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

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

PETITIONERS' OPENING BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the courts below err in construing this Court's *Carnival* decision and other precedent to require summary judgment for lack of standing where Petitioners presented overwhelming evidence of particularized harm to several individuals traceable to the challenged pollution permit?
2. Did the Court of Appeals err in precluding associational standing if particularized injury is experienced by an association's member?
3. Was relitigation of Petitioners' Article III constitutional standing in state court barred where Article III standing had been litigated in federal court, and that court found Article III standing?
4. Did the ALC abuse its discretion by sanctioning a reasonable interpretation of ambiguous statutory text whose meaning had never before been litigated?
5. Did the ALC abuse its discretion by retroactively declaring that discovery had closed eight months prior where the parties had voluntarily conducted and the ALC had condoned discovery in the intervening eight months?

INTRODUCTION

In South Carolina, the ability of citizens to challenge unlawful state-authorized pollution is an important check on governmental power and bulwark for individual rights. That ability is provided by statute, is enshrined in the Constitution, and has been protected by this Court for decades. *See* S.C. Code Ann. § 44-1-60(E)-(G) (allowing all "affected persons" to contest state pollution permits); S.C. Const. art. 1, § 22 (protecting right to contest state agency actions that affect private rights); *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329–33, 649 S.E.2d 31, 32–35 (2007) (recognizing standing to challenge beach scraping permit); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (recognizing standing to challenge permit to fill wetlands).

The decisions below erroneously departed from this settled framework, adopting new legal tests that would effectively extinguish the right of citizens to challenge unlawful state-authorized pollution. Specifically, the orders misconstrued *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n* ("*Carnival*"), 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014), and other precedent to require summary judgment for lack of standing even where citizens presented overwhelming evidence of particularized harm from the challenged authorizations. Taken to their logical conclusion, the decisions below would preclude standing if *more than one person* has particularized harm, and if *at least one* member of an association has particularized harm. The number of persons with standing would be zero.

That result is contrary to plain statutory text, the State Constitution, and binding precedent. Because Petitioners more than met their burden to show "affected persons" standing to challenge the pollution permit in this case, the Court should reverse, enter summary judgment in favor of Petitioners' standing, and remand.

Alternatively, the Court could find that litigation of standing here was barred by collateral estoppel. Well before the ALC granted summary judgment on the basis of no standing, a federal court addressed the same issue and entered summary judgment in favor of standing. The courts below erred in refusing to honor that decision as precluding relitigation of the same issue here.

In addition to the erroneous standing ruling, the Court should reverse two state Administrative Law Court ("ALC") orders that were patent abuses of discretion.

First, the ALC issued sanctions against Petitioners for contending that the statutory term "must" establishes a mandatory duty for the Department of Health and Environmental Control ("DHEC") Board permit review conferences. Issuance of sanctions for a reasonable statutory interpretation was an arbitrary abuse of discretion that impinged Petitioners' right of free speech and counsels' duty of vigorous representation.

The ALC also entered an order retroactively closing discovery to remove Petitioners' ability to depose key witnesses. That also was a clear abuse of

discretion because the parties had conducted—and the ALC had condoned—discovery well beyond the date later announced as a discovery deadline.

The Court should reverse those two orders and enter summary judgment in favor of standing. The matter should be remanded to the ALC so Petitioners can contest the legality of permits issued for pollution that will directly and negatively affect their health, property, and quality of life.

STATEMENT OF THE CASE

Petitioners[1] in this case are associations of neighbors and local citizens who sought to contest unlawful pollution permits issued for a large shipping terminal to be built in a small, constricted area on Charleston's historic peninsula. The terminal would home-base very large vessels that emit diesel soot onto surrounding homes, discharge pollutants into neighboring waters, and bring nearly 2,000 vehicles—cars, taxis, trucks, buses and tractor-trailers—into a confined area already wracked by severe traffic congestion.

Faced with what they believed were unlawful permits that failed to protect their health and property, Petitioners sought administrative review before the DHEC Board and the ALC as "affected persons" given that right by statute. S.C. Code Ann. § 44-1-60(E)–(G).

[1] Petitioners are the 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.

They intended to show that the DHEC approvals were illegal because the agency did not disclose or consider the terminal's actual pollution impacts as required by law, and further failed to include necessary permit conditions to limit those impacts to residents. Among other things, Petitioners contended that DHEC failed to consider: the "extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project," S.C. Code Ann. § 48-39-150(A)(9), S.C. Code Ann. Regs. 30-11(B)(9) (R.001338); the project's effect on the "value and enjoyment of adjacent owners" and "[t]he extent to which the development could affect [] irreplaceable historic and archeological sites of South Carolina's coastal zone," S.C. Code Ann. § 48-39-150(10), (6); long-range cumulative impacts, including air quality impacts, S.C. Code Ann. Regs. 30-11(C)(1); "reasonably foreseeable similar activities of the applicant and others" impacting water quality, S.C. Code Ann. Regs. 61-101(F)(3)(c)(4); minimization of impacts to a National Historic Landmark district, Coastal Zone Management Plan ("CMP") IV-25 (R.001338); and whether "there is a feasible alternative" to the project which could "reduce[] adverse consequences on water quality," S.C. Code Ann. Regs. 61-101(F)(3)(c), (F)(5)(b).

Before the Petitioners could present their case to the ALC on the illegality of DHEC's actions, however, the permittee—the S.C. State Ports Authority ("SPA")—moved for summary judgment on Petitioners' supposed lack of standing. Earlier, the ALC had rejected an SPA motion to dismiss on the same grounds, finding that that the Petitioners had sufficiently alleged "affected person" standing as a matter

of law. R.000081–89. Subsequently, however, despite multiple affidavits detailing particularized harm to individuals and documents from SPA's own files showing that the terminal would increase local traffic and pollution, the ALC granted SPA's motion for summary judgment for lack of standing. The ALC held that Petitioners were not "affected persons" because they failed to satisfy federal Article III constitutional standing requirements that the ALC applied to preclude standing where particularized injury is experienced by more than one person and where at least one member of an association has particularized injury. Using those and other erroneous tests, the ALC disregarded first-hand testimony of physical injury and reduced property and business values and gave no consideration of that evidence 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 ALC also summarily rejected the Petitioners' objection that litigation of standing under an Article III standard was barred by collateral estoppel. SPA had earlier sought summary judgment in the U.S. District Court for the District of South Carolina (an Article III court) on the basis that no Article III standing existed to challenge federal permits for the same terminal at issue here. SPA lost. *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-2942-RMG, 2013 WL 6488282, at *15 (D.S.C. Sept. 18, 2013). The federal district court held that "it is clear that Plaintiffs [including several of the Petitioners] have standing under Article III . . . ." *Id.* The ALC, however, dismissed Petitioners' estoppel objection in

a footnote that examined neither the elements of issue preclusion nor their application to Article III standing. R.000079.

Beyond standing, the ALC made two other rulings that are on review. First the ALC sanctioned Petitioners for contending that S.C. Code Ann. § 44-1-60(F)—which directs that the DHEC Board "must" hold a review conference within 60 days of an affected person's request—sets forth a mandatory duty. While no court had ever before determined whether § 44-1-60(F)'s duty is mandatory or discretionary, the ALC, at SPA's request, sanctioned Petitioners for having contended the former as a basis for remand to the DHEC Board. The sanctions order did not address the ambiguity in the statutory language previously recognized by the ALC in its prior order denying remand. R.000009–10. Instead, it adopted SPA's statutory reading whole cloth and ordered Petitioners to pay SPA $9,300 for advancing an alternate interpretation.

Second, the ALC retroactively closed discovery to prevent Petitioners' deposition of SPA witnesses. The ALC's order, entered March 3, 2014, announced that discovery had closed ten months earlier, on May 20, 2013 — even though the parties had conducted discovery in the intervening months with the ALC's knowledge and acceptance. R.000064–66. The ALC's retroactive closing of discovery prevented deposition of SPA witnesses regarding documents that SPA had produced on a "rolling" basis well past the retroactively imposed deadline.

Petitioners appealed the ALC's rulings to the Court of Appeals on April 21, 2014. Following oral argument on February 14, 2017, that court affirmed the ALC

by unpublished per curiam opinion issued October 18, 2017. Petitioners filed their petition for certiorari on January 29, 2018. On August 21, 2018, this Court granted review.

FACTS

The facility that SPA proposes adjacent to a crowded neighborhood in downtown peninsular Charleston is not simply a dock. It is a very large terminal engineered to home base 1,000-foot, fifteen-story vessels with some 3,500 persons aboard. Whereas a port-of-call terminal serves as a stop on a passing ship's itinerary, a home-base terminal is materially different. It must be engineered for embarkation/debarkation of a home-based vessel, and include facilities to house, load, and unload thousands of passengers, as well as luggage, supplies, waste, water, and fuel at every home-base "turn." Here, each home-base visit of the planned-for 3,450 passenger vessel would bring up to 1,600 cars, 16 trucks, 32 buses, 90 taxis, and 20 tractor-trailers into a severely congested neighborhood area. R.002460.

Very large passenger ships are in essence floating towns. They require power for lighting, heating and ventilation, dining and kitchen facilities, laundry facilities, and water supply and sewage systems capable of servicing thousands of people. The energy to power these systems comes from large engines that burn high sulfur diesel fuel and emit large amounts of sulfur dioxide, nitrogen oxide, and particulate matter, in addition to carbon monoxide, carbon dioxide, and hydrocarbons. R.002612. Diesel exhaust is a likely human carcinogen; vessel emissions contribute

to adverse health effects associated with ambient concentrations of particulate matter and visibility, haze, and acid deposition. R.002612, 002628; *see also* U.S. EPA, Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 75 Fed. Reg. 22,896, 22,903–09 (April 30, 2010). SPA's terminal would emit more than 120 tons of EPA-regulated air pollutants per year. R.001718.

SPA announced its proposed 108,000 square foot terminal in 2010, the same year the agency began home-basing cruise ships year-round at a much smaller existing terminal. R.002434. That terminal, built in 1973, is in SPA's words "desolate" and "out-of-date," R.002481, R.002482, and its small size and antiquated facilities make home basing even a 2,500 passenger vessel "exceptionally cumbersome," with operations taking place in tents due to a lack of indoor space, R.002426, R.002436.

More importantly, the old facility does not meet federal security guidelines for an international shipping terminal and has been subject to "conditional approval" from U.S. Customs and Border Protection ("CBP") that requires progress towards a new security-compliant terminal. R.002459; R.002474.

The proposed terminal would be three times larger than the existing one, and is engineered to home base a ship with 3,500 passengers visiting twice a week. R.002439, R.002468, R.002462. The terminal would facilitate even larger ships coming to Charleston, as the terminal wharf would be upgraded to accommodate a vessel 1,100 feet long and 160 feet across, R.002457, the dimensions of a 4,100

passenger vessel, while SPA has also acquired a passenger loading ramp capable of servicing a vessel with 4,500 passengers. R.001794, R.001888, R.002600.

The new terminal would have significant localized impacts, as shown by multiple standing declarations submitted to the ALC. Declarant Tommie Robertson's home is so close to the proposed terminal that she could "throw a rock" onto it. R.002588. She testified that she has experienced health impacts from "thick black smoke" emitted from smaller cruise ships docked at the more distant existing terminal. R.002589. She watched dark soot move from berthed vessels to her home and, "within seconds of breathing the emissions," experienced pain in her throat and difficulty breathing and was "forced to retreat indoors." R.002588–89. The harmful emissions entering her lungs are so "unbearable [she] can no longer open her windows or enjoy [her] porch while the cruise ships are in town." R.002589. Unsurprisingly, she is concerned that a much larger terminal built much closer to her home would "significantly increase[]" the adverse effects she has experienced, increasing "the interference with the use and enjoyment of [her] property," and "exacerbating the adverse effects that [she is] currently experiencing." R.002588–90.

Stephen F. Gates testified that the accumulation of heavy oily soot on his historic home and property began in 2010 when year-round cruise ship home-basing began at SPA's smaller existing terminal. R.002595. In addition to being forced to more regularly clean deposited soot from his property, Gates testified to his concern that the pollution he experienced was a threat to his health based on the "reputable

medical opinions of the Charleston County Medical Society and South Carolina Medical Association, who have warned and advised local residents of the increased risks associated with low-grade sulfur emissions from cruise ships idling and debarking from port." R.002595. He testified that he is "personally concerned about the real and substantial risks posed by this soot and additional air emissions" on his "health, on the value of [his] property, [and] on the historic integrity of [his] neighborhood" if cruise ship operations are expanded as a result of the permit at issue in this case. R.002595. Based on SPA's own statements, Gates further declared that "[o]ngoing and increased" cruise operations would be attributable to DHEC's approval of permits for the larger terminal, and would cause impacts in his neighborhood being "perpetuated and exacerbated." R.002596.

Christina Dodd also started finding "oily soot" in and on her home with the onset of home-base operations, and she testified in a sworn affidavit that she is "very concerned about 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." R.002577. Dodd testified to concentrated cruise-related vehicular traffic in the streets immediately surrounding her home restricting ingress and egress, and to the degradation of her early 19th Century neighborhood's internationally-renowned historic integrity from a very large cruise terminal and ten-story high cruise ships. R.002577–78. Based on her review of "a great deal of information" about SPA's proposed terminal—which would be "just a couple blocks" from her home—she "concluded that Permit OCRM-12-054-B [the subject of this

case] will only make worse" the problems she has experienced with the recent onset of year-round cruise home-basing operations. R.002577.

In addition to air pollution, concentrated traffic, and historic degradation, cruise ships—with toilets, baths, and kitchens to serve thousands of persons aboard—discharge pollution into surrounding waters that can have high levels of bacteria and other harmful pollutants. R.002602–03. SPA has admitted that supposed limits on the discharge of food waste, and sink and shower drain fluids are "voluntary," R.002467, and "gray water" can be discharged within three miles of shore while a vessel is underway. R.002423. Marty Morganello, President of the Charleston Chapter of the Surfrider Foundation, testified that "the dumping of this waste" exposes those like himself "who use and enjoy these waterways to risks of disease and infection." R.002751. Morganello "regularly swim[s] and kayak[s]" in area waterways, and he testified that increased cruise operations would heighten the "potential for raw sewage and pollution to wash onshore or otherwise come into contact" with him while recreating, decreasing his "use and enjoyment of the waterways surrounding [his] home." R.002752. (Morganello Affid. ¶ 3).

These individuals are members of local associations that actively participated in the administrative process leading up to the DHEC staff decisions in this case. The associations and their members spoke at public hearings and submitted comment letters detailing significant impacts that the terminal would have on them. They also provided options for reducing them. For example, they commissioned a study showing that plug-in shore-power, used at other terminals

around the world, would significantly decrease localized air pollution. R.002601–4. They also proposed that DHEC adopt enforceable limits on the size and frequency of vessels to reduce the entire suite of impacts and injuries posed by the cruise terminal. R.000120–22. Notably, these limits are in line with "voluntary" guidelines SPA has itself announced. SPA's guidelines, however, are merely a "voluntary" promise to provide public *notice* prior to expanding operations beyond SPA's self-announced levels, and do not actually limit its operations. R.000901 (Voluntary SPA Cruise Management Plan). Petitioners sought to make the limits on ship size and frequency enforceable permit terms to reduce injury to their homes and health. R.002596.

After DHEC failed to consider the terminal's full range of impacts in evaluating SPA's application or include options to reduce them, Petitioners sought administrative review of the unlawful permits as "affected persons" as provided for in S.C. Code Ann. § 44-1-60.

STANDARD OF REVIEW

A finding of the ALC must be reversed if it is: (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B).

On appeal from summary judgment, an appellate court reviews the decision below applying "the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Vaughan v. Town of Lyman*, 370 S.C. 436, 440, 635 S.E.2d 631, 633 (2006) (Supreme Court standard of review). *See also Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 73, 698 S.E.2d 244, 247 (Ct. App. 2010), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013) (equivalent standard of review in Court of Appeals). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). "On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." *Vaughan*, 370 S.C. at 440, 635 S.E.2d at 634.

A judge's decision to apply sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act "sounds in equity and rather than at law." *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 167, 758 S.E.2d 483, 499 (S.C. 2014) (quoting *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). "Therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the [Act] by taking its own view of the evidence." *Holmes*, 408 S.C. at 167, 758 S.E.2d at 499 (internal quotations omitted). *See also Father* 353 S.C. at 260, 578 S.E.2d at 14 (appellate court reviews

the decision to grant sanctions on "its own view of the preponderance of the evidence"). If the appellate court agrees with the sanctioning court's view of the evidence, the appellate court reviews the decision to grant sanctions and the terms of the sanctions for an abuse of discretion. *Father*, 353 S.C. at 261, 578 S.E.2d at 14; *Holmes*, 408 S.C. at 167, 758 S.E.2d at 499. "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Father*, 353 S.C. at 261, 578 S.E.2d at 14.

The ALC's "rulings on discovery matters" are also judged under an "abuse of discretion" standard. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010) (quoting *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009).

ARGUMENT

The courts below erroneously misapplied and disregarded decades of binding precedent to prevent "affected persons" from challenging unlawful DHEC permits. Among other things, they held that particularized harm is rendered a non-cognizable "generalized grievance" if experienced by more than one person. They also barred associational standing if particularized harm is experienced by at least one individual member. The result of these and other erroneous holdings was to preclude standing and to prevent the proper weighing of overwhelming testimonial and documentary evidence that Petitioners had standing to challenge DHEC's permit as "affected persons."

The departure from established standing law was wholly unnecessary, as the issue of the Petitioner groups' standing to challenge permits for the cruise terminal at issue had been previously litigated in and decided by a federal court, which entered summary judgment in favor of "clear" standing. The courts erred by allowing relitigation of an issue barred by collateral estoppel.

Finally, the ALC abused its discretion by (1) sanctioning Petitioners for interpreting the statutory term "must" as establishing a mandatory duty, and (2) retroactively closing discovery after all parties—and the ALC—had assented to ongoing discovery well after the date subsequently identified as closing discovery.

This Court should overturn the decisions of the ALC and Court of Appeals and remand the case to the ALC for a contested case proceeding on the merits of Petitioners' challenge to the Permits.

I. The Courts Below Erred by Entering Summary Judgment Against Petitioners Despite Overwhelming Evidence of Individual Standing

A. The Courts Erred in Applying *Carnival* to Disallow Standing Where More than One Person Has Standing

The Court of Appeals followed the ALC in misconstruing this Court's decision in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n ("Carnival")*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014), to hold that where multiple individuals set forth similar particularized injuries, those injuries become "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 not what this Court held, and it is contrary to decades of black letter law.

The U.S. Supreme Court has made it "clear that standing is not to be denied simply because many people suffer the same injury." *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S. Ct. 2405, 2416 (1973). If an individual's injury is sufficiently personal, it is not defeated because others are harmed as well. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24, 118 S. Ct. 1777, 1786 (1998); *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S. Ct. 1361, 1366 (1972). The principles from *Sierra Club v. Morton* have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that "[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury." *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted). *See also Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("injury to all is injury to none" theory would "deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation."); *SCRAP*, 412 U.S. at 688, 93 S. Ct. at 2416 ("To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.").

By the Court of Appeals' reasoning, however, "[t]he greater the threatened harm, the less power the courts would have to intercede;" which "is an illogical proposition." *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 965–66 (D. Or. 2006). While courts have found no 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," it is "[t]he 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.* at 969 (quoting *Atkins*, 524 U.S. at 23-24, 118 S. C. at 1785-86). But "where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Akins*, 524 U.S. at 24, 118 S. Ct. at 1786 (quoting *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50, 109 S. Ct. 2558, 2564–65 (1989)).

Here, the injuries described by Petitioners' members to their homes, health and well-being, and personal recreational activities, *see supra* 9-12, constitute particularized harm even if some are shared by neighboring residents. The Court of Appeals' misreading of *Carnival* to prevent standing would mean that standing only exists when a *single* person is injured, with the greatest standing afforded where the fewest people are injured. That perverse result contradicts longstanding precedent and must be reversed.

B. The Courts Erred in Applying *Carnival* in the Administrative Context in Contravention of Legislative Intent

The Court of Appeals was also mistaken in extending *Carnival* to limit access to the administrative review process created by the General Assembly for all

"affected persons." S.C. Code Ann. § 44-1-60(E)-(G). As this Court is aware, *Carnival* arose from a complaint filed in Circuit Court alleging property-law based nuisance claims and zoning code violations. Those causes of action have unique and heightened standing-related elements: respectively, the need to show "special injury" and "special damages." *Carnival*, 407 S.C. at 78–79, 753 S.E.2d at 852. In contrast, Petitioners here did not lodge claims with specialized elements against a private defendant in Circuit Court; they invoked a procedure for *administrative review* of an agency decision that the General Assembly created *and* made available to all "affected persons." *See* S.C. Code Ann. § 44-1-60(E)-(G).

That difference is essential. The General Assembly may create a "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute." *State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929).

The legislature did so here, directing that all "affected persons" be given requested notice of DHEC decision, be allowed to request DHEC Board review, and be permitted to file a contested case hearing request with the ALC. S.C. Code Ann. § 44-1-60 (E)(1), (E)(2), (F), (G). Standing in this case thus centers on Petitioners' status as "affected persons," which in turn presents a question of "statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

The terms "affected persons" and "affected person" are used interchangeably in § 44-1-60 and are not defined.[2] They must therefore be given their ordinary and customary meaning. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99 705 S.E.2d 28, 33 (2011). "Affected" means one "acted upon, influenced, or injured." Black's Law Dictionary (6th Ed. 1990), and use of the plural "persons" means more than one person can be affected. Thus, the customary meaning of the term "affected persons" is persons acted upon, influenced, or injured by a DHEC permit. The basic standing question in this is case is whether property owners living and working near the proposed terminal—who submitted sworn testimony and documentary evidence of particularized harms including property damage and physical injury—raised at least an issue of fact as to their status as "affected persons."

Yet rather than applying the rules of statutory construction, the ALC equated "affected persons" with the *Lujan* Article III standing test R.81. The Court of Appeals compounded that error by imposing a "*Lujan*-plus" requirement that Petitioners must prove *both* that they are affected persons *and* that they meet the *Lujan* standing test. Op. 4. Beyond contradicting decades of precedent, that holding cannot be correct as a matter of statutory construction; it renders meaningless the statutory language giving standing to affected "persons," which is

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[2] This contrasts with other administrative review procedures, where the category of participants is spelled out. *See* S.C. Code Ann. § 61-6-185(A) (persons in county or "within five miles" can contest retail alcohol license in ALC); S.C. Code Ann. Regs. 61-15(103)(1)) (for challenges to Certificates of Need for Health Facilities and Services, defining "affected persons" as those "residing within the geographic area served or to be served by the applicant" and those in the area who provide similar services).

not limited to only one "person" and creates a heightened and undefined standard for standing that only applies when a citizen objects to a permit authorizing environmental degradation. *See Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (rejecting construction of statutory language that "renders it meaningless"). That reading would also lead to the perverse result of making it harder to question an unlawful toxic waste dump than to challenge a liquor store license or medical scanner certificate. *See supra* note 2.

Beyond contravening clear statutory intent, the construction adopted below also renders the statute unconstitutional. South Carolina citizens cannot be deprived of their right to contest agency actions that damages them. *See* S.C. Const. art. I, § 22 ("[n]o person" shall 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"). As with other individual rights, that right is not weakened or lost because others also have it. The statutory readings adopted below must be reversed. *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (constitutional construction must prevail over an unconstitutional one).

C. The Decisions Below Erred in Applying *Carnival* and Other Cases As Obviating The Need to Construe All Evidence and Inferences in Petitioners' Favor As Required by Rule 56

The standing issue in this case was raised in SPA's motion for summary judgment. Summary judgment could only be granted if Petitioners' responsive

showing, viewed in a light most favorable to them and drawing all inferences in their favor, failed to raise a material question of fact as to their standing. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009). Rather than apply the proper Rule 56 standard, the courts below treated this case like *Carnival,* which was decided on a motion to dismiss after the Court held that the complaint in that case "fail[ed] to allege any particularized harm" to support standing. *Carnival*, 407 S.C. at 75–77, 753 S.E.2d at 850-51. Here, the ALC *rejected* a motion to dismiss for lack for standing. R.000051–54. Yet it then changed course to hold—despite substantial evidence showing that SPA's terminal would cause Petitioners particularized harm—that Petitioners had failed to raise a single material question of fact as to whether they had affected persons standing.

That disregard for evidence violated Rule 56, which requires a court "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable" to Petitioners. *Gignilliat,* 385 S.C. at 456, 684 S.E.2d at 758 (quoting *Brockbank*, 341 S.C. at 378-79, 534 S.E.2d at 692). Not only did the courts below fail to resolve a *single* inference in Petitioners' favor, they refused to consider—much less weigh in Petitioners' favor—numerous affidavits and documents showing that the challenged permit would cause harm more than sufficient to show standing.[3] That evidence, summarized at *supra* 7–12, included

[3] This Court has recognized three types of citizen 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 Transp.*, 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)). Because Petitioners had statutory standing they were not required to

sworn testimony of a resident who lives within a stone's throw of the proposed terminal and experienced "thick smoke" enveloping her home, causing respiratory pain and forcing her to retreat indoors out of fear for her health. R.002588–89. Individuals further testified that a very large cruise terminal close to their homes would worsen existing adverse effects they have personally experienced (R.002589, R.002576–78) and that fear of increased pollution from the proposed terminal would diminish swimming and recreating in area waterways. R.002751–52. SPA's own documents showed that the proposed terminal will home-base larger more polluting ships than have ever before based year-round in Charleston, *e.g.*, R.007493 (SPA: new terminal "designed to handle ships up to 3,500 passengers"); will cause more pollution and traffic, R.007461 (SPA: existing traffic counts "considerably lower" than at proposed terminal); and would allow operations to continue that otherwise could not, R.002455.[4]

Taken together, this information was more than sufficient to show particularized imminent injury traceable to the terminal and the permits authorized by DHEC. It also showed that those injuries would be redressed if DHEC's permits were set aside, or remanded to the agency for full consideration of

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separately demonstrate Article III constitutional standing, *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518, but their evidentiary production was more than enough to demonstrate either kind of standing.

[4] SPA's claim that a new 20-acre, 100,000 square foot terminal would somehow have "no effect" defies common sense and contradicts the record, including SPA's admission to the ALC that a new terminal is needed "in order to comply with both current terminal security requirements mandated by federal law under the oversight of the [CBP], as well as the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 et seq." R.001103.

the impacts that it improperly omitted and conditions imposed to reduce them, including shore-side power to reduce local diesel soot pollution, R.002601–04, shuttle services to minimize traffic, R.002601, and enforceable limitations to reduce all forms of pollution in the local area, R.002596. *See also* R.000237, R.000386, R.002596, R.0002601 (options for alternative terminal locations); R.002596, R.002601 (proposal for binding effluent limits to prevent water pollution).

In treating this case as analogous to *Carnival* at every level, the courts below failed to consider this evidence at all, much less in a light most favorable to Petitioners, erroneously citing cases like *Carnival* to short-circuit the required standard of review under Rule 56. They ignored sworn affidavits asserting injury to individuals' health and the environment for a lack of expert medical testimony, Op. 8; R.000086, contradicting clear precedent that expert testimony is *not* required to show a reasonable fear of injury for standing. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d at 149, 159–60 (4th Cir. 2000) ("[No federal circuit has] required additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment.").[5]

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[5] *See also Friends of the Earth, Inc. v. Laidlaw, Envtl, Servs. (TOC), Inc.*, 528 U.S. 167, 183181–184, 120 S. Ct. 693, 704-06 (2000) ("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," crediting testimony that water "looked and smelled polluted."); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 256 (3d Cir. 2005) (accepting lay standing testimony regarding health risk from toxic waste dump); *State v. Douglas*, 380 S.C. 499 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception."); *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391 (2005) (Affidavits need only be based on "personal knowledge,"

The courts similarly disregarded property owner testimony of diminished value on the basis that standing requires a party produce "evidence of declining property values and business" from a prospectively challenged permit, also presumably from an expert. Op. 9 (emphasis added); R.000085 (ALC noting absence of "evidence of real estate appraisals or other probative measures of real estate values"). This too contradicts clear precedent. Courts have never required that a person must wait until the damage is done, or even begun, to have standing to prevent harm; if the "perceived threat to [plaintiffs] is sufficiently real and immediate to show an existing controversy," standing is present. *Blum v. Yaretsky*, 457 U.S. 991, 1000, 102 S. Ct. 2777, 2784 (1982) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496, 94 S. Ct. 669, 676 (1974)). *See also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 102 S. Ct. 752, 760 (1982) (noting "the Art. III requirement of actual *or threatened injury*") (emphasis added).

Several property owners testified to the deposition of oily soot on their historic homes; extreme concentrated traffic congestion in their immediate vicinity; and pollution that can be seen, smelled, and indeed tasted on their private property; and that, if the project proceeds, all of these harms would worsen and as a result their properties would lose value. R.002584 (Lane Aff.); R.002589–90 (Robertson Aff.); R.002576–78 (Dodd Aff.); R.002594 (Gates Aff.). These were more than

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setting forth facts that would be admissible at trial; evidence is admissible if it is relevant, i.e., if "it tends to establish or to make more or less probable some matter at issue," either "directly or indirectly.").

sufficient to show standing. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43–44, 691 S.E.2d 135, 146 (2010) (a property owner may "give his estimate of its value or the damage inflicted upon it even though he is not an expert") (quoting *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (1992)). In discounting this material as supposedly "only concern without evidence," Op. 9, the Court of Appeals effectively decided "issues of credibility and fact" that *cannot* be decided on summary judgment; indeed, issues of credibility preclude summary judgment. *True v. Monteith*, 327 S.C. 116, 120-21, 489 S.E.2d 615, 617 (1997) (summary judgment inappropriate where resolution of disputed facts hinges on issues of credibility); *Brenham Cmty. Protective Ass'n v. U.S. Dep't of Agric.*, 893 F. Supp. 665, 671 (W.D. Tex. 1995).

Finally, the courts inexplicably ignored testimony and documents from SPA's own files showing that the complained of injuries are traceable to the challenged terminal permit and were redressable. Challenged permits need not be the only and certainly not the "last step in the chain of causation" to trace them to a plaintiff's harm, *Bennett v. Spear*, 520 U.S. 154, 168–69, 117 S. Ct. 1154, 1164 (1997).The statutes giving rise to these permits were intended to protect human health, the environment, property owners, and South Carolina's historic and natural resources. *See e.g.*, SC Code Ann. § 48-39-20(E) (Coastal Zone Management Act enacted because "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to

destroy these values.") The General Assembly explicitly provided a mechanism for redress to persons affected by harm to these values. S.C. Code §§ 1-23-310, et seq., & 44-1-60. That is exactly what the Petitioners sought here.

This Court, based on all of the above, should enter summary judgment in Petitioners' favor and clarify that *Carnival* did not change settled law, which requires that evidence of standing must be considered on summary judgment pursuant to the standards applicable under Rule 56.

II. Particularized Injury to an Organization's Members is No Barrier to Associational Standing.

To have associational standing, an organization in South Carolina 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., Inc. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441(1977)).

The first two elements are clearly present here. Individual standing was overwhelmingly demonstrated, and Petitioners showed that the interests at stake are germane to the purposes of the associations seeking to promote neighborhood wellbeing, preserve historic resources, and reduce needless environmental degradation.[6] As to the third element, however, the Court of Appeals referenced the

[6] *See, e.g.*, R.002595-96 (Charlestowne Neighborhood Association); R.02600–01 (Coastal Conservation League); R.02644–45 (Preservation Society of Charleston);

Robertson affidavit and faulted the Petitioners for not having explained "how the claims they have asserted or the relief they have requested can be adjudicated *without* the affiant's participation in the lawsuit." Op. at 10 (emphasis added).

In the court's view, by submitting Mrs. Robertson's detailed testimony to show particularized harm and individual standing, Petitioners had somehow introduced her involvement as needed for adjudication of the merits of the claims asserted and relief sought—thereby negating associational standing. Taken to its logical conclusion, that holding means that evidence of associational standing's first element (individual member standing) cuts against the third (no need for members to participate in merits or remedy litigation). Thus, groups with the *strongest* individual member standing would have the *weakest* associational standing.

That is error. The third element of the associational standing test exists to prevent 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).

R.002582 (Historic Charleston Foundation); R.002588 (Charleston Communities for Cruise Control); R. 000091 (ALC Opinion) (Charleston Chapter of Surfrider Foundation); R.000090–91 (ALC Opinion) (Historic Ansonborough Neighborhood Association).

The claims asserted here (that DHEC's permit decisions were unlawful) and the relief sought (vacatur or remand and modification of the permit) do not, on their face, require individual participation of each injured party. Courts faced with analogous circumstances have found, accordingly, the third element of associational standing 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."); *see Bldg. & Constr. 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 member").

Furthermore, the notion that Petitioners failed to explain that participation of individual members was not needed for the merits, Op. at 10, is simply wrong. The Petitioners made that point repeatedly. *E.g.*, R.002356–61 (Pet. Resp. to SPA Mot. Sum. J.) (explaining that members' participation not needed in substantive litigation); Pet.-Appellants' Final Reply Br. 12–13 (explaining "the requested remedy–resolution of an issue of law–will benefit both the injured members and

other injured members alike even though they don't all participate") (internal citations omitted); R.000237 (Pet. 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.

By definition, associational standing is representative, requiring the participation of individual members to establish individual standing for the organization. *See Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441 (requiring an organization's members to "otherwise have standing to sue in their own right" as an element of associational standing). That is why Mrs. Robertson was *not* included in Petitioners' list of proposed witnesses needed for the contested case proceeding, but instead among the "[o]ther members of the Petitioner groups, as needed for standing." R.000240. By confusing the need to demonstrate individual standing with the need for individuals to participate in the litigating the merits of the case, the decision below would give associations with the most particularized injury the least standing. The Court should reverse and find associational standing was shown under long-standing precedent.

III. Relitigation of Article III Standing Was Barred by Collateral Estoppel.

"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). "The 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 for lack of Article III constitutional standing, SPA moved for summary judgment for lack of Article III standing in U.S. District Court, where federal permits for SPA's same cruise terminal were challenged. That court, after the standing issue was briefed and litigated, ordered summary judgment for the plaintiffs—which included Petitioners Coastal Conservation League and the Preservation Society of Charleston—finding it "clear that Plaintiffs have standing under Article III to bring this action." *Pres. Soc'y of Charleston*, 2013 WL 6488282 at *15.

In this case, Petitioners' objected to relitigation of the Article III standing as barred by collateral estoppel. The courts below demurred on two grounds, both mistaken.

First, Petitioners were faulted for having failed to show that Article III standing was "actually litigated" in federal court. Op. 11. But Petitioners submitted not only the federal court's order showing that SPA had litigated and lost the Article III standing issue, they submitted SPA's own *briefs* showing that SPA made the *same Article III standing arguments* in federal court, almost verbatim. *Compare* R.002524–25 (SPA federal court brief, claiming injury "pertains to existing

cruise operations generally and not the permitted activity") *with* R.001127 (SPA state court brief, claiming injury "pertains to cruise operations generally, rather than the permitted activity").[7] Petitioners could not have done more to show actual litigation.

In light of this, the Court of Appeals' additional assertion that the same standing issue was not "actually litigated" in federal court because SPA made a more limited standing argument in federal court than it did before the ALC, Op. 11 n.12, is wrong. As just explained, SPA made the same arguments in both cases. Yet even if it had not done so, the Court of Appeals used the wrong test. Collateral estoppel—or "issue" preclusion—does not turn on whether identical *arguments* were made; it turns on whether the same *issue* was actually litigated. *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821. "[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. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphases in original). Where a party failed to make a certain argument on an issue that was actually litigated in the earlier proceeding, collateral estoppel still applies and the party is barred from relitigating the same issue using the new argument. *Sec. Indus. Ass'n v. Bd. of Governors,* 900 F.2d 360, 364 (D.C. Cir. 1990).

[7] *Compare also* R.002525 (SPA federal brief, "alleged injuries impact all citizens and visitors to Charleston and are not unique to Plaintiffs' members,") *with* R.001129–30 (SPA state brief, arguing Petitioners "fail[ed] to articulate a harm any different from what may be suffered by the public generally"); *and compare* R.0025225 (SPA federal brief, claiming no redressability because cruise ships will continue "regardless of whether the SPA is able to fulfill its plans of moving the terminal") *with* R.001154–55 (SPA state brief, arguing no redressability because cruise ships "will continue to call on UPT under its current configuration going forward").

The Court of Appeals introduced a third error on its own by suggesting, *sua sponte*, 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)). But SPA never argued for that exception in its brief, and the court identified no "unfairness or injustice" or "public policy" that would support relitigation of standing here. To the contrary, waiving collateral estoppel and forcing non-profit associations that prevailed in federal court to bear the expense and effort of yet again litigating their Article III standing to challenge permits for the same proposed facility is both unfair and unjust. Nor is any countervailing justice served by insulating unlawful state permits for a leisure cruise terminal from administrative review; SPA's own statute defines its interests to include consideration of ways "to diminish or mitigate any negative effect port operations or expansion" upon "the environment" and "quality of life of residents in communities located near existing or proposed port facilities," S.C. Code Ann. § 54-3-80(A)(3)(d). Public policy is served best by preserving the right of citizens to invoke administrative review.

Furthermore, removing the right of affected citizens to challenge DHEC permits could jeopardize DHEC's permitting authority under the federal Clean Water Act, a source of one of the approvals 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 . . ."). Decertification of South Carolina's water permitting program would invite a level of federal agency

involvement in South Carolina affairs that the General Assembly did not intend and would no doubt disfavor.

The Court should find that relitigation of Article III constitutional standing was barred by collateral estoppel.

IV. The ALC Abused its Discretion By Sanctioning Petitioners For Contending the Term "Must" Denotes a Mandatory Duty.

The ALC abused its discretion by imposing sanctions upon Petitioners for contending that statutory language directing that the DHEC Board "must" hold a review conference within sixty days of a request for review sets forth a mandatory duty, rather than a discretionary one. The statute states that no "later than sixty calendar days after the receipt of a request for final review," the "final review conference *must* be conducted by the board . . . ." S.C. Code Ann. § 44-1-60(F) (emphasis added). If the Board "declines" its duty to hold the conference within the allotted 60 days, the statute provides for jurisdiction in the ALC. *Id.*

The Petitioners contended that these provisions taken together set forth a mandatory duty for the DHEC Board to hold a requested conferenced within 60 days, and prevent the board's inaction from creating a jurisdictional gap by allowing affected persons to go to the ALC. Thus, after DHEC Board declined its duty to hold a conference, it invoked the ALC's authority and then filed a motion seeking remand to force the DHEC Board to undertake the mandatory conference. R.000157 (Motion for Remand). SPA moved for sanctions and the ALC granted them because, in their view, the statute makes DHEC Board reviews discretionary

rather than mandatory. R.000100. The ALC ordered the Petitioners to pay $9,300 in costs to SPA. R.000075.

While the ALC read the statute differently than did Petitioners, because the Petitioners' reading was reasonable, the imposition of sanctions was an abuse of discretion. "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' *indicates the legislature's intent to enact a mandatory requirement.*" *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (emphasis added). Further, the term "decline" can mean refusal to undertake a mandatory duty in addition to refusal of a voluntary invitation. *See* Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/decline (last visited Aug. 28, 2018) (defining "decline" as "to refuse to undertake, undergo, engage in or comply with" an obligation); Webster's College Dictionary (2010) (defining "decline" as "to withhold or deny consent to do; refuse").

"If a statute is susceptible to two reasonable interpretations, it is ambiguous." *South Carolina Dep't of Social Services v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008). The undersigned have found no reported case, in any jurisdiction, where a party was sanctioned for reading the term "must" as mandatory, or offering one interpretation of an ambiguous law over another. On the contrary, in line with the ethical duty of lawyers to vigorously advance their clients' interests, courts routinely reject sanctions for far more aggressive advocacy. *See, e.g., Hunter v. Earthgrains*, 281 F.3d 144, 153–54 (4th Cir. 2002) (overturning sanctions order, noting that "[c]reative claims . . . may merit dismissal, but not

punishment") (internal quotations and citations omitted); *Maddox v. City of Costa Mesa*, 193 Cal. App. 4th 1098, 1109, 122 Cal. Rptr. 3d 629, 637 (CalApp. 2011) (rejecting sanctions where appeal merely raised a "novel issue of statutory interpretation"); *First Am. Bank & Trust v. First Guar. Bank*, 615 So. 2d 1060, 1063 (La. Ct. App. 1993) ("The mere fact that a legal argument or theory is creative or novel is not a basis for sanctions."); *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458, 459 N.E.2d 129, 133 (Mass. App1984) (finding appeal that "presents an argument that is novel, unusual or ingenious, or urges adoption of a new principle of law or revision of an old one" not frivolous).

The Court of Appeals faulted the Petitioners for "disregard[ing]" other language "indicating" that ALC review is available if the Board "declines" to hold said conference. Op. 13. Petitioners did not disregard that language. As discussed above, they addressed it directly, and showed how it supported their reading of the term "must" as mandatory while providing jurisdiction in the ALC to redress the Board's dereliction of duty. Appellants' Final Initial Br. 58–59. 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, and their interpretation is entirely reasonable under canons of statutory interpretation.[8]

[8] For its part, the ALC also relied upon background summary in a brief one of the Petitioners filed years ago in litigation where the language here was not in issue, reading this as a concession that the DHEC Board's duty is discretionary.

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). There was no evidence of bad faith here; Petitioners were sanctioned for advancing a permissible reading of at best an ambiguous statute, in a case of first impression. The ALC's order was a clear abuse of discretion.

It bears mentioning that Petitioners' attorneys in this matter have appeared before this Court numerous times and have 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. Petitioners further submitted affidavits from experienced attorneys not involved in this case who testified that Petitioners' filings were well within the bounds of prevailing legal practice and did not warrant sanctions. R.000427–29 (Linton Aff.), R.000431–35 (Bouch Aff.).

By affirming the ALC's order with no actual analysis, the Court of Appeals endorsed sanctioning a party for putting forth a more than reasonable statutory reading of a previously-*un*interpreted statute. Left undisturbed, the sanctions order would chill free expression of what the law means and undermine counsel's duty of vigorous representation. This Court should reverse.

R.000075. Petitioners are aware of no case holding that background legal summary in a brief, submitted in a case addressing a separate legal issue, prevents a party from subsequently litigating the meaning of the summarized law.

V. The ALC Abused Its Discretion By Retroactively Closing Ongoing Discovery.

In March 2014, the ALC retroactively declared that discovery had closed in May 2013, preventing the Petitioners from taking critical depositions after SPA had produced tens of thousands of pages of documents between May 2013 and March 2014. Before the ALC's March 2014 announcement, all parties, and the ALC itself, had operated with the understanding that discovery had *not* closed. SPA propounded discovery requests after June 2013 and produced thousands of pages in "rolling discovery" into 2014. For its part, the ALC explicitly acknowledged ongoing discovery past June 2013, including in an order issued in December 2013.

The summary below shows that the parties and the ALC understood discovery to be ongoing well after June 2013:

May 20, 2013 (the day discovery was later deemed "closed")

- SPA submits proposal for nine months of discovery and "an expanded number of depositions" to ALC.[9] R.000231.

May 21, 2013 (day after discovery later deemed "closed")

- Petitioners submit to ALC "that more discovery will be needed to adequately prepare this matter for hearing." R.000241.

May 31, 2013 (ten days after discovery later deemed "closed")

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[9] SPA also urged the Court to allow "discovery . . . to proceed in accordance with the Rules 26–37, SCRCP," rules which contain no limitations on the number of depositions nor the time-frame within which discovery must be completed. R.000231.

- ALC justifies November 2013 hearing date as providing "over four months for discovery"; "hopeful the parties could complete discovery within the time period."[10] R.002934.

June 10, 2013 (three weeks after discovery deemed "closed")

- SPA proposes to "develop a scheduling order with deadlines for discovery, dispositive motions, exchange of evidence, etc.," and says it will "inform the Court that we are going to try and come up with a consent scheduling order and ask that the Court let us know what week it will set the hearing for inclusion in that order." R.002939.
- Petitioners and DHEC agree. *Id.*

June 14, 2013 (almost one month after discovery deemed "closed")

- SPA informs ALC that "the parties are working on a proposed scheduling order with deadlines on discovery, dispositive motions, exhibit exchange, and other deadlines as well as a proposed confidentiality order for discovery matters." R.002941.

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[10] Section 1-23-320(E) of the South Carolina Code states that "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved." SCALC Rule 10 guides the procedure that will allow the parties the opportunity to respond and present evidence in compliance with Section 1-23-320(E). SCALC Rule 10 requires the ALC to "determine the procedure appropriate to the complexity of the issues presented and the types of proof likely to be introduced so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved in the hearing. The administrative law judge may . . . take such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts." In a complex case such as this, the ALC recognized that expanded discovery is necessary.

August 19, 2013 (two months after discovery deemed "closed")

- SPA subpoenas third party witness. R.000543.

December 2, 2013 (over five months after discovery deemed "closed")

- ALC order notes that as of September 6, 2013, "the parties were still conducting discovery." R.000041.

December 18, 2013 (six months after discovery deemed "closed")

- SPA announces its view that discovery had closed on May 20, 2013 to block depositions.

June 2013 – March 2014

- SPA produces tens of thousands of pages of documents over eleven months started after "close" of discovery.

March 3, 2014

- ALC declares that discovery closed on May 20, 2013.

This timeline shows that the parties and the ALC conducted and condoned discovery well beyond the May 20, 2013 date retroactively declared to be a deadline, and SPA's reversal in late 2013 was simply a tactical pivot to avoid having SPA witnesses deposed, even as SPA continued to slowly produce the thousands of pages that would form the basis of depositions.

The ALC based its retroactive discovery closure on SCALC Rule 21(A) which sets a default 90-day period for discovery in ALC matters, but allows the ALC to expand that period on good cause shown or upon its own motion. Petitioners submitted uncontested evidence that discovery past the default 90-day period is

standard practice in complex administrative proceedings such as this one. R.002950–52 (Riley Aff.). Further, SCALC Rule 10 calls on each ALC to set a procedure "appropriate to the complexity of the issues presented and the types of proof likely to be introduced so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved in the hearing," and to take "such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts"—requirements that the ALC failed to meet, cutting against any inflexible adherence to SCALC Rule 21. Furthermore, as the ALC itself acknowledged and condoned, "the parties were still conducting discovery" long after the 90-day purported deadline had passed. R.000041.

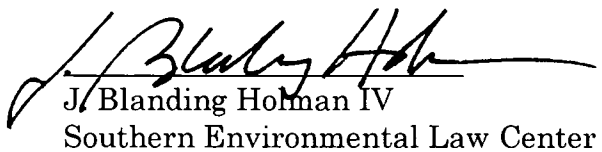
Given the actions of the parties and the ALC, and usual practice in cases like this one, the Petitioners proceeded with discovery in the absence of a formal consent motion expanding discovery—just as SPA and DHEC did. When SPA abruptly changed position, Petitioners promptly sought a formal order memorializing expansion of the default period for discovery. SCALC Rule 21(A) (allowing ALC on good cause or on own motion to expand or curtail discovery); *see* S.C. Code Ann. § 1-23-320(E) ("Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.") The Petitioners more than met the "good cause" standard because discovery was already ongoing and retroactively ending it would unfairly Petitioners by preventing depositions.

The ALC arbitrarily rejected the Petitioners' request and deemed discovery retroactively closed by operation of a deadline that goes unobserved in other cases and which neither the parties nor the ALC itself understood to be in effect in this one. That was an abuse of discretion and should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court reverse the decisions below and remand for a contested case proceeding before the ALC on the merits of Petitioners' challenge to the Permits.

Respectfully submitted,



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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-07-0056-CC
Appellate 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 ControlPetitioners,

v.

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

PROOF OF SERVICE

I hereby certify that on October 1, 2018, I caused to be served the foregoing *Petitioners' Opening Brief* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

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