (Gates); R.002599–2606 (Zimmerman); R.002643–52 (Thompson); R.002751–52 (Morganello). *Carnival* provides no basis to convert these particularized injuries into non-cognizable "grievances," *see* 407 S.C. at 81 (noting that claims "could be brought by other parties who can show the required injury"), and the erroneous reading of that case to apply in a different legal realm with entirely different factual predicates[2] was clear error and disrupts

[1] The presence of statutorily-established remedy demonstrates "evident intent" by the legislature to make agency actions reviewable. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchack,* 567 U.S. 209, 225, 132 S.Ct. 2199, 2211 (2012); *see Mendoza v. Perez*, 754 F.3d 1002, 1110 (D.C. Cir. 2014) (where statute gives cause of action to "adversely affected" persons, causation and redressability are relaxed). This Court has never held that "affected person[s]" under S.C. Code § 44-1-60 must have Article III standing, as SPA suggests (citing cases under *other* statutes). The issue would be one of first impression – further warranting review.

[2] That *Carnival* was decided on a motion to dismiss, not on summary judgment, further distinguishes it. SPA's claims about litigation stage burdens, SPA Ret. 9 n.6, are overwhelmed by multiple uncontested affidavits and documents from SPA's own files showing particularized injury from the polluting activities that DHEC's permits would increase. *See* Pet. for Cert. 12.

settled South Carolina caselaw. *See e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (upholding standing based on injury to more than one members' recreational and aesthetic interests). This Court should exercise review to prevent the expansion of *Carnival* beyond its proper place and restore the right of citizens to challenge unlawfully issued state permits that injure them. S.C. Code § 44-1-60(F); S.C. Const. Art. 22.[3]

B. The Erroneous Expansion of *Carnival* to Block Associational Standing Where Individual Particularized Injury Is Shown Warrants Review

In addition to reading *Carnival* to preclude standing where more than one person shares an injury, the courts below read *Carnival* to preclude associational standing where an individual shows particularized injury. The end result is to render associational standing a logical impossibility based on an errant construction of *Carnival.* This erroneous holding deserves review.

In *Carnival*, this Court affirmed that an association can assert standing where "[1] an association's 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." 407 S.C. at 76, 783 S.E.2d at 851. But here, the Court of Appeals held that evidence of harms supporting the *first* element – individual standing – went instead to the *third* element, and showed standing was lacking. Op. 9. The Community Groups showed – repeatedly – that this was error and that their

---

These materials created *at least* an issue of fact as to standing, yet the ALC ordered summary judgment *against* standing. That was clear error. R. 56, SCRCP.

[3] SPA contends that the statutory language allowing "affected persons" to contest DHEC permits should be ignored because following the statute would allow persons in Alaska to file administrative challenges here. SPA Ret. 15. But a person living in Alaska would not be impacted by a permit authorizing polluting activities in South Carolina, so they would not qualify as an "affected person." If a citizen of Alaskan *were* impacted – e.g., if she owned property here – her rights *would* be protected, as required by the U.S. Constitution.

individual members' participation was unnecessary to litigate the legality of *DHEC's* permit or to fashion relief. R.002356-61; R.000237; Pet. for Reh'g 8-11. The Court of Appeals and now the Agencies simply ignore this showing, effectively merging the associational standing elements in a way that severely restricts the ability of associations across South Carolina to protect their members' rights.

The Agencies would further confuse things by requiring that injuries to members must "derive from the respective affiants' membership in the organizations." SPA Ret. 14; DHEC Ret. 11. That is incorrect. Associational standing allows groups to represent their members' interests *regardless* of their derivation, which is why the National Rifle Association can bring lawsuits to protect members' rights deriving from the U.S. Constitution. *See, e.g,. Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 191-92 (5th Cir. 2012) (upholding associational standing to challenge gun law on constitutional grounds). Conservation groups likewise have standing to represent the recreational and aesthetic interests of members even if such interests do not arise from membership in the association. *See, e.g., S.C. Wildlife Fed'n*, 296 S.C. at 190, 371 S.E.2d at 523 (allegations of injury to "members' use and enjoyment of the fish and wildlife of the wetlands" sufficient for standing to challenge Coastal Council decision); *Laidlaw*, 528 U.S. at 180-88, 120 S.Ct. at 704-08 (finding associational standing based on injuries to members' individual recreational interests).

As the U.S. Supreme Court has recognized, "the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290, 106 S.Ct. 2523, 2533, (1986); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 459, 78 S.Ct. 1163, 1170 (1958).

The Agencies, who do not dispute the germaneness of the asserted interests *to* the Community Groups, are simply wrong to claim that such interests need derive *from* them.

The Court of Appeals' egregious misinterpretation and merger of *Carnival's* associational standing elements, which precludes standing where particularized injury is shown, merits certiorari and reversal.

C. Review is Needed to Correct the Errant Notion that Standing Cannot Exist When Present Injury is Exacerbated and Others Experience Similar Injuries

The Court of Appeals' decision holds that if injury is widely shared, it cannot support standing. Op. 9. That position is untenable, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24, 118 S. Ct. 1777, 1785 (1998) ("injury in fact" found "where a harm is concrete, though widely shared"), and the Agencies do nothing to defend it. The Court should exercise review to correct this obvious legal error, which has widespread ramifications.

The Agencies also do not defend the Court of Appeals' holding that exacerbation of an existing injury cannot support standing, presumably because it too is obviously wrong. *E.g., California Ass'n of Physically Handicapped, Inc. v. F.C.C.*, 778 F.2d 823, 832 (D.C. Cir. 1985) ("[I]njury which predates an agency action can give rise to standing if the agency perpetuates or exacerbates the injury."). Instead, they contend that no injury is possible from issuance of the Permits because "cruise ships will continue to call on UPT in the future" regardless of whether the new terminal is constructed. SPA Ret. 3; *see also* DHEC Ret. 3. The Agencies cite *Bailey v. South Carolina Department of Health and Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) for that proposition, but in *Bailey* the party challenging a dock modification permit failed to produce *any evidence* that modification would change *anything at all* about an ongoing boat operation. *Id.* at 7–8, 693 S.E.2d at 429-30. By contrast, the Community Groups produced overwhelming evidence that, as compared to SPA's self-described "desolate,"

"unattractive," "antiquated," and "out-of-date" existing terminal, Appellants' Initial Br. 7 (and record citations), SPA's proposed terminal – three times bigger and explicitly engineered to home-base substantially larger ships – will cause new injuries and worsen existing ones. Pet for Cert. 10 (citing R.002589); *id.* at 12 (citing R.000124, R.002438-39, R.007493); R.002455; R.002457; R.002465–66. The Agencies have no answer to that evidence, which takes this case squarely away from *Bailey.* Further, as SPA admits, the project for which the DHEC permits are sought is needed to "maintain" compliance with terminal security requirements. SPA Ret. 4. Because SPA cannot indefinitely continue cruise operations at its existing terminal without a permit, R.002367; R.002469; R.002479, DHEC's unlawful authorizations cause injury by enabling harmful operations to continue when they otherwise could not – distinguishing *Bailey.*[4]

Review is needed to reaffirm that exacerbation of existing injuries – even where such injuries are shared with others – are sufficient for standing to contest a DHEC pollution permit.

D. Allowing Relitigation of Article III Standing Was Error

The courts below wrongly allowed relitigation of Article III Constitutional standing even though a federal Article III court had already concluded by written published order resolving motions for summary judgment that the Community Groups had Article III standing. The Court of Appeals reasoned that Community Groups failed to show that the *issue* of Article III standing was actually litigated because SPA raised different *arguments* in federal court. Op. 11, 11 n.12. This was clear error, since the Community Groups demonstrated that SPA actually litigated (and lost) not only the overall Article III standing issue in federal court (which is all that estoppel requires), but also the same sub-issues. *See* Pet. for Cert. 16–18.

[4] SPA's claim that cruise operations are not "unchecked" is undercut by its own admission that the only thing limiting expansion of cruise operations is SPA's "voluntary" agreement to give the City of Charleston advance notice of expanded operations. SPA Ret. 3.

SPA claims that the Court of Appeals based its decision on "procedural injury" being present in federal court, SPA Ret. 17, but that is wrong. In fact, the Court of Appeals *expressly rejected this reasoning from the ALC's order*, Op. 11 n.11, and with good reason: The federal court found standing based on the "detrimental effects of the proposed new cruise ship terminal-including increased traffic congestion and airborne pollution from cruise ships" on neighboring resident members – the same substantive standing grounds pressed here. *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-2942-RMG, 2013 WL 6488282, at *15 (Sept. 18, 2013). Allowing relitigation of Community Groups' Article III standing after the same issue was actually litigated and decided by an Article III court was plain error and should be reversed.

E. SPA's Procedural Arguments On Standing Are Meritless

SPA's citation to the two-issue rule is a meritless distraction. That rule arises in jury trials where the jury returns a general verdict resolving multiple causes of action and the verdict is supported by more than one of them; unless *all* the causes of action are appealed, the verdict stands. *See, e.g., Anderson v. S. Carolina Dept. of Highways and Public Transp.*, 322 S.C. 417, 419 (1996). Applied in other circumstances, however, the two-issue rule supports affirmance only where a dispositive *issue* has not been appealed – for example where a plaintiff fails to appeal all issues that independently afford a complete defense (e.g., statute of limitations and contributory negligence). *Id.*

The Agencies contend the two-issue rule requires affirmance because the ALC's rulings on the Article III standing elements of causation and redressability were not appealed to this Court. However, this argument is meritless because the dispositive issue – the supposed lack of Article III standing – *was* properly appealed, both to the Court of Appeals and this Court.

Appellants' Initial Br. 1 (presenting as error ALC's finding that the Community Groups "lacked Article III Constitutional Standing"); Pet. for Reh'g 2; Pet. for Cert. 1 (presenting as error Court of Appeals finding of no standing based on a "a new test for constitutional standing in South Carolina"). Moreover, even if the Community Groups were required to argue every sub-issue (which they are not), the Article III standing elements of causation and redressability were in fact addressed in their appeal. Appellants' Initial Br. 30 ("injury-in-fact fairly traceable to DHEC's decisions that could be redressed by administrative review."); *id.* at 33 (asserting Petitioners would be "injured by" terminal pollution and judicial review could "reduce or avoid," i.e., redress, that injury); Appellants Reply on Pet. for Reh'g 2 (describing "injury-in-fact directly traceable to DHEC's issuance of the challenged permit"); Pet. for Cert. 12 (citing evidence "showing that the proposed terminal is intended and engineered to handle larger, more polluting cruise ships than current facilities can accommodate," establishing causal connection between the Permits and alleged injuries, redressable by vacatur of the Permits).

The claim that the Petitioners did not address traceability or redressability "*at all*" in the Court of Appeals, SPA Ret. 10 (emphasis original), is thus demonstrably false, as is confirmed by SPA's citation to its own responsive brief filed below addressing those very elements, *id.* 11 n.7 (citing SPA's Court of Appeals arguments on "causation [traceability] and redressability").[5]

Similarly meritless is SPA's claim that the Court's prior order under Rule 204 "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. The Court made no such finding, and DHEC does not join SPA in this meritless argument. Certiorari

[5] Because the ALC's decision on standing was appealed to the Court of Appeals, there was no requirement to separately appeal to *this* Court every single ALC finding on the individual elements of Article III standing. *See* R. 242(b), SCACR (providing for Supreme Court review of "final decision[s] of the Court of Appeals").

is subject to the court's "sound judicial discretion" with factors including whether "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b)(3), SCACR. There was *no* Court of Appeals decision at the time SPA made its request, but there is now – and it has multiple erroneous holdings that conflict with and misinterpret this Court's precedent. Review is thus warranted under Rule 242(b)(3), and SPA should not be heard to the contrary after having itself *sought* this Court's direct review.

II. The Court Should Correct Important Abuses of Discretion by the ALC.

A. The ALC's Sanctions Order Was an Abuse of Discretion

The ALC's sanctions order against Petitioners' for asserting a permissible statutory interpretation was an abuse of discretion and the Court of Appeals erred in affirming it. The Agencies' contend that Petitioners are precluded from challenging the Sanctions Order because they did not also appeal the ALC's Remand Order that also rejected the Community Groups' statutory interpretation. SPA Ret. 18; DHEC Ret. 12. That attempt to avoid review fails: the sanctions order itself addresses the statutory interpretation that gave rise to it (albeit incompletely and erroneously), R.000072–74, and the issue on appeal is whether the argument was *sanctionable*. It was not. Beyond the procedural diversion, the Agencies have not refuted Petitioners' showing that litigants are entitled to put forth plausible, non-frivolous, textually-based interpretations of ambiguous statutory language, without being subject to sanctions, even if a court ultimately embraces other interpretations.[6] *See e.g.*, *Quets v. Needham*, 198 N.C. App. 241, 256, 682 S.E.2d 214, 223 (2009) ("Rule 11 sanctions are inappropriate where the issue raised by a plaintiff's complaint is one of first impression.").

[6] The Agencies' position would (absurdly) force the Community Groups, in order to obtain review of the initial sanctions order, to risk *further* sanction by appealing the Remand Order.

The Agencies declare that it is "demonstrably false" and "demonstrably incorrect" that the language at issue here has never before been litigated, SPA Ret. 19; DHEC Return 13, but provide no such demonstration – their string-cite, Ret. 19; DHEC Ret. 13–14, is to cases where the statutory language was *paraphrased or discussed in dicta with no textual analysis*. Whether the Board "must" hold conferences when requested, and what remedies are available when it "declines" were not litigated in any of them, and the Agencies have identified no decision of the ALC or any court making a specific holding on these issues.

Finally, the Agencies fail – as the courts below failed – to explain why, as a matter of statutory construction, the Community Groups' reading of the statute in question is unreasonable. The statute directs that the DHEC Board "must" hold a review conference within 60 days of a request and that if it "declines" to do so, jurisdiction lies with the ALC. SC Code Ann. § 44-1-60(F). Community Groups demonstrated, with reference to dictionary entries, that this language can be read as giving the Board a non-discretionary duty and the ALC remedial jurisdiction where the Board fails to undertake it. Appellants' Initial Br. 58-59. Neither the Agencies, nor the courts below, have ever explained how this reading is so grammatically untenable as to warrant punishment for its mere utterance. The sanctions order was an arbitrary abuse of discretion and should be reversed

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

The ALC also abused its discretion by arbitrarily and retroactively deeming discovery closed when all parties and the ALC had acknowledged and participated in discovery well past that date.

SPA claims that Petitioners "only sought expanded discovery in order to prepare for the hearing on the merits," not for responding to the motion for summary judgment on standing

grounds. Ret. 23. In fact, the Community Groups spent several pages fleshing out the argument that "SPA's Filing of Summary Judgment Motions Makes Depositions Essential." R.002278-81. As the Community Groups clearly articulated to the ALC, "It is black letter law that summary judgment should not be considered until the opposing party has a chance to complete discovery of the issues underlying the summary judgment motion." R.002279.

In light of overwhelming record evidence establishing Petitioners' standing, further discovery was not needed to *properly* resolve summary judgment in favor of Petitioners' standing. But the ALC simply disregarded the Petitioners' evidence altogether and accepted SPA's self-serving claims at face value, so completion of discovery including depositions would have been material at summary judgment, and in any event, will be relevant for trial if this Court overturns the Court of Appeals' affirmance of the ALC's grant of summary judgment on standing grounds, as it should.[7]

The Agencies do not contest that: (1) the ALC itself condoned and explicitly acknowledged discovery ongoing well after the supposed discovery deadline, R.000026; (2) SPA continued discovery and produced thousands of pages of documents even after the Community Groups filed their Motion to Expand Discovery and SPA filed its motions for summary judgment, R.1044, R.001172, R.2232; or (3) that it would have been unreasonable for the Community Groups to file deposition notices before the flood of documents from SPA had slowed. In short, the parties and the ALC thought and acted with the understanding that discovery was ongoing well past the "deadline" that was then retroactively imposed. Finally, but

[7] The ALC's attempt to insulate its abusive retroactive discovery order from review, by vacating the discovery order as *moot* based on based on the erroneous standing order currently on appeal, ALC Order 19 n.23, does not make this issue unappealable. SPA Ret. 21; DHEC Ret. 15–16. If the standing order is reversed, as it should be, discovery, even by the ALC's own lights, would no longer be moot.

importantly, the Agencies do not rebut Petitioners' showing that the procedural rule that the ALC relied upon in shutting down discovery – a rule that had been heretofore disregarded by the ALC and parties for months on end – is in fact rarely observed in such cases in the ALC. Pet. for Cert. 12; Appellants' Initial Br. 52–53 (citing Riley affidavit, R.002950–52).

The ALC's closure of discovery was arbitrary and abusive, and should be reversed.

III. Conclusion

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

Respectfully submitted,

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29401
Telephone: (843) 720-5270

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorneys for Petitioners

Charleston, SC
April 5, 2018

RECEIVED

APR 10 2018

S.C. SUPREME COURT

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-07-056-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,

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2018, I caused to be served the foregoing *Petitioner's Consolidated Reply to Returns to Petition for Certiorari* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

Randolph R. Lowell, Esq.
Tracey C. Green, Esq.
Chad N. Johnston, Esq.
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Michael Gary Corley, Esq.
South Carolina
Environmental Law Project
430 Highmarket Street
Georgetown, SC 29440

Amy E. Armstrong
Jessie A. White
South Carolina
Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Jefferson Leath, Esq.
Leath, Bouch, & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar. Esq.
S.C. DHEC
Office of OCRM
1362 McMillan Avenue
Suite 400
North Charleston, SC 29405

J. Blanding Holman IV
April 5, 2018