THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge
Case No. 13-ALJ-07-0056-CC
Appellant Case No. 2014-000847

Supreme Court Case No. 2018-000137

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

v.

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

PETITIONERS' REPLY BRIEF TO SOUTH CAROLINA STATE PORTS AUTHORITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Rather than respond substantively to Petitioners' extensive citation to record evidence and controlling case law, South Carolina Ports Authority's ("SPA") brief attempts to take the Court down countless rabbit holes.

All are dead ends. Removed of their rhetorical dressing, SPA's assertions are meritless, and they fail to cure the multiple reversible errors committed below.

FACTS

SPA tells the Court that its $35 million, 108,000 square foot cruise terminal will change nothing. SPA 2. That claim, counterintuitive on its face, is demonstrably counterfactual on the record. In SPA's joint federal and state application[1] for its project, SPA stated:

> *With continued growth of the cruise business and especially with the current terminal security requirements, the need for a new facility has become critical.* To address the requirements of new Federal regulations, in 2007 the SCSPA entered into a Memorandum of Understanding with US Customs and Border Protection (CBP) for the ***conditional approval*** of ongoing cruise operations on a trial basis. That conditional approval ***has been renewed on an annual basis with the understanding that an improved facility would be needed for continued operations.*** R.001243

This and other SPA statements demonstrate that without its project, cruise operations could not legally continue. *See* R.002473 (SPA: "the facility must be updated to comply with the Maritime Transportation Security Act of 2002 (post-9/11 requirements)"); R.002479 (SPA: "urgently needs upgrades to properly serve passengers and ships and to conform to post-9/11 security standards").

Beyond being "needed for continued operations," SPA has been "very clear"

[1] Making materially false statements on a federal permit application is a violation of federal law. 18 U.S.C. § 1001(a)(2).

on the "urgent need to improve our passenger terminal facilities," R.002470, and its desire to build a new terminal to "accommodate the *growing demands* of the cruise industry," R.002438 (emphasis added). In SPA's own words, its existing terminal is "desolate," "undistinguished," "out-of-date," and "unattractive," R.002481, R.002482, with operations conducted in tents due to a lack of indoor space, R.02436. SPA views Charleston as "a very attractive destination for cruise ships from all over the world," and "[i]n order to meet this demand, [SPA] need[s] to modernize and update [its] one-berth cruise facility" R.002474. Asked if its $35 million investment would lead to increased cruise activity, an SPA official responded: "you can be sure we wouldn't pursue the business if it didn't make economic sense." R.002488.

In addition to showing that a proposed terminal will allow cruise operations to continue, and grow, beyond what they otherwise could, SPA's own documents also undercut its new claim that the project would shrink its impacts. SPA 8-9. It is undisputed that the proposed 108,000 feet^2 terminal building would be three times larger than the existing one. SPA's contends for the first time in years of litigation that the new operation would take up less space than the existing one. SPA 10. Yet SPA admits it is selling "35 of the total 63 acres" of UPT for redevelopment, SPA 10, which would leave 28 acres (1,219,680 feet^2) for the new operation: an area four times *larger* than the facilities SPA says comprise its existing operation.

SPA next suggests that the "baseline" for evaluating a new terminal's impacts is existing cargo operations of 200 ships a year and rail and trucking operations. SPA 6, 10. In fact, SPA ceased rail operations almost a decade ago when

it completed a major project to move them to a different terminal.[2] Because SPA cannot legally continue or expand cruise operations without a new terminal, the proper baseline is *no* cruise operations at UPT.

SPA's claim that its existing terminal can "accommodate" ships with 3,500 passengers, SPA 9, made with no citation to the record, contradicts multiple documents in it. *See, e.g.*, R.001243 (indicating home basing operation for 2,500 passenger ship not in compliance with federal safety regulations); R.002426 (small antiquated facility makes home basing even a 2,500 passenger ship "exceptionally cumbersome"). Of course, "accommodating" a port-of-call vessel does not mean "home-porting" one: the latter requires far more infrastructure and space to properly and safely handle and process passengers, luggage, and supplies. The space needed by security personnel alone to meet federal security requirements to home base a 3,500-passenger vessel is 28,000 square feet—*the size of the entire existing terminal building*. R.002459, R. 1591. SPA's proposed terminal is specifically designed to home base vessels with 3,500 passengers, about 1,000 more than aboard the vessel currently based at SPA's existing terminal.[3]

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[2] In March of 2011, SPA announced that "daily trainloads of vehicles will no longer enter Union Pier Terminal." R.002437. SPA's own memorandum regarding criteria pollutant emissions shows that, in baseline year 2012, the "only significant activity at UPT was the use of the terminal for passenger cruise ships." R.001717

[3] *See* SPA 7 n.6. The Carnival *Ecstasy* carries 2,600 passengers, while the proposed terminal is engineered to home base a cruise vessel with 3,500-passengers. R.002439; R.002468; R.002462. In fact, the facility is sized accommodate a vessel 1,100 feet length overall, with a 160-foot beam, R.002457, the dimensions of a 4,100-passenger vessel. Existing mooring and bollard systems would be upgraded to accommodate the larger vessels, R.002451-52; R.002444. SPA has also acquired a passenger-loading ramp capable of servicing a vessel with 4,500 passengers. R.001794, R.001888, R.002600.

Finally, SPA claims—again, without no record citation—that Petitioners are a "vocal minority" seeking to "derail" the project "all because the Project does not align with the minority's vision for Charleston and their preferred kind of tourists." SPA 3. In reality, Petitioners are neighbors and community groups who researched and proposed options for reducing impacts from cruise operations to protect their health, homes, and environment. They recommended several feasible measures to the South Carolina Department of Health and Environmental Control ("DHEC") that would reduce impacts—such as shorepower, prohibitions on dirty water discharges, and binding limits on ship size and frequency.[4] DHEC, aligned with the wishes of its big-sister state agency, unlawfully refused to consider the measures. Petitioners therefore exercised the rights given by the General Assembly for "affected persons" to request administrative review of DHEC's decisions pursuant to S.C. Code Ann. § 44-1-60.

ARGUMENT

I. Because Record Evidence Showed Standing Under Any Test, Summary Judgment Against Petitioners Was Error

A. The Proper Legal Test Is Whether Petitioners Are "Affected Persons" Under S.C. Code Ann. § 44-1-60

All parties agree: in South Carolina"[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." *ATC S. Inc. v. Charleston County*, 380 S.C. 191, 195, 669

[4] SPA's "*Voluntary* Cruise Management Plan" merely obligates SPA to inform the City of Charleston in advance when and if it exceeds 104 vessels per year or ship size limits, with no enforcement mechanism. As an SPA executive told Carnival, it "does not limit or impact in any way the cruise business in Charleston." R.002433

S.E.2d 337, 339 (2008). If Petitioners have statutory standing as "affected persons" under S.C. Code Ann. § 44-1-60(E), (F), they need not show Article III constitutional standing. *Youngblood v. S.C. DSS*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (constitutional standing applies when "*no* statute confers standing").

Determining "whether a statute confers a standing [on a party] is an exercise in statutory interpretation." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. As we showed in our Opening Brief, the best interpretation of "affected person" is one who injured by a DHEC permit decision. Br. 19. By creating an administrative remedy for "affected persons," the General Assembly showed "evident intent" to make agency actions reviewable, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchack*, 567 U.S. 209, 225 (2012). This means the standing inquiry should focus on "affected person" status rather than the adequacy of the provided remedy for redress. *See Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014).

The Administrative Law Court ("ALC") correctly observed that "a statute can confer standing even though it does not exist via the constitutional test," R.0048, in denying SPA's motion to dismiss for lack of standing. ALC nevertheless contends, and the ALC agreed, that § 44-1-60 *also requires* constitutional standing, SPA 17-20 (citing *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001), *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007)).

Those cases do not require that an "affected person" under § 44-1-60 must show constitutional standing In *Sea Pines*, a homeowner association filed suit in

Circuit Court to enjoin a Department of Natural Resources-authorized deer culling program on Hilton Head. This Court applied Article III precedent to find that the citizens lacked standing to pursue their due process claims. 345 S.C. at 603, 550 S.E.2d at 292. But the Court went on to consider the plaintiffs' challenges to DNR's permitting decisions on the merits. *Id. Sea Pines* thus stands for the proposition that constitutional standing is *not* required to challenge state-issued environmental permits. And while *Smiley* cites *Sea Pines* without analysis in applying constitutional standing in a different permit-appeal context, the decision turns on Mr. Smiley's alleged *injury*, consistent with our view that "affected person" standing turns on injury. *Smiley*, 374 S.C. at 331, 649 S.E.2d at 33. More importantly, *Smiley* was decided before the Court clarified, in *ATC South,* that statutory standing and constitutional standing are independent. 380 S.C. at 195, 669 S.E.2d at 339.[5]

The best reading of the statute in light of these authorities is that "affected person" statutory standing turns on whether a party would be injured by a DHEC permitting decision. There is no legal basis for injecting other requirements—e.g., making affected persons prove that the General Assembly's administrative remedy satisfies federal "redressability" test—into the statute. If a party is an "affected

[5] The statute at issue in this case, § 44-1-60, superseded the administrative appeal procedure addressed in *Smiley* and controls over vestigial regulatory provisions including Regulation 30-6, cited by SPA. *See* S.C. Act No. 387 § 53 (June 9, 2006). Regulation 30-6's use of the term "affected person with standing" merely supports Petitioners' position that "affected person" and constitutional "standing" are indeed distinct. *In the Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous") (internal quotation omitted).

person," they are entitled to invoke the review procedure of § 44-1-60.[6] Petitioners more than made that showing. Br. 9-12. The courts below erred by requiring more.

B. *Carnival* Did Not Alter Existing Law So As to Preclude Standing

SPA erroneously contends that, under *Carnival*, no standing is possible here because the "nature" of the harms makes them "generalized grievances" suffered by the "public as a whole" and "insufficient to establish standing." SPA 21 (quoting Op. at 9 (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 847, 851 (2014))). That is incorrect.

The Plaintiffs in *Carnival* filed a complaint in Circuit Court asserting nuisance and zoning claims with heightened standing requirements ("special injury" and "special damages," respectively). *Carnival*, 407 S.C. at 78–79, 753 S.E.2d at 852. The Court, based "solely on the allegations set forth in the complaint," *id.*, 407 S.C. at 74, 753 S.E.2d at 850, found that the injuries alleged—e.g., reduced "use and enjoyment of the local environment and Charleston's historic assets," R.02102—did not include "particularized harm" to support standing, *id.*, at 75–77, 753 S.E.2d at 850-51. At the same time, the Court recognized the claims "could be brought by other parties who can show the required injury." *Id.* at 81, 753 S.E.2d at 853.[7]

Here, the Petitioners showed particularized injury with overwhelming

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[6] SPA is mistaken in claiming, SPA 20, that our reading of § 44-1-60 would allow persons in Alaska to challenge DHEC permits. Rather than give standing to any person who requests notice of a DHEC decision, only an injured party would have standing, and because DHEC only permits projects in South Carolina its actions would give no rise to injury in Alaska.

[7] This refutes SPA's implication that *Carnival* precludes standing for any persons injured by cruise facilities or ships, SPA 21. Notably, SPA does not argue that *Carnival* is *res judicata*.

evidence. For example, Mrs. Robertson testified that the proposed terminal would be immediately adjacent to her home, R.002588; that "thick black smoke" from the more distant existing terminal envelopes her home, causing throat pain and difficulty breathing "within seconds" and forcing her "retreat indoors," R.002588–89; that this pollution is so "unbearable [she] can no longer open her windows or enjoy [her] porch while the cruise ships are in town," R.002589; and that a larger terminal much closer to her home would "significantly increase[]" her injuries, both "exacerbating the adverse effects" she is already experiencing and causing more "interference with the use and enjoyment of [her] property." R.002588–90.

It is hard to conceive of injury more particularized than pollution covering an individual's home and causing them to gag. The record thus distinguishes *Carnival.* Nor is SPA correct to contend that *Carnival* categorically excludes such harms as "nothing more than general grievances" where they are experienced by more than one person because they are "part and parcel" of living in the "urban environment of the Charleston Peninsula." SPA 22. *Carnival* hinged on the lack of particularized harm, not the surfeit of it, and SPA's theory would provide the least standing where particularized harm is greatest. That result is as perverse as it is legally untenable. *See, e.g., Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1988) (holding that if an injury is sufficiently personal to an individual, it is not defeated because it is "widely shared"); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). *Carnival* if anything underlines the need to show individual harm where "special injury" and "special damages" are required. It does not prohibit multiple persons with

particularized injuries from qualifying as "affected persons," which would conflict with the statute's provision of plural standing. Br. 19-20.

C. The Complete Disregard of Non-Movants' Standing Evidence on Summary Judgment Was Reversible Error

Petitioners' evidence overwhelmingly demonstrated standing under any legal test, statutory or constitutional, distinguishing *Carnival* and making summary judgment against them plain error. SPA attempts to justify the lower courts' disregard of evidence with vague, general claims that standing witnesses who testified to matters within their experience and impacts on their homes, health, and wellbeing are not "not qualified" as experts to "opine about expected health impacts." SPA 23. SPA cites no law to support its aspersions, and fails completely to answer our demonstration that precedent forecloses them.

To summarize, the law clearly permits lay witnesses to testify as to standing without being qualified experts. *Friends of the Earth, Inc. v. Laidlaw, Envtl, Servs. (TOC), Inc.*, 528 U.S. 167, 181–184 (2000) ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity," crediting testimony that water "looked and smelled polluted.").[8] The standing witnesses here plainly laid out the basis for their

[8] *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) (a plaintiff "'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged' in the specific geographic area of concern.") (internal quotation omitted); *see Nat. Res. Def. Council v. Ill. Power Res., LLC*, 202 F. Supp. 3d 859, 870 (C.D. Ill. 2016), *motion to certify appeal of other issues granted sub nom. Nat. Res. Def. Counsel v. Ill. Power Res., LLC*, No. 113CV01181JBMTSH, 2016 WL 9650981 (C.D. Ill. Nov. 2, 2016) (to

perception that cruise operations at the proposed terminal would extend and exacerbate particularized harms they have already experienced in their homes and surrounding environs, and their reasonable fear that those impacts will degrade their health and wellbeing going forward. In South Carolina, lay witnesses may submit affidavits, and may offer "opinions or inferences" that are "rationally based on [their] perception," *State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). Further, a property owner may "give his estimate of its value or the damage inflicted upon it even though he is not an expert." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43–44, 691 S.E.2d 135, 146 (2010) (internal quotation omitted).[9] SPA's general conclusory objections ("speculation," "hearsay") cannot negate multiple affidavits describing personal and particularized experience of harms and reasonable fears that the project will exacerbate them.[10] Summary judgment affidavits need only be based on personal knowledge and set forth facts that would be admissible at trial—i.e., facts tending to "directly or indirectly" make "more or

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support standing, a "fear need not be based on medical or scientific evidence of probable consequences in order to be reasonable"); *see also Romanelli v. Long Island R. Co.*, 898 F. Supp. 2d 626, 632 (S.D.N.Y. 2012) (because inhalation of stone dust and fumes from burning kerosene and fresh asphalt can cause respiratory problems is essentially uncontroversial, it falls within the ken of common knowledge).

[9] SPA attempts to deny that the courts below disregarded property owner testimony about property values, SPA 24, yet goes on to defend their having done just that because that testimony was "unsupported by expert testimony." *Id.*

[10] Mr. Gates' statement that he reasonably feared inhalation of known probable carcinogens could negatively impact his health was not rendered hearsay because he attached information bolstering his concern. *See, e.g., United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) ("a statement offered to show its effect on the listener is not hearsay"). The record includes SPA and other self-authenticating government records bolstering the reasonableness of his concern. R.001718 (SPA: terminal would emit 120 tons per year of criteria pollutants); R.002612 (Congressional Research Service Report).

less probable some matter at issue"—and it was reversible error to disregard Petitioners' affidavits and enter summary judgment against them. *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005).

SPA has no answer to this legal authority, which shows that disregarding the Robertson, Dodd, Gates, Lane, Morganello, and Zimmerman affidavits based on personal knowledge and describing particularized harm from the challenged permits was reversible error. Br. 10-12. SPA likewise fails to refute our showing that documentary evidence, including from SPA's own files, confirmed Petitioners' concern that a large proposed polluting terminal on their doorsteps would cause them individual harm.[11]

Fundamentally, SPA seems to believe that Petitioners needed to put on their merits case, by proving with expert testimony that SPA's proposed terminal will as a scientific matter cause future disease, in order to avoid summary judgment on standing. SPA has misconceived the inquiry. The "relevant showing" is "injury to the plaintiff," *Laidlaw*, 528 U.S. at 181, and members show that injury if they have "reasonable concerns about the effects" of a project, *id.* at 183-84.[12] Petitioners'

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[11] *See, e.g.*, R.001718 (SPA report estimating cruise emissions of 120 tons per year of criteria pollutants); R.002628 (Corbett report) ("Marine engines combusting petroleum fuels emit air pollutants that may lead to, or exacerbate, health problems like asthma, bronchitis, and lung cancer. Engine combustion produces harmful byproducts including carbon monoxide (CO), nitrogen oxides (NOx), particulate matter (PM), and sulfur dioxide . . . ."); R.002612 (Congressional Research Service Report) (emissions from "marine diesel engines contribute to . . . adverse health effects associated with ambient concentrations of particulate matter. . . ."); *see* U.S. EPA, Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 75 Fed. Reg. 22,896, 22,904 (Apr. 30, 2010).

[12] Said another way, the "relevant question is not whether pollutants are present in such a high concentration that they will assuredly cause health problems," but

concerns here are more than reasonable: Petitioners have *already experienced* particularized injury that the proposed project would make worse. That is true not just for health and environmental harms, but also for "aesthetic or recreational interests" that this Court has said give rise to injury for standing. *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Testamentary and documentary evidence showed overwhelming proof of standing and summary judgment against Petitioners was clear reversible error.[13]

D. SPA's Claim That a 25-Acre Terminal That Will Emit 120 Tons of Pollution per Year and Clog Neighborhoods with Trucks and Buses Will Have Only "Beneficial" Impacts Is Contravened by the Record

SPA's claim that it is "indisputable" that its project will have only beneficial impacts, SPA 22, is premised on the notion that a new 25-acre terminal would do nothing to change cruise operations. That is demonstrably wrong. SPA's application for the new terminal cites the "need" for the facility as "critical" for "growth" of SPA's cruise business, and for compliance with "new Federal regulations" concerning "terminal security requirements." R.1243. SPA's conditional

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rather whether pollution attributable to the permitted project "could cause harm" and "are present in the geographic area in which the standing witness has an interest." *Illinois Power*, 202 F. Supp. 3d at 870.

[13] Summary judgment was improper regardless of whether the ALC's opinion is read to ignore evidence or simply give it less evidentiary weight; resolution of disputed facts based on credibility is improper. *Austin*, 387 S.C. at 43–44, 691 S.E.2d at 146; *True v. Monteith*, 327 S.C. 116, 120-21, 489 S.E.2d 615, 617 (1997). SPA's convoluted urging of "skepticism" of affidavit evidence, SPA 24 n.21, asks that inferences be drawn against the *non-moving* party, which the opposite of proper summary judgment procedure. Any skepticism here should instead apply to SPA and its claims that cruise operations are environmentally benign, especially given that its resident cruise line, Carnival, pled guilty to federal criminal charges that it "knowingly and willfully discharged oil contaminated waste from their bilges into the sea and falsely represented in their Oil Record Books that the waste had been discharged using operational pollution equipment." R.02152.

authorization from federal regulators was issued on the understanding "that an improved facility would be needed for continued operations." R.1243.

Beyond allowing operations to continue when they otherwise would not, a new $35 million terminal that is three times the size of what exists today and designed to home base 3,500 passenger vessels is likely to increase the operation's scale and impact on neighbors. SPA's own documents show that the traffic count generated by a homebased 2,500 passenger vessel is "considerably lower" than the new facility's 3,500-vessel target. R.002455. In fact, the larger ships would bring upwards of 1,600 cars, 16 trucks, 90 taxies, 32 buses, and 20 tractor-trailers per home-base visit, R.002460, and discharge more than 120 tons of EPA-regulated air pollutants per year, R.001718.

Diesel exhaust is a likely carcinogen and vessel emissions have adverse health effects. R.002612, 002628. SPA's own documents show that shore-power should be considered next to "residential populations" because "*proximity matters when it comes to diesel emissions.*" R.002464 (emphasis added). Petitioners commissioned an expert study of shorepower, which showed it would significantly decrease the localized emission of harmful pollutants. R.002627-002641.[14] Despite that, and despite SPA documents showing shorepower is feasible,[15] DHEC

[14] Charleston legislators then introduced a bill to bring shorepower to the cruise terminal, and Charleston City Council passed a resolution supporting it. Tyrone Richardson, *Council Support Shoreside Power*, Post and Courier (Feb. 24, 2014), https://www.postandcourier.com/business/council-supports-shoreside-power-cruise-ship-opponents-worry-about-pollution/article_e624ef6d-a579-538b-a752-6d20ceb651e1.html (last visited Dec. 3, 2018).

[15] Shorepower is feasible at the proposed terminal as an engineering matter. R.002453.

unlawfully refused to evaluate its ability to reduce the terminal's impacts.

Petitioners submitted multiple affidavits from persons who testified that the proposed terminal would prolong and worsen particularized harms—e.g., from diesel soot, traffic gridlock, and degradation of National Register historic neighborhoods—that they have personally experienced in and around their homes. R.002588–89, 002576–78. SPA's claim that Petitioners "do not attempt to argue new or additional harm will occur as a result of the Project," SPA 22, is, accordingly, false. So too its claim that "full capacity cargo" and "train" operations are the proper "baseline" for judging impacts: as already noted, SPA removed major cargo and rail operations at Union Pier almost a decade ago, *supra* at 3, and plans to sell the remainder of the property for real estate development.[16]

SPA's citation to *Bailey v. South Carolina Department of Health and Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), is thus inapposite. The plaintiff challenging a dock modification permit in that case provided *no evidence* that modification would change *anything at all* about an ongoing boat operation. *Id.*, 388 S.C. at 7–8, 693 S.E.2d at 429-30. Petitioners here produced substantial and multi-sourced evidence that, compared to the antiquated existing terminal, SPA's proposed terminal will cause cruise operations to continue when they otherwise could not and will expand operations, causing new injuries and exacerbating existing ones. R.002589, R.000124, R.002438-39, R.007493, R.002455,

[16] Selling the proposed terminal location and moving operations to the underutilized Veteran Terminal in North Charleston would bring in $100-190 million for SPA in raw land value and add $4-7 million in annual tax revenues. R.002227 (Dover Kohl study). This is another option that Petitioners put forth as a win-win solution, but SPA and DHEC refused to consider any variation from SPA's pre-selected plan.

R.002457, R.002465–66.[17] *Bailey* does not apply.

E. The Two-Issue Rule Is Inapplicable

The Agencies' two-issue rule argument is groundless. This Court has treated "standing" as *a single issue* for purposes of the rule. *See Sloan v. Department of Transportation*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005) (separating "standing"—including sub-issues of taxpayer and public importance standing, and specific elements of particularized interest—from the issue of "laches"). Because Petitioners appealed the standing issue, review of its sub-elements is not barred by the two-issue rule. *Atlantic Coast Builders & Contractors, L.L.C. v. Lewis*, featured in SPA's brief, demonstrates the point. After a master in equity ruled for a lessee plaintiff on three causes of action—negligent misrepresentation, breach of contract, and unjust enrichment—and the landlord defendant failed to appeal the unjust enrichment ruling, this Court affirmed the verdict because it was independently supported by the unappealed cause of action. 398 S.C. 323, 328, 730 S.E.2d 282, 285 (2012). There was no contention that the defendant had to appeal the holdings as to each element of each cause of action in the case, and expanding the rule to require separate appeal of every distinct component of each discrete issue would doom appellate courts to a sea of pointless paper.

Furthermore, SPA's argument is meritless under even its mistaken test because the Petitioners' appealed the overall Article III standing issue to the Court

[17] SPA's claim that cruise operations are not "unchecked" because of its "voluntary" agreement to give the City of Charleston advance notice of expanded operations, SPA 3, is incorrect. As an SPA official stated to a Carnival executive, the agreement "does not limit or impact in any way the cruise business in Charleston." R.002433

of Appeals and to this Court *including* the sub-elements of causation/traceability and redressability.[18] No magic words were required to preserve the various standing sub-issues for review, *see State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003), especially given that standing's sub-elements overlap and are intertwined, *see, e.g.*, Note, *Causation in Environmental Law*, 128 Harv. L. Rev. 2256, 2275 (2015) (recognizing that injury and causation are intertwined elements in *Laidlaw*, 528 U.S. at 181-83); *see* R.003128 (SPA counsel: "traceability kind of bleeds into the [re]dressability component"). The Court should decline the Agencies' invitation to convert the two-issue rule into a mandate to "scour the records before [them] for the purpose of avoiding issues," *Atl. Coast Builders*, 398 S.C. at 332, 730 S.E.2d at 287 (Toal, C.J., concurring in result and dissenting in part), and address the properly presented and important standing issues in this case.

II. SPA's Associational Standing Arguments Are Foreclosed by Binding Precedent

South Carolina's test for associational standing tracks federal law in

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[18] *See* Appellants' Ct. of Appeals Initial Br. 30 (alleging error due to issue of facts as to "injury-in-fact fairly *traceable* to DHEC's decisions" that "could be *redressed* by administrative review") (emphasis added); *id.* 31 (arguing Article III court's traceability holding as dispositive); Pet. for Cert. 9-12 (affidavits and documents showing injury caused by cruise operations); *id.* 10, 12 (tracing injuries to ongoing and expanded cruise operations); *id.* 4 (explaining how Petitioners sought to redress members' injuries to "property and health by challenging DHEC permits that failed—unlawfully—to include reasonable conditions that would reduce pollution impacts in the immediate vicinity"); Br. 1 (presenting "overwhelming evidence of particularized harm to several individuals *traceable* to the challenged pollution permit" and seeking redress through permit nullification); *id.* 12-13 (describing permit conditions that would redress impacts and that Petitioners advocated for in the administrative process; when DHEC unlawfully failed to consider the conditions, the Petitioners sought ALC review). The argument that Petitioners somehow "abandoned" causation and redressability arguments is meritless.

requiring that: (1) one or more of an association's members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested makes the individual participation of each member indispensable to the lawsuit. *See Carnival Corp.*, 407 S.C. at 75-76, 753 S.E.2d at 850-51. Because Petitioners showed all three, the Opinion's contrary holding—based on the incorrect premise that Petitioners had not explained how the legality of DHEC permits could be adjudicated without each members' participation[19]—was reversible error. Br. 26-28.

SPA effectively abandons the Court of Appeals' rationale and offers a new argument instead: that Petitioners have no associational standing because they have not shown their members' injury is "common to the membership" and "necessarily derive[s]" from it. SPA 26. But that is not the law. An "organization has associational standing 'if *one or more* of its members will suffer an individual injury by virtue of the contested act.'" *Carnival*, 407 S.C. at 76, 753 S.E.2d at 850 (quoting *Sea Pines*, 345 S.C. at 600-01, 550 S.E.2d at 291) (emphasis added). SPA's theory that injury must be common to all members and that standing is negated if members' "injuries affect the individuals personally," SPA 26, would turn associational standing's first requirement—a member with individual standing—into a booby trap; once met, it would prevent associational standing altogether.

SPA's additional notion that the third requirement means a member's individual injury must "derive from" membership in the organization, is also wrong.

[19] Petitioners explained that very point repeatedly. *See* Br. 28; *see, e.g.*, R.002356–61 (Pet. Resp. to SPA Mot. Sum. J.); Appellants' Reply Br. 12–13; Pet. for Reh'g, 8–11; Reply In Support of Reh'g 5-8.

Organizations can represent members' interests regardless of where they *originate*: the National Rifle Association can bring lawsuits to protect members' interests originating from the Constitution, not from NRA membership. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 192 (5th Cir. 2012). SPA's mistaken theory owes to the conflation of two kinds of associational standing:

> First, the association 'may have standing *in its own right* to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.' *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Second, the association may have standing as *the representative of its members* who have been harmed. *Id.*; *see also Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Maryland Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1250 (4th Cir. 1991) (emphasis added).

It was only in addressing the first kind (i.e., an organization's standing in its own right) that the Supreme Court indicated that an association may need to show that "the challenged infractions adversely affect its members' *associational ties*." *Warth*, 422 U.S. at 511 (internal citations omitted) (emphasis added). And it was in addressing the second kind (representational standing, as asserted here) that the Court went on to enunciate the now-familiar three factor test, which *does not* require that individual member standing derive from membership in the association. *Id.*[20]

[20] SPA's theory would convert the third factor—meant allow associational standing to promote "administrative convenience and efficiency," *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555-56 (1996)—into one that forces courts to hear members' claims in separate lawsuits, *Bhd. of Maint. of*

SPA's cursory arguments in a footnote, SPA 25 n.23, concerning the other elements of associational standing are inadequate to preserve them for review, *see Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691–92 (Ct. App. 2001), including the second element—germaneness—on which the Court of Appeals made no ruling. The interests Petitioners seek to vindicate are obviously germane to their respective organizational purposes. While the harms they seek to reduce from ongoing and expanded industrial scale cruise operations (diesel soot entering homes and lungs, thousands of vehicles injected onto traffic-choked neighborhood streets, infectious water pollution, and fifteen story ultramodern structures towering over three story Colonial homes) may not matter to state agencies, they matter to Petitioners and are germane to their organizational purposes and activities.[21]

Associational standing doctrine "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others," *United Auto. Workers v. Brock*, 477 U.S. 274, 290 (1986), and that associations can bring specialized legal and policy expertise that are useful for plaintiffs and courts alike, *id.* at 289. This Court should recognize

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Way Emps. Div. of the Int'l Bhd. of Teamsters v. Ind. Harbor Belt R. Co., No. 2:13 CV 18-PPS-APR, 2014 WL 4987972, at *5 (N.D. Ind. Oct. 7, 2014), even where individualized determinations of damages are unnecessary. *See Hosp. Council of W. Penn. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) ("The Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by individual association members.").

[21] *See e.g.*, R.002595-96 (CNA); R.002600-01 (CCL); R.002644-45 (PSC); R.002582 (HCF); R.002588 (CCCC); R.000091 (Surfrider). *See* Ct. of Appeals Initial Br. at 41-43 and Reply to DHEC at 17-18.

these important functions of the doctrine and find that all the required associational standing elements have been met.

III. SPA's Argument Against Collateral Estoppel Is Meritless

Petitioners' brief showed that SPA actually litigated (and lost) not only the same Article III constitutional standing *issue* in federal court, but also the same *arguments*. Br. 30-31. Rather than address those matching arguments, the substance of the federal court's decision, or even the (inconsistent) reasoning of the ALC and Court of Appeals, SPA sets off on a journey to avoid estoppel with musings about what questions a party's standing "begets." SPA 28.

It should have looked at its own federal court brief for the answer. There, SPA admitted that "the basic purpose of standing doctrine is to ensure that the plaintiff has a sufficient personal stake in the outcome of a dispute to render judicial resolution of it appropriate." R.002524 (case quotation omitted). That is basically right, while SPA's new theory of standing as a protean "prefatory justiciability consideration," SPA 28, is not. Nor is its claim that, because certain federal statutes give citizens "procedural rights," the standing issue in federal court was different than in this permit challenge. SPA 29.

The federal case was a permit challenge too.[22] And, in moving for summary judgment on standing there, SPA made the *same arguments* it made here—i.e., that all harms pertain to existing cruise operations, are generalized grievances, and will

[22]The federal permit was the product of SPA's "*Joint* Federal and State Application" for federal and state permits, R.001241, and joint pre-application meetings between SPA and with federal and state permit writers, R.2530. This further undercuts SPA's implication that the state and federal processes were unrelated.

continue with or without permits for proposed terminal; and that the challenge to the permit is limited in scope to five piling clusters.[23] R.002501-25. Those arguments were rejected by the federal court, which agreed with plaintiffs that the challenged permit was substantively infirm and "unlawful and void." R.2573; *Pres. Soc. of Charleston v. U.S. Army Corps of Eng'rs*, No. CIV.A. 2:12-2942-RMG, 2013 WL 6488282, at *16 (D.S.C. Sept. 18, 2013). *The federal opinion makes no mention of "procedural rights" whatsoever.*

The Court of Appeals, like the ALC before it, erred in allowing relitigation of Petitioners' Article III constitutional standing after the same issue, and even the same arguments, were actually litigated and decided by an Article III court.[24]

IV. The ALC Abused Its Discretion in Sanctioning Litigants for Contending That "Must" Denotes a Mandatory Duty

Sanctioning a party for offering a reasonable statutory interpretation was a patent abuse of discretion. SPA's attempt to avoid review, like DHEC's, is baseless: because the sanctions order directly addresses the statutory interpretation issue, R.000072–74, there is no barrier to review.

On the merits, SPA has (still) not shown that Petitioners' reading of the

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[23] SPA's suggestion that DHEC had no authority to look beyond the permitted piling clusters necessary for the terminal to proceed goes to the *merits* of Petitioners' case, which contends, *inter alia*, that DHEC's crabbed scope of review was *unlawful*. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 36, 766 S.E.2d 707, 719 (2014) (Regulation 30–11 gives DHEC authority to consider upland impacts of project and may grant or deny a permit based in part on the upland impacts that would result from the project). Standing is a separate inquiry.

[24] SPA does not respond to our showing that the Court of Appeals erred in *sua sponte* holding that the public interest bars application of issue preclusion here, Br. 31-32. That issue is therefore waived.

statute to require DHEC Board review and provide jurisdiction in the ALC if the Board declines that duty is incorrect, much less untenable. Rather than ignore it, SPA 32, Petitioners showed with dictionary entries that the term "declines" includes failure to undertake a mandatory duty, which the statute says the DHEC Board "must" undertake. Br. 34. SPA has no answer to this beyond huffing and puffing. It also has no answer to our showing that this issue has never before been litigated. The cases it cites overlap with DHEC's, and show, merely, that statutory language was summarized with no party *litigating* whether the Board "must" hold conferences and what remedies are available when it "declines" to do so. *See* Reply to DHEC at 20-21.[25] The same goes for a brief's background discussion in a case where this Court rejected these same Agencies' mistaken view of a *different* part of the statute. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 428, 702 S.E.2d 246, 252 (2010) ("SPA's bold statement that DHEC should not bear the burden" of determining when a party should be notified of permit decisions "is unavailing under these facts").

Sanctions are a rare remedy reserved for "extreme" lawyer misconduct. *See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 593, 713 S.E.2d 624, 625-26 (2011). They are inappropriate where litigants set forth a textually-based interpretation of a statute in good faith rather than for an improper purpose

[25] SPA and DHEC seem to think a term's meaning was "litigated" if the term appears in summary, dicta, or background discussion of an order or brief. They are wrong. Courts are "not bound to follow [their] dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Comty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

like delay.[26] *See Clarendon County v. TYKAT, Inc.*, 09-ALJ-17-0458-CC, 2010 WL 6782564, at *4-5 (June 1, 2010) (denying sanctions even against litigant whose proposed statutory construction would require a "coerced reading, rejecting established canons of construction"). The sanctions order was an arbitrary abuse of discretion and should be reversed.

V. The ALC Abused Its Discretion in Retroactively Closing Discovery That All Parties and the ALC Acknowledged Was Ongoing

SPA's attempts to hide the abusive discovery order behind procedural barriers are meritless. Indeed, *this Court already rejected SPA's motion to dismiss premised on the same SPA theory* that the discovery order is unreviewable. SPA is bound by that law of the case. Even if it weren't, no rule or precedent prevents the Court from reviewing an order that would become "un-moot" on remand and, indeed, judicial economy supports it.[27] SPA's claims of waiver, abandonment, and estoppel, SPA 39-40, are also meritless. First, SPA has unclean hands to press equitable arguments because it knowingly engaged in and condoned discovery well after the date it later claimed discovery "closed." *Cf. Rhodes v. Benson Chrysler-*

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[26] SPA's attempt to discredit our citation to Rule 11 and the Frivolous Civil Proceedings Sanctions Act rather than ALC Rule 72 fails: Rule 72 must be read in reference to the Sanctions Act. Rule 72, RPALC, 2014 Editor's Note. SPA has also failed to distinguish the cases we cited establishing the reasonableness and good faith standard it obviously wants to avoid.

[27] SPA's cases hold no differently and address situations where a court below lacked jurisdiction to enter an order or vacatur's effect on service of process. *See Ware v. Ware*, 404 S.C. 1, 17, 743 S.E.2d 817, 826 (2013) (vacating South Carolina divorce order because Alabama order was *res judicata*); *Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (dismissing appeal of order granting new trial while appeal of original trial was pending); *Rice v. Alpha Sec.*, 556 F. App'x 257, 260 (4th Cir. 2014) ("nonsuit, and its subsequent vacatur, does not change the service of process requirement"). *See* Reply to DHEC at 23.

Plymouth, 374 S.C. 122, 128–29, 647 S.E.2d 249, 252 (2007) (party that engaged in extensive discovery waived right to retroactively demand arbitration). Second, Petitioners were not required to separately appeal each subsequent ALC procedural action—denial, then vacatur, then declaration of mootness—to obtain review of the ALC's abusive discovery order. They appealed *that* order, which is all they were required to do.[28]

On the merits, SPA offers nothing to refute our showing that the parties proceeded with discovery well after May 20, 2013 (the date the ALC later retroactively declared to be a "deadline") and that the ALC explicitly and repeatedly condoned the same with the aim that the "parties could complete discovery" in time for the 2014 merits hearing, R.002232. There was, accordingly, no reason for Petitioners to defend their discovery rights until SPA—whose prehearing statement projected "six to nine months," or until February 2014, to complete discovery, R.002231, and which produced thousands of pages of discovery throughout 2013 and into 2014, R.01042-43, 002240-41—abruptly reversed position and announced that discovery had closed eight months earlier, in May 2013.

Petitioners promptly sought to protect their rights, showing ongoing discovery production by SPA (which produced thousands *more* pages of documents into late 2013 and into 2014, *see* R.1042) and demonstrating that retroactive use of

[28] SPA has made no attempt to show some of the elements necessary for judicial estoppel, including that "the party taking the [prior inconsistent] position must have been successful . . . and have received some benefit;" and "the inconsistency must be part of an intentional effort to mislead the court." *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004).

Rule 21's default period was improper.[29] The Petitioners easily showed "good cause"[30] by establishing that retroactive discovery closure was unfair and would harm them.

SPA's claim that Petitioners sought to re-open discovery "only for the merits trial" and not for summary judgment," SPA 23, is untenable given that Petitioners made pages of argument to the ALC that "SPA's Filing of Summary Judgment Motions Makes Depositions Essential." R.002278-81. Further, while discovery was not necessary to *correctly* resolve summary judgment—under Rule 56, SCRCP, the ALC should *not* have blindly accepted *movant* SPA's affidavits given non-movants' conflicting evidence and testimony—the ALC did not follow lawful summary judgment procedure, but instead accepted SPA's claims, inferences, and evidence at face value. Upon reversal of the ALC's erroneous summary judgment order, Petitioners' deposition of SPA affiants, who made statements directly at odds with SPA's own documentary evidence, will be essential for a fair trial.[31]

The ALC's retroactive closure of discovery was an arbitrary and unfair abuse of discretion and should be reversed.

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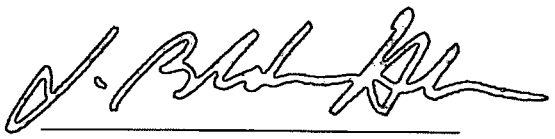
[29] Petitioners submitted testimony from an experienced ALC practitioner that the default discovery period of Rule 21, RPALC, is rarely observed in environmental cases, R.002950–52, as was indeed the case here where all the parties conducted and the ALC explicitly condoned discovery well beyond the default period. SPA's citation to Rule 6(d), SCRCP, as supposedly barring that affidavit, SPA 41, is misplaced: the ALC rules have different discovery motion requirements, Rule 19, RPALC, meaning Rule 6(d) does not apply. Rule 68, RPALC.

[30] Cases the Agencies cite from other jurisdictions and interpreting different rules of procedure are not relevant to establish a heightened standard.

[31] Self-serving statements by SPA witness Lehman, for example, directly contradict statements made by him in multiple documents produced to Petitioners months after discovery was retroactively declared "closed." R.002277-78.

Respectfully submitted,



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December 7, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

v.

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

PROOF OF SERVICE

I hereby certify that on December 7, 2018, I caused to be served the foregoing *Petitioners' Reply Brief to South Carolina State Ports Authority* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

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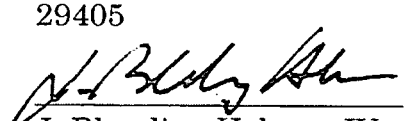

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