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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2018-000137

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

v.

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

Brief of Respondent South Carolina Ports Authority

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2. If the issue of Constitutional standing is properly before the Court, did the Court of Appeals correctly affirm the Administrative Law Court's determination that Petitioners lacked standing to challenge the DHEC Permit?

3. Are the courts of this state bound by a federal court's determination that some—but not all—of the associations that are parties to this case have standing to assert deficiencies of administrative process regarding a concurrent federal permitting authorization issued pursuant to procedural, non-substantive federal statutes?

4. Did the Court of Appeals properly determine that the Administrative Law Court did not abuse its discretion in imposing sanctions against Petitioners for advancing a frivolous motion unsupported by the pertinent statute?

5. Is Petitioners' appeal from the Administrative Law Court's vacated order on discovery properly before the Court and, if so, did the Court of Appeals err in affirming the Administrative Law Court's determination that Petitioners are not entitled to relief from the denial of the motion to re-open discovery?

INTRODUCTION

The very narrow legal issue presented by this appeal is Petitioners' standing to challenge to the permit issued by Respondent South Carolina Department of Health and Environmental Control ("DHEC") to co-Respondent South Carolina Ports Authority ("Ports Authority"), which is the state authorization to modify an existing warehouse structure on Union Pier Terminal ("UPT") in downtown Charleston ("Permit"). The modified structure is the proposed new home of the Ports Authority's passenger cruise operations in Charleston. These modifications are a part of a planned capital improvement initiative instituted by the Ports Authority, involving substantial public outreach and participation, in connection with its vision to reinterpret its long-term use of UPT. Petitioners have gone to extraordinary lengths in three separate legal challenges[1] and in the press to turn the challenged Permit and authorized modifications into a judicial referendum on the cruise industry in Charleston.

To be clear, however, the issue of continued cruise operations is not before the Court. Despite Petitioners' efforts to make it so, this case is not about whether cruise ships can continue to call on UPT. Cruise ships have called on UPT continuously since 1973 and passenger ships have called on UPT and the Charleston peninsula for over 100 years, and will continue to do so regardless of whether the existing warehouse is renovated into a new cruise terminal. Petitioners'

[1] This case is one of three filed by many of these same Appellants against the cruise industry in Charleston. This Court has already heard one of these cases, accepting in its original jurisdiction an action alleging nuisance and zoning claims that attacked the cruise terminal and its perceived effects on the Charleston peninsula based on the very same allegations of injury. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). The other case challenged in United States District Court the United States Army Corps of Engineers' ("Corps") compliance with review procedures under the Nation Environmental Policy Act ("NEPA") incident to its authorization of the Project. *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 2013 WL 6488282 (D.S.C. Sept. 18, 2013) ("NEPA Challenge"). The Project is currently under consideration by the Corps for a federal permit.

characterization that cruise ships currently call unchecked on UPT, or would in the future if cruise operations are shifted 600 yards to the north, is incorrect. Stripped of Petitioners' purposeful exaggerations, the truth about the capital infrastructure project, which is located entirely within the existing boundaries of an active Ports Authority marine terminal, is simple and uncontroversial. Specifically, this case is not about the authorization of cruise ships to call on UPT, but about the efforts of a vocal minority to derail a Project that will benefit the environment and surrounding neighborhoods, all because the Project does not align with the minority's vision for Charleston and their preferred kind of tourists of the City.

In truth, the Ports Authority has long-sought to be a good partner with the City of Charleston and steward of the City's ambiance with respect to its passenger cruise operations. In fact, the Project is that rare infrastructure project that enjoys the support of both the local (City) and state governments (General Assembly).[2] The irony in Appellants' position is that Charleston would not be what it is today without the maritime industry. The Ports Authority has worked with the City of Charleston to voluntarily limit the number of cruise vessel calls to 104 per calendar year, as well as to restrict the size of cruise ships calling on Charleston to a maximum 3,500 passenger design capacity, consistent with the passenger capacity of ships that have previously called on UPT. **(R.p.000153)** Although these actions were taken independently and in good faith by the Ports Authority, Petitioners have disregarded the positive effects of the Project on the environment and surrounding communities and have resisted the Project because it does not achieve their stated goal of preventing all-but the highest end of luxury cruises from calling on the peninsula.

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[2] *See* **(R.pp.001842-45)**, S.968 Concurrent Resolution, 119th Session (2011); **(R.pp.001846-48)**, Charleston City Council Resolution (Sept. 14, 2010).

STATEMENT OF THE CASE

This administrative matter began when the Ports Authority submitted a joint application to the Corps and DHEC[3] in January 2012 for a license to engage in activities affecting the waters of the United States and critical areas of South Carolina. **(R. pp. 001240-1257)** The Ports Authority sought approval to modify Building 322, a warehouse located on the northern end of UPT, as part of a plan to relocate passenger cruise operations to that location from the southern end of the terminal. **(R. pp. 001182; 001184)**

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

Thereafter, the parties participated in extensive discovery and motions.[4] However, no party sought to expand the Rule 21.A, RPALC, discovery period and, thus, the deadline for completing

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[3] The Application was submitted to DHEC through its Office of Ocean and Coastal Resource Management ("OCRM"). **(R.pp.001249-1257)**

[4] In one particular motion, Appellants sought to remand the Permit to DHEC a second time by filing a motion to vacate the Permit as a result of the decision reached in the companion federal case. **(R.pp.000761-801)** This motion was likewise denied by the ALC ("Vacatur Order").

discovery expired 90 days after the notice of assignment of the contested case request. The Ports Authority thereafter gave notice that it intended to file a motion for summary judgment for lack of standing and, in response, Petitioners filed an out-of-time motion to re-open and substantially expand discovery. The ALC found that Petitioners had not satisfied the good cause standard and denied the motion. ("Discovery Order") **(R.pp.000064-68).** However, the ALC later vacated the Discovery Order and alternatively found it to be moot in light of its decision on the Ports Authority's motion for summary judgment on standing. **(R.p.000095)** Notwithstanding its vacatur, the Discovery Order is the second of the three orders challenged in the Petition.

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

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

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(R.pp.000056-63) Petitioners appealed the Vacatur Order to the Court of Appeals, *see* Notice of Appeal (filed April 21, 2014), but the Court declined to address the merits of the denial based on its disposition of the standing issue. **(App.p.11)** Petitioners have abandoned the issue of the Vacatur Order before this Court, however, because they did not raise the issue in the Petition or in their brief. *E.g.*, *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993).

for reconsideration, **(App.pp.75-76)**, Petitioners then sought review by this Court. On August 21, 2018, the Court granted Petitioners' Writ of Certiorari.

STATEMENT OF THE FACTS

The Ports Authority was established in 1942 for "promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State, namely Charleston, Georgetown, and Jasper, and works of internal improvement incident thereto." S.C. Code Ann. § 54-3-110; 1942 S.C. Acts 626, § 2. The Ports Authority is authorized to "do and perform any act or function which may tend to or be useful toward the development and improvement of [the harbors and seaports of Charleston, Georgetown, and Jasper] and to the increase of water borne commerce, foreign and domestic, through such harbors and seaports." S.C. Code Ann. § 54-3-130(9). With respect to Charleston Harbor, the Ports Authority has the mission of developing and improving the harbor "for the handling of water borne commerce from and to any part of the State and other states and foreign countries." S.C. Code Ann. § 54-3-130(1).

Pursuant to its statutory charge and obligations cited above, the Ports Authority has sought to foster, stimulate, and increase water-borne commerce through hosting passenger cruise operations in Charleston. Current cruise operations in Charleston occur on UPT, which is a 63-acre property on the Charleston peninsula located along the Cooper River owned and operated by the Ports Authority as a fully operational marine terminal. **(R.pp.001544-46; 001631)** As currently configured, the northern end of UPT can and has accommodated upwards of 200 cargo ships annually, in addition to the trains and trucks necessary to service those cargo ships, while the southern end of UPT consists of a designated cruise passenger terminal. **(R.pp.001107-1110; 001492-98)** The remainder of UPT consists of a number of warehouses used by the Ports Authority for cruise and other operations, as well as paved, surface parking. *Id.* Since its dedication, UPT

has accommodated roll-on/roll-off cargo facilities used for automobiles, trucks, and heavy equipment, in addition to passenger cruise operations. *Id.*

The cruise industry in Charleston has benefited in recent years by the City's continued and increasing popularity as a tourist destination. The draw of Charleston and the successful cruise partnership with the Ports Authority has resulted in cruise lines designating Charleston as a preferred port-of-call destination,[5] as well as the home port for certain of their passenger vessels.[6] The corresponding increase in cruise vessel calls—and the increase in maritime commerce—has, in turn, contributed to the City of Charleston and the State of South Carolina in numerous ways, including increased local revenue. **(R.pp.001499-1503)**, Aff. of Joseph P. Riley, Jr. ¶4 (Aug. 22, 2011) (noting that the cruise industry has generated approximately $35 million and over 400 jobs).

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

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[5] Port-of-call destinations are those locations that are designated stops on a cruise ship's itinerary, but which do not serve as the port of embark or ultimate disembark for passengers, which is often referred to as a "home port."

[6] Most recently, Carnival Cruise Lines ("Carnival") designated Charleston as the home port of one of its vessels. Currently, that vessel is the Carnival Ecstasy. The Ecstasy is scheduled to be replaced by the Carnival Sunshine beginning in or about May 2019.

For perspective, the only action proposed by the Ports Authority which implicates DHEC's permitting jurisdiction for the Project is the possible installation of *five* (5) additional pile clusters, *see* **(R.pp.003216, 003232)**, amongst the existing approximately 1,008 pile clusters that are currently a part of the support structure under Building #322, which the Ports Authority proposes to renovate, *id.* The additional five pile clusters are the only activity being permitted by DHEC, as the remainder of the work occurs above-ground to Building #322[7] within the existing footprint of an already developed and fully-functioning marine terminal.[8] In fact, the purpose of the additional five pile clusters is to support the construction of three elevators and two escalators in the renovated Building #322 in order to make the terminal more easily accessible to handicap patrons.

The factual premise advanced by Petitioners, which serves as the core contention ungirding their brief, is that the renovation of Building #322 and corresponding shift of cruise operations 600 yards to the northern half of UPT will constitute a significant enlargement of facilities dedicated to cruise operations and will, in turn, shepherd in a massive increase in cruise activity in Charleston. Pet'rs' Br. at 8-10. But this premise is misleading at best. In truth, the Project constitutes a *consolidation* of current operations and impacts as compared to the baseline of cruise operations occurring today on UPT.

First, Petitioners wrongly assert that the new facility will be "a very large terminal" (Pet'rs' Br. at 8), that "would be three times larger than the existing [terminal] ... facilitat[ing] even larger ships coming to Charleston," (*id.* at 9). In truth, while the new cruise operations located in Building

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[7] The UPT Project also includes other activities not subject to the DHEC Permit challenged in this appeal.

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

#322 would consist of 108,000 square feet, compared to the approximate 30,000 square feet of the current cruise terminal (Building #325) that serves only the limited purpose the embarking and debarking area for passengers, current cruise operations on UPT utilize more than 196,400 square feet of covered space on UPT **(R.p.001182)**,[9] *far more* than the Ports Authority's proposed consolidated cruise operations under the capital improvement plan.

Second, although Petitioners contend that the new "larger" terminal will be "engineered to home base 1,000-foot, fifteen-story vessels with some 3,500 persons aboard," (Pet'rs' Br. at 8), "visiting twice a week," (*id.* at 9), this too misrepresents the existing operations. The Ports Authority can accommodate the larger ships that Petitioners identify (3,500 passengers) at its current terminal today, and nothing in the Permit or this litigation impacts the Ports Authority's ability to do so now or in the future. Further, cruise ships are no different in size than the cargo ships that have traditionally called on UPT. **(R.p.001548)**[10] And even under the Ports Authority's voluntary self-limitation of annual cruise ship calls under the VCMP, UPT will have hosted 99

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[9] The existing UPT passenger facilities are comprised of six buildings. **(R.p.001182)** The northernmost building in the complex is Building 304, which has approximately 40,000 square feet of covered warehouse space. **(R.p.001571)** Moving east on the property, Building 303 consists of 42,000 square feet of covered warehouse space. *Id.* To the south is Building 305, which consists of 27,000 square feet of additional covered warehouse space and is also the southernmost existing railroad spur termini on UPT. *Id.* Buildings 301 and 302 are located to the south of Buildings 303-305, with Building 301 located adjacent to the dock apron and consisting of approximately 40,000 square feet and Building 302 located to the west of Building 301 and consisting of an additional 21,000 square feet of warehouse space. *Id.* Combined, Buildings 301-305 house embarking and debarking baggage operations, as well as intake and security offices for the Ports Authority's current cruise operations. Finally, Building 325 serves as the principal passenger terminal building. Built on the wharf, Building 325 is a two-story structure comprising approximately 30,000 square feet and serves as the primary embarking and debarking area for passengers, and houses existing CBP personnel. *Id.* Additionally, Buildings 312 (47,000/sf), 313 (38,000/sf), and 324 (80,000/sf) currently serve as covered warehouse parking for cruise passengers. *Id.*

[10] The photo depicted at **(R.p.001548)**, shows UPT on a day when both a cargo ship and Carnival passenger cruise vessel were calling on UPT at the same time. In addition, Building 322 is depicted in the photo on the wharf next to the Liberty cargo vessel.

cruise ship calls in 2018, *i.e.*, essentially at the twice a week limit, just as it did in 2015 (93 calls), 2016 (96 calls), and 2017 (104 scheduled calls), with 93 calls already scheduled for 2019.

Finally, although Petitioners would have this Court believe that the shift of cruise operations 600 yards to the north would cause the neighborhoods bordering the northern side of UPT to incur new and different impacts, the reality of the baseline conditions is likewise far different than Petitioners represent. In addition to the nearly 200 cargo ships that called on the northern end of UPT annually, including the trains and trucks serviced those cargo ships, current cruise operations already utilize the remaining open-air, paved surfaces of the northern end of UPT for surface-level passenger parking. Current cruise traffic management plans, created in conjunction with the City of Charleston to address prior complaints regarding impacts to traffic and to achieve a net neutral impact in traffic, if not reduction, direct incoming and outgoing passenger cruise traffic and ship store delivery trucks to entrances to UPT off of Concord, Laurens, and Washington Streets, along the northern boundary of UPT. Should the Proposed Project come to fruition, no changes are planned to the current traffic configuration, and the existing surface parking for passengers will be modified slightly, but remain in its existing location.

Further, in anticipation of the permitted upgrades, the Ports Authority has already ceased existing rail operations to UPT through relocating cargo operations to other facilities. As a result, emissions at and around the terminal have and will continue to decrease, including for the areas represented by Petitioners. **(R.pp.001230; 001706-1715; 001717-24; 001726-27)** Finally, once cruise operations have been moved to the northern end of UPT, the Ports Authority has proposed selling the southern end of UPT, consisting of approximately 35 of the 63 total acres, for redevelopment and devotion to public green space at and around the historic United States Customs House. **(R.pp.001107-1110; 001492-98)**

SUMMARY OF ARGUMENT

The Opinion of the Court of Appeals should be affirmed for a number of procedural and substantive reasons. Petitioners did not appeal from the adverse rulings by the ALC on the causation and redressability prongs of the test for Constitutional standing, warranting the application of the two-issue rule to the ALC's standing determination. Beyond that infirmity, Petitioners' call for this Court to abandon its traditional Constitutional standing analysis for challenges to DHEC permits in favor an amorphous and non-existent standard of an "affected person" that simply requires a person request notice of a permit decision to achieve standing, is a sea-change departure from this State's settled standing framework and contrary to the precedent of this Court. On the merits, the Opinion's standing analysis conforms to this Court's holdings in the *Carnival* decision, which involved many of these same parties alleging identical injuries, and correctly held that Petitioners failed to meet their heavy burden in demonstrating an injury-in-fact that is concrete and particularized, and actual or imminent, rather than conjectural or hypothetical, and that is also traceable to the challenged conduct, as well as likely to be redressed by a favorable decision. Finally, the ALC's rulings on the issues of discovery and the imposition of sanctions, to the extent that they are properly before the Court, were well within the ALC's considered exercise of its discretion.

ARGUMENT[11]

I. The two-issue rule precludes the Court's consideration of the standing issue because Petitioners did not seek this Court's review of the adverse "causation" and "redressability" rulings by the ALC, rendering those issues the law of the case.

In order to satisfy Constitutional standing, a party must show all three elements of the test throughout the litigation: "[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury." *Carnival*, 407 S.C. at 75, 753 S.E.2d at 850 (citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001) ("The party seeking to establish standing carries the burden of demonstrating each of the three elements.")). Even if a party identifies a concrete and particularized injury, that is not enough. Instead, the party must also show that their alleged injuries are traceable to the challenged conduct of the defendant and must also put forward a good faith basis for the proposition that a favorable decision of the court would redress the injuries.

Petitioners have not preserved their challenge to the ALC's analysis and express rulings regarding the causation and redressability of their alleged injuries. *See* ALC Order at 11-13 **(R.pp.000087-89)** Initially, in the Petition for Writ of Certiorari to this Court, Petitioners failed to even mention, much less challenge, the ALC's determination that their alleged injuries-in-fact were neither traceable to the conduct of the Ports Authority nor likely to be redressed by a favorable decision on the Permit.[12] In their brief, however, Petitioners attempt to revive their prior

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[11] Any allegation contained in Petitioners' brief that is not expressly addressed or rebutted in this brief is denied.

[12] The Court of Appeals affirmed the ALC's standing analysis, expressly confirming the ALC's rulings on the injury-in-fact and causation elements of standing, Op. at 8-9, while leaving the redressability element undiscussed, presumably under *Futch v. McAllister Towing of*

challenges to the ALC's adverse holdings as to causation and redressability, albeit in a conclusory fashion. Br. of Ptr's at 23 ("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 ...."), at 26 ("Finally, the courts inexplicably ignored testimony and documents from [the Ports Authority]'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 ....").[13] However, Petitioners cannot advance arguments in their briefs to this Court which were not presented in their Petition for Writ of Certiorari. *See McCray v. State*, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995) (holding that an issue not raised in a petition for writ of certiorari but presented in the petitioner's brief is not preserved for the Court's review); *see also Ingle v. State*, 348 S.C. 467, 477 n.4, 560 S.E.2d 401, 406 n.4 (2002) (same). Consequently, Petitioners have abandoned their challenges to the causation and redressability elements of standing.

Moreover, Petitioners' failure to appeal from the ALC's additional holdings on causation and redressability precludes this Court from reaching the issue of standing. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900,

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Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining that the appellate court need not address remaining issues when disposition of prior issues is dispositive), given the complete affirmance of the Opinion.

[13] Collectively, these quotations are the only discussion of the causation and redressability elements of standing in Petitioners' brief and consist solely of self-serving conclusory statements with no analysis or discussion of case law sufficient to meet their burden of good faith persuasion. *See, e.g., Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993).

903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Significantly, the two-issue rule "is applicable under []circumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds required affirmance." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

Here, the ALC's finding that Petitioners lacked standing alternatively was based upon the independent grounds and holdings listed in the Standing Order, namely that Petitioners failed to demonstrate any of the three elements of standing.[14] Petitioners' failure to appeal the remaining standing prongs from the Standing Order means that those grounds independently support the Standing Order and this Court is precluded from addressing Petitioners' standing arguments.

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[14] Although not challenged by Petitioners in their brief, the Ports Authority asserts that the ALC correctly ruled against Petitioners on the elements of causation and redressability, and the Ports Authority relies on its prior filings before the Court of Appeals and ALC on those issues. *See* Mot. for Summ. J. at 43-59 (addressing the causation and redressability elements) **(R.pp.001144-60)**; Reply in Supp. of Mot. for Summ. J. at 31-37 (same) **(R.pp.002839-45)**; COA Br. of Resp. at 19-23. In sum, these prior filings conclusively demonstrate that, in addition to failing to assert valid injuries-in-fact, Petitioners' allegations and supporting affidavits failed to demonstrate that the alleged injuries were traceable to the permitted move of cruise operations to the northern end of UPT, given that the alleged injuries all related to existing cruise operations and were attributable, not to the Ports Authority, which merely put into place the required infrastructure for ships to call at UPT, but rather to third parties not before the court that utilized said infrastructure. *Id.*; *see also Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010); *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Those filings also conclusively demonstrate that Petitioners' allegations and supporting affidavits failed to demonstrate that their alleged injuries would be redressed by a favorable decision of the court, given that cruise operations will continue at UPT at existing or elevated levels, regardless of whether the planned improvements to Building 322 and shift of cruise operations to the northern end of UPT occur. *Id.*

II. The Court of Appeals applied the correct standard to its determination of whether the Petitioners lacked standing to challenge the DHEC Permit and did not err in affirming the ALC's grant of summary judgment against Petitioners.

Petitioners have the burden of establishing standing. *Georgetown County League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011). Standing is conferred by statute; by the constitution; or by the public importance exception.[15] *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). As associations, Petitioners have standing only if one or more of their individual members would have standing. *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001); *see also Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Because neither the associations nor these individual members are the object of the licensing decision, Petitioners' burden to prove standing is "substantially more difficult." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("*Lujan II*")).

This Court reviews a grant of summary judgment using the same standard applied by the ALC. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). Summary judgment must be granted if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether

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[15] Although Petitioners alternatively sought refuge under the public importance exception to standing, they did not seek certiorari to the Court of Appeals' treatment of the issue, *see* Pet. for Writ of Cert., which affirmed the ALC's rejection of the application of the exception to Petitioners and these facts, and Petitioners have likewise not attempted to argue the public importance exception in their brief. Consequently, Petitioners have waived and/or abandoned the issue of public importance standing and it is unpreserved for this Court's review. *See Biales, supra* (holding that the failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal); *State v. Stone*, 290 S.C. 380, 383, 290 S.E.2d 517, 518 (1986) (holding that an exception not argued in the brief is deemed abandoned on appeal); *Smith Land Co.*, 393 S.C. at 354 n. 2, 713 S.E.2d at 289 n. 2 (2011) (holding that the issue of standing was not raised to the Court and therefore was unpreserved for appellate review).

summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 425 S.E.2d 23 (1992). However, the non-moving party cannot simply rest on allegations or denials but must identify facts establishing a genuine issue for trial. *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006). Affidavits proffered by the non-moving party must consist of more than conclusory or speculative allegations of fact or subjective beliefs to survive summary judgment. *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). A non-movant may not simply "replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" to avoid dismissal at summary judgment. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("*Lujan I*"). The general rule for adjudging a summary judgment motion does not allow a court to transform a party's affidavit from what it submitted into what it wished it had submitted. *Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.").

Specific to a determination of standing, "[a]t the summary judgment stage, there must be a factual showing of perceptible harm. Merely affirming an injury is not enough; standing analysis does not involve an 'ingenious academic exercise in the conceivable.'" *Tisdale v. South Carolina Dep't of Health and Envtl. Control*, Docket No. 98-ALJ-07-0079-CC (Sept. 8, 1998) (Bates, J.) (conclusory allegations unsupported by specific facts failed to sufficiently establish the existence of an essential element of standing) (citation omitted). Thus, although "general factual allegations of injury resulting from the defendant's conduct may suffice" at the pleading (and motion to dismiss) stage, "[i]n response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,'" but, instead, must provide specific facts, whether by affidavit or

other evidence. *Lujan II*, 504 U.S. at 561 (quoting *Lujan I*, 497 U.S. at 889); *see also* Fed. R. Civ. P. 56(e); *Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013) (noting that the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case;' therefore, 'each element must be supported ... with the manner and degree of evidence required at the successive stage of the litigation") (quoting *Lujan II*, 504 U.S. at 561).[16]

a. Section 44-1-60 does not establish a lesser standing threshold than that required by the *Lujan-Sea Pines* analysis.

In asking this Court to abandon its existing precedent for standing in administrative challenges to DHEC permit decisions in favor of a lesser "affected person" standard that requires nothing more than requesting notice from DHEC of its decision, Petitioners are advocating a sea change in the standing analysis of this State. It is perhaps strategic, then, that Petitioners never expressly put this requested change in policy and law before the Court in stark relief. To be clear, however, abandonment of Constitutional standing in favor of "affected person" standing is Petitioners precisely what Petitioners are seeking.

Reading Petitioners' brief, one might be confused into thinking that "affected person" standing was already the law, as Petitioners' repeatedly mischaracterize the opinions of the ALC and Court of Appeals as departures from precedent for applying this Court's three-part Constitutional standing rubric to Petitioners' challenge. *E.g.* Br. of Pet'rs at 15-16 ("The courts

[16] Petitioners' assertion that both lower courts misapplied the Rule 56 summary judgment standard in reaching this result, *see* Br. of Pet'rs. at 21-27, demonstrates a misapprehension of their burden of demonstrating constitutional standing at the summary judgment stage. *Smith Land Co.*, 393 S.C. at 358, 713 S.E.2d at 292 ("The party asserting standing bears the burden of proving all of its elements.") (citing *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291). "However, this burden is 'substantially more difficult' where the party bringing the claim was not the object of the action 'but rather seeks to challenge government action or inaction because of the alleged illegality.'" *Id.* (citing *Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589).

below erroneously misapplied and disregarded decades of binding precedent to prevent 'affected persons' from challenging unlawful DHEC permits. . . . 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 . . . .").[17] But that is not the case, however, and based solely on Petitioners' desire to avoid compliance with the Court's traditional three-part *Lujan-Sea Pines* constitutional standing standard.

In short, despite the existing standing framework, Petitioners broadly assert that Section 44-1-60 provides statutory standing to any "affected person." Br. of Pet'rs at 19-21. However, this argument runs contrary to the plain language of the statute, its implementing regulation, and numerous decisions of the ALC, the Court of Appeals, and this Court. *See, e.g., Smiley v. S.C.*

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[17] This has not always been Petitioners' position in this case. In response to the Ports Authority's motion to dismiss for lack of standing, Petitioners acknowledged that the proper standing standard for the Permit is the traditional *Lujan-Sea Pines* Constitutional standing standard. **(R.pp.000362-96)** Petitioners did not argue the statutory standing standard of an "affected person" under Section 44-1-60 at all. *Id.* Likewise, in response to the Ports Authority's motion for summary judgment for lack of standing, Petitioners relegated statutory standing to an afterthought, acknowledging that the traditional *Lujan-Sea Pines* Constitutional standing standard is appropriate here and arguing the three-part test:

> The [ALC] has concluded [in the order denying the motion to dismiss] that if Petitioners sufficiently show "Article III" standing - that is, "injury-in-fact, with a causal com1ection between the injury and the conduct complained of, which is redressable by a decision of this Court" - then they qualify as affected persons" under the statute. [ALC Order denying motion to dismiss] at 12. ***The Community Groups agree***, but would respectfully submit that the statutory term "affected person" turns more on the injury element than causation and redressability, since the statute uses the term "affected person" to delineate the universe of citizens entitled to notice of a DHEC decision and to invoke administrative review of it.

Pet'rs' Resp. to Mot. for Summ. J. at 3-4 (emphasis added) **(R.pp.002325-26)** Only on appeal, after it became apparent that Petitioners could not satisfy the required causation and redressability elements of Constitutional standing, did Petitioners entirely shift the thrust and focus of their standing argument to advocate for a change in law to statutory standing that limits the focus of an "affected person" to allegations of injury alone.

Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (concluding that a person "adversely affected" by a permitting decision pursuant to former § 48-39-150 must satisfy the requirements of "constitutional standing" set forth in *Lujan II*); *see also O'Sullivan v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0491-CC (Jan. 18, 2002) (Geathers, J.) ("The requirement that a person bringing a contested case be 'adversely affected' by the agency's decision is essentially synonymous with traditional standing requirements."); S.C. Code Ann. Regs. 30-6.A ("A [DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by ***an affected person with standing*** pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39.") (emphasis added).[18] In form and practice, as described above, the concepts of statutory and traditional constitutional standing in this setting are one and the same.[19] Thus, under South Carolina law, a person is an "affected person" only when they have standing under the traditional *Lujan-Sea Pines* test.

An "affected person" is not defined under Chapter 1 of Title 44. *Cf., e.g., Carnival*, 407 S.C. at 78-79, 753 S.E.2d 846, 852 (discussing the statutory standing standard expressly provided by S.C. Code Ann. § 6-29-950 in the context of a zoning claim). Section 44-1-60(E) provides only that a person is deemed to be an "affected person" by DHEC for purposes of obtaining notification

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[18] DHEC similarly has averred that an "affected person" means a person meeting the elements of the *Lujan-Sea Pines* standing test. **(R.p.002033)** *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 07-ALJ-21-0107-CC, -0108-CC, Hrg. Trans. at 37 (July 2, 2007) ("[G]enerally the Department's view would be that unless otherwise defined by statute or regulations [the meaning of affected person] would be the equivalent of judicial standing....").

[19] Indeed, this is the result consistently reached by the ALC, and Petitioners have not cited any case in which the ALC, or an appellate court has applied anything other than the Constitutional standing test to decisions of DHEC of this type. *See, e.g.*, Ports Authority Mot. for Summ. J. at 22-24 (collecting cases which expressly require a party to meeting the Constitutional standing test in order to qualify as an affected person and challenge a DHEC decision) **(R.pp.001123-25)**

of DHEC actions if they request, in writing, to be notified of DHEC's decision with respect to the permit, license, or other agency action at issue. Section 44-1-60(F) does not provide a legally protected interest—or statutory standing—to an individual solely based upon their written request of DHEC to be provided notice of the department's decision. Under Petitioners' reading, standing in the context of a permit challenge would be rendered meaningless because, for example, a person in Alaska would have standing to challenge a permit in South Carolina simply by timely submitting a request for review by DHEC and thereafter filing a contested case. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (holding that this Court will reject an interpretation of a statute which leads to an absurd result). Petitioners' argument appears to be based loosely on *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). But that case only determined whether DHEC was required to give notice in those circumstances; it did not evaluate the showing a person must make to challenge issuance of a license in the ALC as an "affected person." *Id.* at 428, 702 S.E.2d at 251 ("In our view, the ALC's and the court of appeals' foray into the degree of 'formality' needed for § 44-1-60(E) 'affected person' status is ***not necessary for deciding this appeal.***") (emphasis added). In light of the subsequent decisions in *Carnival* and *Smiley*, Petitioners' argument fails.

b. Petitioners failed to meet their burden of demonstrating constitutional standing under the *Lujan-Sea Pines* test.

Even if this Court were inclined to disregard Petitioners' failure to appeal the causation and redressability elements of constitutional standing and consider the merits of their arguments, both the Court of Appeals and the ALC correctly determined that Petitioners failed to satisfy the injury-in-fact requirement of constitutional and, by extension, associational standing.[20] Petitioners'

[20] Rather than address the issue of individual standing and associational standing separately, the Court of Appeals collapsed its analysis and analyzed straightaway the first prong

standing argument primarily revolves around their contention that the lower courts both erred in applying at all, or erred in the application of, this Court's *Carnival* decision, which involved many of these same parties. That is a difficult bar to clear, however, as both the ALC and the Court of Appeals reached the exact same conclusion on allegations of the exact same injuries, alleged by many of the exact same parties, and for the exact same activities, as those this Court analyzed in *Carnival*. Op. at 9 (holding that injuries alleged by Petitioners, "even if actually suffered by individual complainants, are 'only generalized grievances suffered by the public as a whole which are insufficient to establish standing.'") (quoting *Carnival,* 407 S.C. at 76, 753 S.E.2d at 851).

Petitioners incorrectly assert that the Opinion stands for the proposition that "particularized harm is rendered a non-cognizable "generalized grievance" if experienced by more than one person." Br. of Pet'rs at 15. That is a mischaracterization. Petitioners presume that their submitted affidavits of individuals qualify their respective associations as having met the standard of a concrete and particularized injury, rather than one that is conjectural or hypothetical. The Opinion correctly holds that Petitioners failed to allege or identify any particularized injury and, instead, alleged or identified only speculative claims shared by the public at large and incident to living in Charleston's urban environment that do not amount to actual or imminent harm. Op. at 9. And

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of the test for associational standing, which is essentially the same as the traditional 3-part constitutional standing analysis, *i.e.*, that one or more of the association's members is able to demonstrate an injury-in-fact, causation, and redressability in their own rights. *See Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589 ("An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). To the extent that this Court considers the Court of Appeals' combination of individual and associational standing to be error, such error is harmless given that the result would be the same if the two concepts were analyzed separately. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

because all of the alleged injuries—including traffic congestion, impacts to air quality and other pollution, increased congestion of Charleston, and general impacts to recreational, environmental, aesthetic and property interests—even if presumed, all are "of general interest common to all members of the public," *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at, 291, and are part and parcel of Petitioners' decisions to live in the urban environment that is the Charleston peninsula.

More significantly, Petitioners' alleged injuries do not establish standing because the harm is attributed to *current* cruise and cargo operations that already occur at UPT today. *See, e.g., Bailey, supra.* Petitioners do not attempt to argue new or additional harm will occur as a result of the Project, as compared to the baseline of activity at UPT of full capacity cargo, train, and cruise operations, as it is indisputable that the Project will have beneficial impacts to each of the identified "injuries" suffered by public who live and work in downtown Charleston. Thus, the ALC and Court of Appeals were correct to find that Petitioners never established a cognizable injury-in-fact that was actual and concrete, and not conjectural or hypothetical as it relates to a proposed, but un-built, cruise terminal. *Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590 (holding that a "[p]rospective concern falls far short of the standard of 'concrete and particularized and ... actual or imminent' harm set forth in *Lujan*"). Petitioners' suggestion that the Opinion holds that standing would only exist if a single person is injured is misplaced hyperbole. Their problem is not the number of people injured, but the nature of the harm they allege.

The Court of Appeals and ALC also correctly determined that the affidavits Petitioners used to support their standing arguments are deficient. But the problems with Petitioners' affidavits extend beyond the absence of expert testimony. For example, the affidavit of Tommy Robertson, conveys nothing more than general grievances that allegedly exist today as a result of *current* operations at UPT but which are not tied specifically to cruise operations and which have no

established connection to a future cruise terminal or cruise ships, or any activity licensed by DHEC. *See* Op. at 3, Standing Order at 10 **(R.p.000086)**; Rule 56(e), SCRCP; *see also, e.g., Bailey, supra* (holding no causation because "potential of having boats mooring at the dock would still exist" regardless of the permitting decision). Again, though, perhaps the most fundamental flaw is that, without a single expert affidavit, Petitioners, through affidavits like Ms. Robertson's, try to connect existing and future operations at UPT to alleged present-day health issues. While Ms. Robertson may certainly describe symptoms she is currently experiencing, as a lay person, she is not qualified to tie her alleged health issues to cruise terminal operations or opine about expected health impacts from future operations. The remainder of her affidavit does no more than articulate inadmissible conclusory opinions and generalized grievances. That does not establish standing.

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

The ALC and the Court of Appeals correctly determined that these affidavits do not show an injury-in-fact. This is consistent with the analysis in *Carnival*, which held that identical generalized allegations do not establish standing. Similar to the deficiencies of Ms. Robertson's affidavit, much of Petitioners' failures to establish standing originate in the fact that, without a single expert affidavit, they tried to connect allegations of present-day health problems resulting from existing cruise operations to future exacerbations from the shift 600 yards to the north through the submission of generalized information concerning health issues that were wholly unconnected to the Cruise Terminal. Contrary to Petitioners' assertions, this was insufficient to meet their burden under Rule 56(e), SCRCP.

Petitioners also misconstrue the Opinion to suggest that the ALC and Court of Appeals "disregarded property owner testimony of diminished value on the basis that standing requires a party produce 'evidence of declining property values and business'" attributable to the permit. Br. of Pet'rs at 25 (quoting Op. at 9). Neither court made such a finding. Rather, the Court of Appeals correctly held that Petitioners' assertions regarding alleged impacts to their properties and businesses, unsupported by expert testimony, were nothing more than the expression of generalized concerns that were wholly unsupported by actual evidence supporting those concerns: "We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses." Op. at 9; *see also Carnival*, 407 S.C. at 76–77, 753 S.E.2d at 851; *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.[21]

[21] No clearer exposition of the courts' appropriate level of skepticism of Petitioners' claims is needed than the circumstances surrounding the submission of the affidavit of Carolyn A. Agnew to this Court in the *Carnival* case by several of the Petitioners. Aff. of Carolyn W. Agnew, Jan. 24, 2012 (Agnew Aff.) *Carnival Corp. v. Historic Ansonborough*, No. 2011-197468 **(R.pp.002046-49)** In her sworn affidavit, Ms. Agnew alleged injuries she suffered to person and property, including diminished property value, resulting from UPT cruise operations near her home in Charleston, South Carolina and in support of the alleged nuisance claims. *Id.*

c. Petitioners are not entitled to maintain this action through associational standing principles.

Beyond the analysis of Petitioners' alleged injuries-in-fact, the Court of Appeals also correctly affirmed the ALC's holding that Petitioners are not entitled to associational standing. Petitioners are a collection of organizations, each made up of individual members.[22] "An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt*, 432 U.S. at 343).

The Court of Appeals held that Petitioners were unable to "satisfy the third required element of associational standing, namely that 'neither the claim asserted nor the relief sought requires the involvement of individual members.'" Op. at 9 (quoting *Hunt*, 432 U.S. at 343).[23] The

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Notwithstanding those assertions, Ms. Agnew executed and filed documents pertaining to the June 2013 sale of her home, including, *inter alia*, the State of South Carolina Residential Property Condition Disclosure Statement, wherein she affirmatively represented to potential buyers the exact *opposite* of the testimony contained in her affidavit. Feb. 5, 2013 Agnew Disclosure Statement (representing Agnew's knowledge of environmental hazards or nuisances, including the existence of noise, odor, smoke, etc., affecting the property as "no") **(R.pp.002051-55)**

[22] Although this motion identifies the individual organizations generally as "Petitioners," each of the Petitioner-organizations must independently satisfy this associational standing requirement with respect to its respective memberships.

[23] Petitioners do not meet the first prong of the *Beaufort Realty-Hunt* analysis based on the fact that, as discussed above, the individual members lack standing. *See Sea Pines*, 345 S.C. 600-01, 550 S.E.2d at 291; *see also Hunt*, 432 U.S. at 342. The second *Beaufort Realty-Hunt* prong also is not present because, for the reasons the ALC fully explains, none of the issues in this lawsuit is germane to any of the Petitioners' respective organizational purposes: challenging the license does not inspire respect for Charleston's material and cultural heritage; protect any structure that adds to the architectural and cultural character of Charleston; foster a spirit of community with the Historic Ansonborough neighborhood; prevent harm to the state's natural resources and preserve quality of life, especially in light of the failure to establish any injury-in-fact arising from the license; protect the 620 members living south of Broad Street in view of the proposal to move cruise operations approximately 600 yards further away; or protect the world's oceans, waves, and

court's analysis was correct because, even if the conclusory and self-serving allegations set forth in the affidavits are taken as true, the alleged injuries affect the individuals personally, rather than as members of the representative associations. Simply put, the nature of the claims as *framed by Petitioners* require participation of their individual members. *See Warth v. Seldin*, 422 U.S. 490 (1975) (denying associational standing because individualized proof was required).

Here, none of the alleged injuries identified by Petitioners have anything to do with or derive from the respective affiants' membership in the organizations. *Id.* at 511 ("[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). In essence, Petitioners are critical of the Opinion's application of the associational standing standard to their alleged injuries despite the fact that Petitioners chose to bring this action as associations, rather than individually. But the ALC, Court of Appeals and now this Court are constrained to evaluating the claims Petitioners' actually advanced, not the claims they now wish they had advanced.

The dissenting opinion in the *Smith Land* opinion of this Court illustrates Petitioners' failure to satisfy the third prong of associational standing. *Smith Land*, 393 S.C. at 360, 713 S.E.2d at 293 (Hearn, J., dissenting). The *Smith Land* dissent analyzes the third prong in light of the underlying purposes of associational standing. Justices Hearn and Kittredge concluded that, in order to satisfy the third prong of the *Hunt* test, the organization asserting its standing must show that the right it seeks to vindicate is common to the membership. *Id.*, 393 S.C. at 360, 713 S.E.2d at 293. Further, the organization must show that the interest at stake in the litigation, which its members assert is harmed, must necessarily derive from their membership in the organization. *Id.*

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beaches, again especially in view of the failure to show any cognizable injury attributable to the license. *See* Standing Order at 15-16. **(R. pp. 000091-92)**

The dissent recognized that while the League of Women Voters alleged that its members suffered and would continue to suffer harm as a result of the permitted activity, the evidence presented by the League of Women Voters was limited to harm alleged by only one member. Pertinent to the issues here, the dissent recognized that injury as to one member of an organization does not extend to the rest of the organization. *Id.*, 393 S.C. at 361, 713 S.E.2d at 293 ("With harm occurring to only one member of the League [of Women Voters] and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one."). Further, the dissent emphasized that the harm suffered by the individual does not, in and of itself, satisfy the associational standing requirement unless the injury suffered flows from the membership in the organization. *Id.*

Applying this sound reasoning here reveals a similar disconnect between the injuries alleged and the ability of the collective organizations to assert the rights of their members. The injuries allegedly suffered—pollution, noise, traffic, property values and aesthetic interests—by individual members do not flow from their membership in the respective associations bringing the action. The affidavits make allegations about their personal experiences with soot, personal fears of breathing air, their forced change of personal driving routes due to traffic concerns associated with the cruise operations, their personal beliefs as to cruise operations and its appropriateness in Charleston, and their fears regarding a reduction in value of their individually properties. However, the individuality of the asserted injuries creates a serious problem in that the third prong of the *Hunt* test cannot be met "when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1252 (4th Cir. 1991).

Petitioners' arguments on associational standing thus continue their misapprehension of the distinction between particularized or generalized injuries for the purposes of an injury-in-fact determination and the standard for associational standing. Associational standing looks at the question of who is the proper party to bring an action; if the allegations are specific to the individual, rather than germane to or deriving from the organization, then the individual is the proper party. For all these reasons, the alleged injuries advanced by Petitioners and relied upon for standing are specific to the respective affiants, not the associations that are parties to this challenge. Petitioners have therefore not met their burden of establishing associational standing.

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

The Court of Appeals correctly affirmed the ALC's rejection of Petitioners' collateral estoppel claim as to standing. In doing so, it reasoned that the ALC's rejection of the issue preclusion claim did not address the question of whether the standing of the plaintiffs in the NEPA Challenge to challenge all government permits was "actually litigated," focusing on the fact the Petitioners admitted that the only issue before the federal court was the federal permit. COA Op. at 11, n.11 and n.12 **(App.p.11)** The Court of Appeals correctly held that the issue of standing as it pertains to this case was not actually litigated before the federal district court.

Initially, Petitioners' argument that the issue of standing was actually litigated by the federal court misapprehends the concept of standing in this context. Standing is not a separate, standalone issue that means the same thing in each case. Instead, standing is a prefatory justiciability consideration that depends on the nature of the underlying challenge. Stated differently, the question of whether a party has standing to challenge something begets the follow-up question of: standing to challenge *what*? The question before the federal court in the NEPA Challenge was standing to challenge the *procedural requirements* of NEPA and the Rivers and

Harbors Act utilized in the federal authorization, *under federal law*. By contrast, the question before this Court is Petitioners' standing to challenge the *substantive terms* of DHEC's Permit, *under state law*. The distinction is not a matter of mere semantics.

In the NEPA Challenge, the federal court was evaluating the conduct of a federal agency under NEPA based on the alleged failures of the Corps to take into account the effects of the project prior to approval of a federal undertaking—a "procedural injury that affects the standing analysis and can relax some requirements." *Ctr. For Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017). "The procedural requirements for NEPA are applicable only to federal agencies," *Northwest Environmental Defense Center v. Rumsfeld*, 2002 WL 1906883, (3rd Cir. April 11, 2002), and the injury in a NEPA inquiry is a procedural, not substantive, injury, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). One who challenges the violation of "a procedural right to protect his concrete interests can assert that right without meeting all the normal standards" for traceability and redressability. *Lujan II*, 504 U.S. at 572 n.7. Moreover, a prior court ruling that a party has standing to challenge an agency's procedural deficiencies under NEPA will not serve as a bar to re-litigation of the party's standing to challenge the substance of the agency's action. *Nat'l Resources Defense Council v. Lujan*, 768 F.Supp. 870, 875-76 (D.D.C. 1991) ("*NRDC*").

Here, Petitioners do not address the differences in the standing analysis for a procedural injury versus a substantive injury. Nor do they address their higher burden of proof to demonstrate standing to challenge substantive terms of a permit in this case. However, because the federal court's standing analysis was predicated on alleged procedural injuries within the context of NEPA, the plaintiffs in the federal litigation needed only to meet a more relaxed standard for standing, not the normal standards applicable for substantive injuries. *Ctr. For Biological*

Diversity, 868 F.3d at 817. As a result, standing to seek relief for a procedural injury under NEPA does not present an "identical issue" as standing to seek relief for a substantive injury, even under NEPA. *NRDC*, 768 F.Supp. at 875-76. Recognizing this distinction, the ALC correctly determined that issue preclusion was not applicable because the federal court's inquiry only addressed "the federal process," *see* Standing Order at 3 n.2. **(R. pp. 000079)**, not the substantive issue in the state-issued permits. Petitioners had the burden of establishing that the federal court actually litigated the issue of their Article III standing to seek redress for both procedural and substantive injuries, but Petitioners failed to meet that burden, relying instead solely on unsupported conclusory statements that lacked the analysis of the actual issue being advanced. Because both the ALC and Court of Appeals recognized this difference and correctly determined that the issue of standing as it pertains to this case was not "actually litigated" in the federal court, the decisions of these courts should be affirmed on this issue.

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

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

In appealing the Sanctions Order and arguing that they acted reasonably in advancing a motion to remand, Petitioners rely principally upon the supposed reasonableness of their construction of Section 44-1-60(F). However, Petitioners did not appeal the Remand Order, which flatly rejected the reasonableness of Petitioners' construction in clear and unambiguous holdings. **(R.pp.000009-000011)**, Remand Order at 4 (rejecting Petitioners' argument and instead holding that subsection (F) "obviously recognizes the existence of discretion," and the DHEC "Board could not decline to do a mandatory act"). Although the Remand Order was not immediately appealable, Petitioners were required to appeal the Remand Order as a part of this appeal because the ALC's holdings in the Remand Order as to the reasonableness of Petitioners' arguments formed the sole

basis of the ALC's determination in the Sanctions Order that the motion to remand was frivolous. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). In light of Petitioners' failure to appeal the Remand Order, the findings of the order are the law of the case and may not be reviewed by this Court. *See Atl. Coast Builders, supra.* Petitioners' challenge of the ALC's construction of Section 44-1-60(F) therefore is unpreserved for this Court's review. *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

b. S.C. Code Ann. § 44-1-60(F) unambiguously establishes a discretionary standard for conducting final review conferences by the DHEC Board.

Even if the Court were inclined to allow Petitioners to make arguments contrary to the ALC's holdings from the unappealed Remand Order, Petitioners' argument that Section 44-1-60(F) requires a mandatory final review conference is patently unreasonable given the plain language of the statute and Petitioners' deliberate omission of contrary portions of the statute in their motion to the ALC. The statute provides as follows:

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

§ 44-1-60(F) (emphasis added). Thus, the DHEC Board plainly has the option of either holding a review conference or declining to do so in writing. In other words, not only does the statute contemplate the DHEC Board's discretion to decline review of a staff decision, it specifically

provides for it. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing."). Moreover, the Board's discretion is further recognized in Section 44-1-60(G)(1), which provides, *inter alia*, the time frame wherein a DHEC staff decision may request a contested case with the ALC, stating that a contested case request may be filed 30 days after "notice is mailed to the applicant, permittee, licensee, and affected persons that the ***board declined to hold a final review conference***." (Emphasis added).

In their motion to remand and again to this Court, Petitioners' rely exclusively upon the word "must" in the first sentence of subsection (F), arguing that its use connotes a mandatory duty by the DHEC Board to conduct a final review conference. Petitioners fault the Court of Appeals' characterization of the motion to remand as "'disregarding[ing]' other language 'indicating' that ALC review is available if the Board 'declines' to hold said conference," stating once again that Petitioners "did not disregard th[e] language [of § 44-1-60(F)]," and instead "addressed it directly." Pet'rs' Br. At 36. These statements are demonstrably false, however. Even a cursory review of the motion to remand shows that Petitioners quoted only the first sentence of subsection (F) and did not cite, *at all*, the language referencing the DHEC Board's discretion to decline to conduct a final review conference. **(R.pp.000157-58)**, Pet'rs' Motion to Remand. However, "[i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. [Further, a] statute should not be construed by concentrating on an isolated phrase." *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

Petitioners' efforts to avoid the discretionary language of Section 44-1-60(F) through hyperemphasis of a single word in a single sentence contained in the statute is a frivolous

argument. *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong."). Contrary to Petitioners' arguments, the mandatory requirements applicable to final review conferences, *i.e.*, "must" and "shall" referenced in Section 44-1-60(F), referring to the time period and manner in which the final review conference must be conducted, are clearly only applicable *if* the DHEC Board decides to conduct a final review conference.

Further, although Petitioners now assert that "the meaning of the language at issue here *has never been litigated before this case*," Pet'rs' Br. at 21 (emphasis in original), that statement is also false. Both the ALC and the appellate courts of this state have expressly recognized the Board's discretion to decline to conduct a final review conference. **(R.pp.000191-92)**, Ports Authority Resp. to Mot. to Remand at 10-11 (collecting ALC orders and opinions of Court of Appeals and Supreme Court). Moreover, given Petitioners' assertion once more of "a strong record of success in important cases" by "Petitioners' attorneys ... before this Court," Pet'rs' Br. at 37, it bears repeating that Petitioner South Carolina Coastal Conservation League (League) and its counsel (including the same counsel representing Petitioners in the present case and appeal) affirmatively represented to this Court that a final review conference by the DHEC Board is optional and discretionary:

> **The Board has the option of conducting a conference or not after a request for review is made.** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F).

(R.p.000218) (emphasis added). Thus, the League and its counsel previously have acknowledged the plain and unambiguous operation of the statutory scheme before this Court, conducted themselves in accordance with the statutory scheme for years and in numerous permitting

challenges, and reversed course in this case only in an effort to delay the ALC proceedings through the motion to remand.

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

Given the unambiguous language of Section 44-1-60(F), the ALC correctly found that Petitioners' motion to remand was unreasonable and frivolous. The imposition of sanctions is reviewed on appeal as an equitable matter, subject to the discretionary authority of the lower court. *E.g., Ex parte Gregory*, 378 S.C. 430, 436-37, 663 S.E.2d 46, 50 (2008). The appellate court reviews the findings of fact of the lower court, taking its own view of the evidence; where the appellate court concurs in the findings of the lower court, the award of sanctions is reviewed under a discretionary standard and will not be disturbed absent a clear abuse of discretion. *Id.*, 378 S.C. at 437, 663 S.E.2d at 50 (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)). An abuse of discretion occurs only when the lower court's conclusions are without reasonable factual support. *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989)).

In support of its determination, the ALC made three factual findings supported by reference to the statute, case law, and other pertinent materials: "Given [1] the clear statutory language, [2] the case law directly recognizing the discretionary nature of DHEC Board review and [3] prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand." Sanctions Order at 6 **(R.p.000074)** Each of the ALC's findings is supported by reference to the statute, case law, and other pertinent materials. Moreover, none of the findings are properly challenged by Petitioners on appeal. As discussed above, Petitioners failed to appeal from the Remand Order, which found that the motion to remand "had no basis in law and was contrary to the language and intent of the statute." Sanctions Order at 4 **(R.p.000100)**

Meanwhile, Petitioners' brief does not address the case law of both the ALC and appellate courts which recognized the discretionary nature of the DHEC Board's review, *see supra* at 33 **((R.pp.000191-92)**, Ports Authority Resp. to Mot. to Remand at 10-11), and upon which the ALC relied, *see* Sanctions Order at 4-5 n.5 **(R.pp.000100-101)**. Nor do Petitioners' challenge the adverse inference drawn by the ALC with respect to Petitioner League's prior acknowledgment to this Court of the discretionary nature of the DHEC Board's review, instead merely noting the ALC's reliance on it without argument. Pet'rs' Br. at 36 n.8. Accordingly, this Court is constrained to considering only whether the ALC abused its discretion in awarding sanctions based on the unchallenged facts. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn, supra*).

d. There is no "bad faith" finding requirement to the imposition of sanctions under Rule 72, RPALC.

In challenging the Sanctions Order, Petitioners misapprehend the ALC's standard for sanctions under Rule 72, RPALC. Rather than make the admittedly difficult argument that they acted reasonably in moving to remand, Petitioners instead argue an inverse application: because they believed their actions to be novel (according to them and despite evidence to the contrary), there was no bad faith. Pet'rs' Br. at 37 ("Sanctions under Rule 11 are an extraordinary remedy reserved for pleadings or arguments that are frivolous[24] or offered in bad faith. There was no evidence of bad faith here ....") (citation omitted). However, neither Rule 72 nor the Sanctions Act requires a finding of bad faith as a basis for sanctions. *See* Sanctions Order at 2-3 (setting forth the standard under Rule 72, RPALC, including its reference to S.C. Code Ann. § 15-36-10 (Frivolous Civil Proceeding Sanctions Act ("Sanctions Act")) (citing Rule 72, RPALC, 2009

[24] Petitioners thus acknowledge that sanctions are appropriate for pleadings that are not offered in bad faith but are merely frivolous, which is precisely what the ALC found in this case in determining that Petitioners' motion met the definition of "frivolous." Sanctions Order at 5-6 **(R.p.000101-102)** Again, Petitioners did not challenge the ALC's analysis of the term "frivolous."

Revised Notes). **(R. pp. 000070-71)** Therefore, Petitioners' contention regarding the arguable lack of "bad faith" present in this case, compared to other non-ALC cases which have imposed sanctions based on other standards, is ultimately beside the point.

Similarly, the ALC properly rejected the "reasonable attorney" affidavits submitted by the Petitioners. The ALC correctly found that neither affidavit was persuasive on the issue of the frivolity of the motion to remand. Sanctions Order at 5-6 **(R. pp. 000073-74)** The first affidavit, **(R.pp.000431-35)** (Bouch Aff.), was biased because it was submitted by a member of the law firm representing Petitioners. The other affiant, **(R.pp.000427-29)** (Linton Aff.), had no demonstrable practice experience in the administrative arena before DHEC or the ALC. In sum, both affidavits are merely impermissible testimony on issues of law, *see Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437, with no attempt to aver that the opinions contained in the affidavits were based on personal knowledge, or that either affiant is an expert in this area of the law. The ALC was correct to reject the submitted affidavits.

e. Petitioners fail to appeal the imposition and amount of attorneys' fees as a reasonable sanction.

Finally, in challenging the Sanctions Order, Petitioners do not appeal from the ALC's determination that a monetary sanction in the form of an award of attorneys' fees and costs incurred by the Ports Authority is the appropriate remedy for its determination that the motion to remand was frivolous. Nor do Petitioners appeal from the amount—$9,300.00—of attorneys' fees awarded.[25] Accordingly, those rulings are the law of the case and beyond the scope of review. *See Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285. Petitioners' failure to appeal both the

[25] Indeed, counsel for the Petitioners represented to the ALC that "[w]e certainly will accept anything the court wishes to do" on the motion for sanctions. *See* September 6, 2013 Hrg. Tr. at 74:4-6. **(R. p. 003115)**

award and amount of attorneys' fees means that, should this Court agree that the ALC did not abuse its discretion in awarding sanctions, the sanctions inquiry is concluded and the imposition and amount of attorneys' fees must be sustained by the Court. Regardless, the ALC's award of the attorneys' fees attributable to the Ports Authority's defense of the motion to remand is directly related to the sanctioned conduct. *See Balloon Plantation v. Head Balloons,* 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (holding that a sanction should be aimed at the specific misconduct of the party sanctioned).

V. The Court of Appeals correctly determined that Petitioners are not entitled to relief from the denial of the motion to re-open discovery.[26]

The Discovery Order is not properly before the Court, as it was vacated by the ALC. Under Rule 21.A, RPALC, parties to a contested case are afforded 90 days from the date of the Notice of Assignment of the case to an Administrative Law Judge to complete discovery. However, "[u]pon motion for good cause shown or upon his own motion, discovery may be expanded or curtailed by the administrative law judge." *Id.* In this case, the parties engaged in discovery during the time periods provided in Rule 21.A, RPALC. Petitioners served interrogatories and requests to produce during this 90-day period. Under Rule 21.A, RPALC, the 90-day discovery period expired on May 20, 2013. Discovery Order at 1-2 **(R. p. 000064-65)** Neither party sought to expand discovery.

Petitioners' request to re-open discovery was not prompted by any identified need for discovery, but was merely an additional delay tactic (similar to the motion to remand). In an email exchange between the respective counsels and the ALC regarding scheduling issues of then-pending motions before the ALC, counsel for the Ports Authority commented that the period for discovery had long-since closed, and that the Ports Authority intended on filing a motion for

[26] Should the Court agree that Petitioners lack standing, it need not reach this issue. *See Futch,* 335 S.C. at 613, 518 S.E.2d at 598 (1999).

summary judgment for lack of jurisdiction (standing). **(R.pp.002255-58)** ("Although discovery has closed ... it seems unlikely that this case will be ready (or even appropriate) for trial on the merits the week of January 27.") On January 23, 2013, a mere five days after the E-mail exchange with the Court but over seven months after the period for discovery had closed under Rule 21.A, RPALC, Petitioners filed a motion to re-open discovery for a period of 90 days and leave to take up to ten depositions. **(R.pp.001041-46)** Petitioners' motion did not address the "good cause" standard set forth in Rule 21.A. *Id.* The ALC initially denied the motion in the Discovery Order, **(R.pp.000064-68)**, but after Petitioners moved for reconsideration, it made the following determination in the Standing Order:

> Petitioners filed a Motion for Reconsideration of this Court's Order of March 3, 2014, denying Petitioner's Motion to Expand Discovery on March 13, 2014. In response to the Court's e-mail inquiry on March 24, 2014, counsel for **Petitioners represented to the Court that Petitioners sought expanded discovery in order to prepare for the hearing on the merits** and not for purposes of responding to the Motion for Summary Judgment. Therefore, **the Order denying Petitioners' Motion to Expand Discovery is vacated**. Nevertheless, **in light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied**. Likewise, all remaining outstanding motions are moot and are also denied.

Standing Order at 19 n.23 (emphasis added) **(R. p. 000095)**

a. None of the ALC's discovery rulings are properly before the Court because the ALC vacated the Discovery Order and because Petitioners failed to challenge the denial of their motion to re-open discovery as moot.

The Discovery Order is not appealable because the ALC vacated that order, rendering it null and void. *See Ware v. Ware*, 404 S.C. 1, 11, 743 S.E.2d 817, 822 (2013) ("A void judgment is one that, from its inception, is a complete nullity and is without legal effect.") (internal quotation marks omitted). A void order is without effect. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice "was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father"); Black's

Law Dictionary (9th ed. 2009) (defining vacate as to "nullify or cancel; make void; invalidate <the court vacated the judgment>"). The attempted appeal from the Discovery Order is therefore not properly before the Court. *Brennan's, Inc. v. Colbert*, 125 So. 3d 537, 541, *on reh'g* (Ct. App. La. Nov. 15, 2013) (holding there is no appeal "from an absolutely null order"); *cf. Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (dismissing appeal from void order); *Rice v. Alpha Sec., Inc.*, 2014 WL 703760 (4th Cir. Feb. 25, 2014) ("Once Rice successfully moved to have her nonsuit vacated, it ceased to exist, and effectively, it never did. It therefore could not have any further effect on the litigation, because it is as if it never occurred."). Although Petitioners' ignore the ALC's vacation of its order in their brief, the Discovery Order in effect never existed and cannot form a basis for Petitioners' appeal. *Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding that court of appeals should have dismissed an appeal from a void order and left intact a prior order by the lower court remanding the case to a single workers' compensation commissioner).

Petitioners have likewise waived their right to challenge the vacatur of the Discovery Order and the denial of their motion to re-open discovery as moot. Petitioners' fifth issue and associated discussion is directed entirely to the initial Discovery Order alone and, thus, does not raise any other discovery arguments. Br. of Pet'rs at 1, 38-42; *see* Rule 208(b)(1)(B), SCACR. Petitioners therefore have abandoned the issue by limiting their argument to the Discovery Order alone and failing to mention the subsequent actions by the ALC. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Finally, Petitioners

affirmatively waived any claim for additional discovery because they affirmatively represented[27] that they sought to re-open discovery only for the merits trial and not to respond to the Ports Authority's motion for summary judgment. Standing Order at 19 n.23. **(R. p. 000095)** Accordingly, the Discovery Order is not properly before the Court.

b. Even if the Discovery Order were not vacated or alternatively mooted, and is properly raised in this appeal, the ALC did not abuse its discretion in denying the motion to re-open discovery.

On the merits of the Discovery Order, the parties had 90 days to complete discovery or timely seek leave of the ALC for an extension by presenting good cause for more time. Rule 21.A, RPALC. The 90-day discovery period expired on May 20, 2013. Discovery Order at 2 **(R.p.000065)** Petitioners served interrogatories and requests for production during this 90-day period. *Id.* Petitioners' motion was not filed until December 23, 2013, more than seven months *after* the 90-day period expired. **(R.pp.001041-1045)** The ALC's rulings on discovery issues are reviewed for abuse of discretion. *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). These determinations are given deference "absent a clear showing of an abuse of discretion." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001). Petitioners have the burden of providing an abuse of discretion. *Dunn, supra.*

Petitioners do not explain why they did not seek additional discovery until approximately one month before the original trial date in January 2014, and only after the Ports Authority stated

[27] Having expressly stated that they needed to re-open discovery only for trial preparation and acknowledging that the discovery would be ripe for resolution after the standing issue was resolved, Petitioners are judicially estopped from taking a contrary position. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."); *see also Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2003) (evaluating elements of judicial estoppel by considering, among other things, a statement made by a party's counsel).

that it intended to file a motion for summary judgment. Discovery Order at 3 **(R.p.000066)** In their brief, Petitioners advance only mistaken beliefs as to how the other parties and the ALC were conducting themselves as an excuse for their failure to do likewise.[28] Br. of Pet'rs at 38-41. At bottom, Petitioners' argument is that the motion to re-open discovery should have been granted because the ALC's discovery rules are "observed mainly in the breach," Br. of Pet'rs at 40-41, and that it is "standard practice" in the ALC to avoid "inflexible adherence to SCALC Rule 21" and instead ignore the discovery deadline, *id.*[29] This is not enough to demonstrate good cause for filing a motion to re-open and expand discovery seven months late. *See* Discovery Order at 3 ("Petitioners ... in no way have been hindered from seeking to expand the length and/or scope of discovery ***within the applicable ninety-day discovery period***.") (emphasis added) **(R. p. 000066)**; *see also Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired); *Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) (holding that litigant must show excusable neglect rather than good cause for untimely motion to extend discovery deadlines); *Derrick v. Johnson Controls, Inc.*, 3:10-CV-3295-CMC, 2012 WL 2072782 (D.S.C. June 8, 2012) (unpublished) ("If a party was not diligent, the good cause inquiry should end.").

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[28] Petitioners' self-serving timeline, Br. of Pet'rs at 38-40, does not establish any relevant point other than to underscore the fact that there were many months in which Petitioners could have—but did not—filed a motion to expand or otherwise seek additional discovery even after the 90-day discovery period expired. *See* Discovery Order at 2. **(R.p.000065)**

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

In the end, Petitioners do not provide any adequate explanation for their failure to comply with the ALC's procedural rules. Characterizing the rules of procedure as suggestions and failing to act diligently under those rules does not constitute good cause, let alone excusable neglect. The record supports the ALC's determination in that regard; therefore, no abuse of discretion occurred.

CONCLUSION

For the reasons explained above, the decisions of the ALC and Court of Appeals should be affirmed.

Respectfully submitted,

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November 27, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

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

Appellate Case No. 2018-000137

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

v.

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

PROOF OF SERVICE

This is to certify that I, Laura Lee Andrews, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the Brief of Respondent South Carolina State Ports Authority by placing the same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed respectively as follows:

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