THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Apr 27 2020

S.C. SUPREME COURT

Appellate Case No. 2018-000137

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

v.

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

Petition for Rehearing by the South Carolina Ports Authority

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Pursuant to Rules 221(a) and 240, SCACR, the South Carolina Ports Authority (Ports Authority) respectfully petitions for rehearing of Opinion No. 27949 issued in this case on February 19, 2020 (Opinion). For the reasons that follow, the Ports Authority respectfully submits that the Court should reconsider the Opinion and affirm the decision of the Court of Appeals and of the South Carolina Administrative Law Court (ALC).

Standard for Rehearing

Rule 221(a), SCACR, provides that a party who believes the Court overlooked or misapprehended points of law or fact is authorized to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, __, 167 S.E. 234, 238 (1933).

Introduction

Until the Opinion, this Court has been clear that the General Assembly has the legislative authority to "specifically confer[] standing" by statute, but only if it establishes (1) a clearly defined set of individuals, (2) under specific qualifying circumstances. *Freemantle v. Preston*, 398 S.C. 186, 195, 728 S.E.2d 40, 45 (2012). The converse is equally true, however: if the General Assembly does not specifically confer standing by clearly defining the category of individuals and circumstances in which statutory challenges may be brought, or if the inquiry into those circumstances requires a fact-intensive examination that goes beyond the four corners of the statute, then "statutory standing" does not exist and courts must use the standard three-part inquiry of constitutional standing.

The Opinion drastically alters the landscape of and practice in the arena of administrative law. The Opinion expressly recognizes that the General Assembly did not define *the operative*

term—"affected person"—used to employ statutory standing, which should have ended the statutory standing inquiry under S.C. Code Ann. § 44-1-60. That is, if the General Assembly did not clearly define the category of individuals and circumstances in which the statute confers the right of challenge, then the General Assembly has, by absence of directive, not specifically conferred "statutory standing" under such circumstances. In finding statutory standing in § 44-1-60(G), the Opinion effectively creates a fourth category of hybrid standing in the form of "judicial standing," requiring a fact-intensive "affected" analysis but otherwise rejecting this Court's prior standing jurisprudence.

Instead, the Opinion invades the province of the General Assembly, in contravention of article I, § 8 of the South Carolina Constitution, and establishes a judicially-created solution to a unique set of facts that will have a multitude of unintended consequences. The Opinion results in a new hybrid test for standing that overturns the standard employed *in all DHEC permit cases* by the South Carolina Administrative Law Court (ALC) for nearly 15 years, while providing no guidance to litigants, the bench, or the bar with respect to its implementation. The issues and claims in this contested case do not warrant this solution. The Ports Authority urges the Court to reconsider the Opinion's sweeping holding on statutory standing that is contrary to the General Assembly's expressed intent.

The Opinion also improperly invades the province of the trial court, by failing to exercise the deference due lower courts in managing discovery and the proceedings before those courts. Instead of simply remanding the matter for the ALC to make further decisions regarding discovery, and deferring to the ALC's decision to award sanctions based on facts that are neither disputed nor subject to this appeal, the Court undermines the abilities of lower courts to manage their proceedings.

Argument

I. The Opinion misapprehends the Project, the authorizations under the Permit, and, most importantly, cruise operations in Charleston.

Although the appropriate context for the Project is absolutely critical, it is apparent that the Opinion misapprehends the very narrow question of the limited work that is authorized by the challenged Permit within the broader cruise industry in Charleston. The only issue before this Court is a critical area permit issued by DHEC. And the only impacts authorized by that permit are the installation of five concrete pilings. **(R. p. 1219)** ("[T]he applicant seek to install 5 pilings consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators.") Nothing more, nothing less. Those five concrete pilings consist of less than .01 acres of wetland fill. And they are proposed to be added to the over 1,000 existing concrete pilings currently supporting portions of UPT. The ability of the Ports Authority to renovate certain of its facilities on its terminals—absent direct impacts to the critical area—does not require DHEC's approval. The ability of the Ports Authority to shift cruise operations to the northern half of UPT does not require DHEC's approval, is not authorized by this Permit, and is not before this Court. Most importantly, the ability of the Ports Authority to accommodate current and future cruise operations at UPT is not subject to DHEC's approval and is not before this Court. In short, this case is not about whether cruise ships can continue to call on UPT in downtown Charleston. Cruise ships have called on UPT continuously since 1973 and passenger ships have called on UPT and the Charleston peninsula for over 100 years. Cruise ships call on UPT today, and cruise ships will continue to call on UPT in the future regardless of whether the Ports Authority renovates an existing warehouse within the UPT boundary into a new cruise terminal, consistent with or without the challenged Permit.

In other words, it is undisputed that the current cruise activity at UPT, in addition to all other cargo activities, can and will continue regardless of whether the Permit is denied. The Opinion either misapprehends or ignores this truth, holding instead that Petitioners, some of whom live near UPT,[1] are "affected persons" entitled to challenge a new Permit to install the five pilings. Op. at 11 ("The General Assembly surely intended DHEC to receive input from all persons affected by a project with potentially harmful environmental impacts. … The purpose of this administrative process is to discover and evaluate harm to the surrounding environment and to persons who would be affected by the proposed project. Those living near the project are most likely to be impacted in ways … [by a] project's environmental consequences.") But by failing to engage in the required analysis of traceability and redressability, as discussed in more depth below, the Opinion allows Petitioners to complain about existing conduct and, thus, loses the necessary context of what this project is, and more importantly, what this project is *not*. Context in this project is paramount, because this project is *not* a new terminal site, it does *not* involve the construction of a new building, it does *not* approve a new use of UPT, and it does *not* constitute permission or authorization for the use of UPT for cruise operations.

[1] The statement of facts of the Opinion incorrectly asserts that "[t]hese organizations have members who are property owners in the neighborhoods very close to the proposed project." Op. at 3. This broad-brush characterization of the Petitioners is unsupported by the record and incorrect as a matter of fact. While it is true that certain of the individual members of certain of the Petitioner-associations do live in proximity to UPT, there is no evidence in the record to support the Court's sweeping *de novo* finding that all of the Petitioner-associations have members who do. *C.f.*, *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (holding that in an action at law such as this one, an appellate court may not make its own findings of fact and instead may only determine whether the ALC's findings lack evidentiary support). The Opinion errs in treating these Petitioners as a monolith, as doing so rejects prior precedent requiring courts to evaluate each litigant's—and is this case, each association's—claims and standing individually. *E.g.*, *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001) (holding that the claimed injury "must be of a personal nature to *the* party laying claim to standing and not merely of general interest common to all members of the public" and "*[t]he* party seeking to establish standing carries the burden").

The Opinion also misapprehends the nature of this existing activity. The Opinion states that the permit authorizes "the Ports Authority to construct a new cruise ship facility at the Terminal by renovating Building 322, a vacant warehouse," Op. at 2, and later characterizes Building 322 as "what is currently a 'storage shed.'" These findings are incorrect as a matter of fact and unsupported by the record. The Permit plainly authorizes the renovation of an existing building into a new cruise terminal, not the construction of a new building, *see* **(R. p. 1219)** ("The work as proposed and shown on the attached plans consists of making improvements to an existing waterfront building."), and Building 322 is neither a "vacant warehouse" nor a "storage shed," but rather an integral part of the Ports Authority's ongoing and existing break bulk and cargo operations on UPT that has historically hosted upwards of 200 cargo ships annually and still accommodates and is used to service multiple cargo ships monthly today, *e.g.*, **(R. p.1192)** (showing a photo of simultaneous use of UPT by a cargo ship and a cruise ship).

The fact that there is existing activity at UPT, including existing use of Building 322 for maritime cargo commerce, is what sets this project apart from a typical DHEC permit. It is also what sets the allegations of injury by the affiants in this case apart from typical permit challenges. The claims by these Petitioners relate to *existing* terminal operations, *existing* terminal facilities, and *existing* use of UPT for cargo and cruise operations. These allegations have nothing to do with the proposed activity authorized by the Permit. These "injuries," to the extent they exist at all, are complaints about the Ports Authority's *existing* legal use of UPT for cruise operations, none of which is subject to the Permit or would change one bit if the Permit is denied.[2] Thus, even under

[2] As the Permit correctly noted in a finding that has not been appealed to this Court:

> [T]he long-range cumulative effect of this project will not have any substantive impact to the general character of the area because the general character of this area has been for more than a century an existing commercial pier that is a SC State Port Authority pier with grandfathered activities that include cargo and cruise ship

its *de minimis* analysis, the Opinion errs in holding that Petitioners are "affected" by the new Permit because they are in fact complaining about existing activity.

Moreover, the Ports Authority could, and may, reject the Permit and continue to accommodate cruise vessels at the UPT under the current configuration with potential modifications to the existing terminal that would not require additional permitting. *See* S.C. Code Ann.§ 48-39-130(C); *S.C State Ports Auth. v. S.C. Coastal Council*, 270 S.C. 320, 322-23, 242 S.E.2d 225 (1978); 1989 S.C. Op. Att'y Gen. 254, No. 89-94 (Sept. 20, 1989); 2016 S.C. Op. Att'y Gen., 2016 WL 386064 (Jan. 6, 2016). However, doing so would leave cargo, rail, and truck operations at UPT ongoing and is not the most environmentally beneficial option, nor does that option provide a better benefit to the public than the Ports Authority's plan. Alternatively, renovating Building 322 would allow the northern end of UPT to be used for cruise operations while the southern end can be redeveloped as green space and mixed-use properties, and provide waterfront access for the public. The Ports Authority's UPT Project would *reduce* air emissions, *reduce* traffic congestion, and *mitigate* all of the environmental impacts that the Petitioners complain of from the existing operations. The result if the Opinion stands and Petitioners are successful in this challenge: the *status quo.* In other words, Petitioners are trying to stop a redevelopment plan that benefits them, the citizens of Charleston, and the State.

II. The Opinion misapprehends the standing analysis that must be applied in this case and also misapprehends the negative ramifications of its perfunctory "affected person" analysis.

The general rule of statutory interpretation is that courts are "confined to what the statute

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operations. This is an activity that would be occurring on an existing commercial pier that is a SC State Port Authority pier. The activity (cruise ship operation) currently exists on this facility and is considered grandfathered at this pier.

(R. p.1225).

says" and have "no right to modify a statute's application 'under the guise of judicial interpretation,'" as "it is 'improvident to engraft extra requirements to legislation.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) (quoting *Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968), and *Berkebile v. Outen*, 311 S.C. 50, 55–56, 426 S.E.2d 760, 763 (1993), respectively). In supplying its own interpretation and definition for an "affected person" as used in S.C. Code Ann. § 44-1-60(G), and thereby concluding that the term requires no more of a permit challenger than simply asserting that they may be "generally, … influence[d] in some way" by the permit at issue, Op. at 8, the Opinion misapprehends not only the legislative intent behind the statute, but also the negative impact of relaxing standing such that it equates to public interest standing. In so doing, the Opinion creates a conflict among § 44-1-60 and other statutes in the state's environmental permitting scheme, and does so based on a misapprehension of legislative intent to make such a drastic change beyond the General Assembly's use of the term "affected." In this way, the Court has declared that the concept of "statutory standing" is no longer prescribed by the General Assembly, despite this Court's prior pronouncements, and instead the Court is free to ascribe its own meaning and intent to the plain of the statute. The Ports Authority respectfully submits that the Court should reconsider the Opinion and affirm the decision of the Court of Appeals.

A. The Opinion improperly confers statutory standing on Petitioners even though the General Assembly did nothing to indicate an intent to extend the ability to challenge a permit to anyone who claims to be "affected."

In concluding that Petitioners are "affected persons" with standing to challenge the Permit, the Opinion supplants the role of the General Assembly by unilaterally re-writing § 44-1-60 to support its presumption—without any evident indication of supporting legislative intent—that the General Assembly must have meant to confer statutory standing by its use of the undefined and broad term "affected." The Opinion then further used its presumption to justify rejecting the

traditional standing analysis in favor of allowing permit challenges by any person who can articulate a possible injury to challenge a permit. But in doing so, the Opinion provides its imprimatur for a *de minimis* and ultimately meaningless threshold for maintaining a permit challenge under § 44-1-60(G), and it does so based on a narrow and non-contextual reading of the term "affected." This interpretation finds no support in the statute and instead constitutes a new, fact-intensive inquiry and judicially-created mechanism by which courts may confer standing on an ad hoc basis to interested parties. Moreover, the Opinion misapprehends how its holding expands the universe of persons who can maintain actions under the environmental permitting statutes without even a *de minimis* connection to or impact from the challenged project, a result that the General Assembly could not reasonably have intended. An examination of the Opinion's holding demonstrates that the practical problems it creates by expanding the universe of potential claimants is more than just a parade of horribles.

i. The Existence of Statutory Standing under § 44-1-60.

Statutory standing constitutes judicial recognition of the separation of powers. At its core, statutory standing is the judicial branch's recognition that the General Assembly has the authority to prescribe, through legislation, certain situations in which individuals are authorized to bring legal claims. This Court has stated that "[s]tatutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (citing *Freemantle v. Preston*, 398 S.C. 186, 194-95, 728 S.E.2d 40, 44-45 (2012)). Stated in the form of a negative, if a statute does not clearly and unequivocally provide the parameters for who may bring a lawsuit and under what circumstances, then the General Assembly has not conferred a statutory grant of standing and it is beyond this Court's

authority to supply such definitional and situational parameters for the General Assembly. The specificity of the statutory grant of standing is critical to the determination of whether statutory standing exists at all.

In this respect, statutory standing is a zero-sum proposition that does lend itself to the Court's traditional, pro forma method of statutory interpretation. The question of standing in this case impacts the ALC's jurisdiction to hear cases, a matter left entirely to the discretion of the General Assembly. *E.g.*, *Katzburg v. Katzburg*, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014) ("The jurisdiction of a court is determined by the sovereign creating it…."); *see also Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013) ("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers."). Where the jurisdiction of the court is the question, the Court is confined to the plain language of the statute and may not engage in traditional forms of statutory construction, as doing so would permit the Court to legislate the jurisdiction of the ALC. The Court is therefore confined to looking for the existence of statutory standing based on a clear grant of authority by the General Assembly and nothing more.

This is fundamentally different than the Court's ordinary duties in interpreting the general laws of the state as set forth in statutes by the General Assembly. *E.g.*, *Univ. of S.C. v. Mehlman*, 245 S.C. 180, 188, 139 S.E.2d 771, 775 (1964) (recognizing that "the General Assembly had the right, by statute, to prescribe the manner and enact the procedure by which private" conduct is regulated, and employing the Court's role in interpreting those statutes). Because statutory standing in this instance confers jurisdiction to the ALC, to the extent that the Opinion identifies a grey area in the use of "affected person" by the General Assembly, separation of powers

principles dictate that the Court must presume the General Assembly did not intend to create statutory standing. By employing traditional means of statutory interpretation to supply its own meaning and intent to the statute, this Opinion impermissibly and unilaterally expands the jurisdiction of the ALC. *See Amisub*, 407 S.C. at 591, 757 S.E.2d at 413 ("[T]his Court must adhere to well-established separation of powers principles, leaving the power to legislate to the General Assembly….").

The Opinion violates this basic principle of statutory standing. In the most telling and significant finding of the Opinion, the Court candidly admits that, "[u]nfortunately, [§] 44-1-60 does not define the term 'affected person.'" Yet, based on the previous explanations of this Court, the entire concept of statutory standing is built upon the presumption of clear legislative intent. *E.g., Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44 (relying on the fact that "FOIA contains a *specific standing provision* allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act's requirements," and later indicating that the Court was "following the legislature's unmistakable intent") (emphasis supplied). The Court's correct acknowledgment that the General Assembly's intent is not discernable from the plain language of § 44-1-60 should have ended the inquiry into statutory standing. If the legislative intent and specific conference of rights is not plain and easily discernable on the face of the statute, statutory standing does not exist and the Court should not employ mechanisms of statutory construction.

Instead, the Opinion immediately looked outside of the statutory text to supply its interpretation of the missing intent for the General Assembly, following the traditional rules regarding statutory construction that are inapplicable here. *E.g., Stephen v. Avins Constr. Co.*, 324 S.C. 334, 339, 478 S.E.2d 74, 76 (1996) ("If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the

borders of the act itself."). As provided above, the grant of jurisdiction by the General Assembly through statutory standing either exists under the plain language of § 44-1-60, or it does not. If the Court is forced to look beyond the text of the statute to supply a definition in accordance with *the Court's view* of the usual and customary meaning of "affected," then the General Assembly has not "unmistakabl[y] inten[ded]" to confer statutory standing. *Contra Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44. And if the Court is free to supply its own interpretation and construction through the search of dictionary definitions and fact-intensive inquiries, as it did here, then the Court is no longer following the General Assembly's guidance, it is creating a new, case-by-case basis for litigants to assert standing. *Id.* at 195, 728 S.E.2d at 45 (describing the straightforward procedure required for the application of statutory standing in the context of a FOIA action as "[t]he legislature has *specifically conferred standing* upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both. Appellant has pled that he is a citizen of the State and that FOIA has been violated. *Nothing more is required*."); *see also Grier*, *supra*. That is especially so here, given the broad and vague nature of the term "affected," as shown by the definition used in the Opinion.

Because the term "affected" is sufficiently broad to encompass *Lujan* standing, as both the ALC and DHEC have repeatedly concluded that it does for at least 15 years, there is no basis for concluding that the General Assembly meant to expand the universe of persons entitled to challenge a permit.[3] Taken in context of the statutory permitting scheme and general standing law,

[3] Even if reference to dictionary definitions was appropriate under these circumstances, which it is not, dictionaries should be the beginning and not the end of statutory analysis. *See*, *e.g.*, *Heilker v. Zoning Bd. of Appeals for Beaufort*, 346 S.C. 401, 410, 552 S.E.2d 42, 47 (Ct. App. 2001) ("[***A court cannot] definitively rely on [common-usage] dictionaries as an end point in defining a word***.") (quoting SAMUEL A. THUMMA & JEFFREY L. KIRCHMEIER, *The Lexicon Has Become A Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 293-94 (1999)) (emphasis and alterations in original). Or, stated simply, "'law dictionaries

the General Assembly's decision not to specifically define "affected person" demonstrates that it did not intend to deviate from the traditional *Lujan* test for standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992). There are very few instances in which the General Assembly has enacted general public standing by statute; the Opinion notes only the South Carolina FOIA statute. *See* Op. at 7. But the FOIA statute is found in a wholly different section of the South Carolina Code, and deals with a subject matter wholly different from an environmental permitting statute. By affording standing to any person who claims that they will generally be influenced by the project—"affected"—without the tethers of showing causation and redressability, the Opinion substantially expands the scope of § 44-1-60(G) beyond what was intended by the legislature under any reasonable interpretation of the statute and the statutory framework. The Opinion therefore erred by judicially legislating an answer to a question that is solely within the authority of the legislature by implementing such expansive and infinitely inclusive criteria that renders the concept of statutory standing meaningless and violates the oft-cited statutory guidelines expressed previously by this Court:

> The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Creech v. S.C. Pub. Serv. Auth., 200 S.C. 127, ___, 20 S.E.2d 645, 652 (1942).

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are not particularly helpful to [a court] in determining the precise meaning of a term in context.'" *Id*. (quoting THUMMA & KIRCHMEIER, at 294). That is especially so here, given that no other permitting statute provides such an expansive gateway to permit challenges.

ii. Instances in Title 44 in which the General Assembly unmistakably conferred statutory standing.

By contrast, a review of Title 44 reveals that the General Assembly knows precisely how to create statutory standing for certain categories of permit challenges, providing the very strong suggestion to this Court that it did not intend to do so under § 44-1-60, a distinction the Opinion does not explore and thereby effectively ignores. In § 44-7-130(1), which governs the Certificate of Need ("CON") permitting program that also falls under DHEC's permitting authority, the General Assembly confers statutory standing on all "affected persons" who meet the definition of "a person residing within the geographic area served or to be served by the applicant," a concept that is fleshed out in the permitting process. And in § 44-1-65, exactly one section after the statute at issue in this case, in provisions governing the permitting of animal and poultry facilities, the General Assembly confers statutory standing on all "affected persons" who meet the definition of "[a] property owner with standing within a one-mile radius of the proposed building footprint or permitted … facility." The fact that the General Assembly defined an affected person in other parts of Title 44,[4] but did not do so in § 44-1-60, clearly implies that it intended *not* to do so.

The Court suggested at oral argument that the Ports Authority's citation to these provisions in Title 44 was made in order to suggest that the Court should borrow the definition of "affected

[4] This reading is furthered by reference to the implementing regulation for § 44-1-60, a logical place for this Court to begin in its search for the common understanding of the statute, yet which is entirely ignored in the Opinion. Regulation 30-6.A provides that "[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 supplied). The inclusion of "with standing" implies that the term "affected person," as used in § 44-1-60, is insufficient to confer stator standing, a position held by DHEC. *But see Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the

person" from these provisions for § 44-1-60. In fact, the opposite is true. The invocation of these other provisions of clear intent by the General Assembly to create statutory standing for qualifying "affected persons" under those circumstances was meant to demonstrate that the absence of the General Assembly providing a clear and unmistakable conference of statutory standing in § 44-1-60(G). According to the maxim of "*expressio unius est exclusio alterius*," by only including an express grant of statutory standing for "affected persons" under certain circumstances (and under two different definitions for who qualifies as an affected person for those purposes), and not under § 44-1-60(G), the General Assembly did not intend to confer statutory standing under § 44-1-60. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); Norman J. Singer, 2A *Sutherland Statutory Construction* § 47:23 (7th ed., Oct. 2019) (same); *see also Hodges v. Rainey*, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000) (relying on and citing the above authority with approval); *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) (restating the maxim that the expression of one thing is the exclusion of another).

In doing so, the Opinion unnecessarily ignores § 44-1-60's place in the statutory framework to conclude that the statute is an outlier, one that—contrary to any other statute within the environmental permitting framework—affords standing to any person who does no more than request notice and allege some concern and potential harm. *See, e.g., Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read

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statute.'") (citation omitted). Rather than defer to DHEC's interpretation of its own implementing regulation for these permit challenges, the Opinion summarily rejected DHEC's longstanding interpretation by ignoring it without reference or explanation, in contravention of its precedent.

as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction."). Thus, even aside from its unwarranted rejection of existing standing jurisprudence, the Opinion creates a conflict among various statutes using the same term within the statutory permitting framework. The failure to interpret § 44-1-60 in the context of other permitting statutes yields an absurd result. *E.g., Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (Courts "will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

Based on this judicial and statutory backdrop, the General Assembly would have more clearly expressed its intent to drastically relax standing for permit challenges beyond simply copying the term "affected person" from other permitting statutes. *Cf.* Op. at 7 (recognizing that "South Carolina's FOIA statute legislatively grants standing to "any citizen of the State" to enforce a FOIA request"). But it did not. Instead, the General Assembly identified the universe of permit challengers by using the term "affected persons" as it has in other permitting statutes. In the environmental permitting context, that term is used to require something more of a complainant than an *ipse dixit* assertion that they might may be affected by the permitting decision. *See* discussion *supra*; *see also Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392-93 (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*, 504 U.S. at 561).

iii. <u>The Opinion provides no guidance for the employment of statutory standing under § 44-1-60 on a going forward basis.</u>

Moreover, despite announcing a new standard of "statutory standing" for all DHEC

permits, the Opinion provides little guidance for the ALC and practitioners for applying this new standard, as it does not provide a clear and precise definition of an "affected person" that can be used on a going-forward basis. Instead, the Opinion engages in a fact-intensive inquiry for these specific Petitioners that is more akin to an injury-in-fact analysis under the default, constitutional standing test.[5] Relying on *Black's Law Dictionary*, the Opinion holds that a party need only be "influence[d] in some way," Op. at 8, or merely "impacted," Op. at 11, in order to qualify as "affected." The Opinion cites case-specific examples of geographic proximity, breathing problems, health effects, noise, traffic and water pollution, none of which appear in the plain language of § 44-1-60, and none of which provide the bench and bar with guidance on the application of this new standing standard in future cases. However, a person can be influenced or impacted by an activity and not injured by that activity. Wind or rain can influence or impact behaviors and thereby "affect" a person, but a person is not "injured" by the normal occurrence of wind or rain absent extraordinary circumstances. It is the same with claims of harm from traffic, which is an "injury" routinely rejected by this and other courts as not being concrete and particularized. *E.g. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014).

Undoubtedly, all persons should be permitted to provide DHEC with their comments and concerns about a project. But the Opinion fails to identify any basis for concluding that the General Assembly intended to allow any person to *challenge* a permit decision to the ALC as long as they

[5] The question was raised by Justice Kittredge at oral argument in this case to the effect that, if no statutory standing under § 44-1-60 exists, why does it necessarily end in the result of the Court applying the traditional constitutional standing test? In response, counsel referenced the Court's adoption of that test in its *Sea Pines* decision Court. However, to answer the question more precisely, in an opinion authored by Justice Hearn and joined by Chief Justice Betty and Justice Kittredge, this Court answered that question definitively: "[w]hen no statute confers standing, the elements of constitutional standing must be met." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518.

claim they may be "affected" because they are "generally … influence[d] in some way." Yet, the Opinion flings the door wide open to these types of nebulous bases for challenging permits. By creating a hybrid standing standard that falls short of an injury-in-fact and rejects altogether the causation and redressability prongs of identifying an "affected person" under § 44-1-60(G), the Opinion holds that a person need not establish a causal nexus between their alleged injury and the permit but, instead, may proceed based on some articulable academic theory as to why they are "affected" by the permitting decision. The Court is far afield from its prior holdings requiring parties to have a personal stake in the subject matter of the lawsuit and a real party in interest. *E.g.*, *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291. In the absence of any legislative intent to create statutory standing under § 44-1-60, the Ports Authority respectfully urges the Court to rehear and reconsider the creation of this alternate form of standing.

B. In attempting to distinguish and avoid the Court's *Carnival* decision, the Opinion drastically alters the landscape and practice of administrative law in South Carolina by unnecessarily and incorrectly signaling that standing means something different in the administrative and regulatory arena than it does for all other claims and those initiated in circuit court.

In reducing the threshold for maintaining actions under § 44-1-60(G), the Opinion rejects the traditional standing analysis that recently was applied to a zoning challenge to these same cruise terminal operations in Charleston brought by substantially the same parties. *See Carnival Corp.*, *supra*. Significantly, in distinguishing *Carnival*, the Opinion errs in stating that the *Carnival* plaintiffs "did not submit affidavits regarding indivdiualized harm." Op. at 10. To the contrary, a number of the same parties to this appeal submitted affidavits in support of standing in *Carnival*, including Christina Dodd, who submitted affidavits in both this case and *Carnival* regarding the alleged impact the cruise terminal has on her health. In fact, she made the same arguments in *Carnival* that the Opinion notes were made in this case. *Compare* **(R.pp.398-401)** (setting forth

allegations of individual harm) *and* Op. at 10 *with* Aff. of Christina Dodd (att'd as Exhibit A) (asserting substantially the same allegations). The Dodd Affidavit also was discussed during oral argument in *Carnival*. **(R. p. 2037)**; *see also* Tr. of Oral Argument in *Carnival* (transcript excerpts regarding the Dodd Affidavit attached as Exhibit B).[6] In short, the "injuries" alleged in this contested case are the same injuries, based on the same cruise activity, terminal location and conduct, and asserted by many of the same exact individuals on behalf of the same exact organizations, which this Court expressly rejected on standing grounds in *Carnival*. Thus, the Opinion misapprehends the similarities between this case and *Carnival* with respect to the appropriate stake in the litigation that a party must have to challenge governmental action, and has erroneously reached a different conclusion.

To be sure, the statute at issue in this case differs from the one applicable in *Carnival*. But in reaching a different result for substantially the same parties with the same stake in the litigation and thus affording *de minimis* standing to parties in cases not within the unified judicial system, the Opinion further compounds the problems by misapprehending the applicable statutory language and framework. Without any legislative directive beyond use of the term "affected," the Opinion rejects consideration of the second and third prongs of the traditional standing analysis that "a causal connection must exist between the injury and the challenged conduct" and that "it must be likely that a favorable decision will redress the injury." *Carnival*, 407 S.C. at 75, 753 S.E.2d at 850 (citation omitted).[7] Yet it is these two prongs that help ensure permit challenges may

[6] *See Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records."); *see also Masters v. Rodgers Development Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984).

[7] Consideration of these prongs would have required a ruling against Petitioners because they failed to properly challenge the lower courts' rulings on these issues in their appeal to this Court. *See* ALC Order at 11-13 **(R.pp.87-89)** Petitioners failed to even mention, much less

be maintained only by those with a stake in the game and that claims are not based on "an ingenious academic exercise in the conceivable." *Lujan*, 504 U.S. at 566.

The concern about permit challenges based on abstract theories of injury is more than just supposition. The U.S. Supreme Court in *Lujan* noted three "novel standing theories" articulated by the petitioners in that case: the "ecosystem nexus" theory, the "animal nexus" theory, and the "vocational nexus" theory. *Id.*, 504 U.S. at 565. The "ecosystem nexus" theory would afford standing to "any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away." *Id*. at 565-66. The "animal nexus" theory would afford standing to "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe" *Id*. at 566. And the "vocational nexus" theory would afford standing to "anyone with a professional interest in [the animals at issue]." *Id*. The U.S. Supreme Court held that these academic theories did not suffice to support petitioners' claims. *Id*. (internal quotations and citation omitted), and because standing "requires, at the summary judgment stage," a factual showing of perceptible harm." *Id*. The Court also noted that the petitioners' claims had "obvious difficulties insofar as proof of causation or redressability is concerned, and that their "obvious problem" was "redressability." *Id*. at 568-69. But it is important to note that invocation of those novel theories in *Lujan* was forestalled through application of traditional standing principles, including injury-in-fact, causation, and redressability. *See id.*

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. 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).

Moreover, the U.S. Supreme Court in *Lujan* drew a clear distinction between the standing required of one who is the subject of government action and one who is only indirectly affected:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

Lujan, 504 U.S. at 561–62 (emphasis in original) (cited with approval in *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) ("The *Lujan* Court also held that it is 'substantially more difficult' to establish standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality.").

The Opinion rejects—and effectively overrules—all of that in favor of requiring only a *de minimis* showing that a person is "affected." In doing so, the Opinion removes all limitations on the ability of anyone to challenge a permit based on nothing more than "an ingenious academic exercise in the conceivable," such as the theories identified in *Lujan*. *Id*. at 566. For instance, based on the Opinion and a straightforward extension of the claims actually made in this case, a party living in Alaska with nothing more than an interest in the subject matter could legitimately have challenged the permit here by alleging that the purported increased pollution from cruise ships in Charleston will impact the planetary atmosphere, which will then "affect" those living in Alaska. Or a person living in Florida or New York might allege that cruise ship practices regarding waste

impact the oceans and, thus, "affect" persons living in those states through waves that, over time, transfer objects from one area of the globe to another.

But the danger in the application of these theories is not limited to the possibility that persons in another state might bring these claims. Based on the Opinion, a person living in Seneca, Inman, Chesterfield, Blythewood, Ninety Six, Allendale, Bluffton, or any other town or point between in South Carolina could challenge a permit issued for a project in Charleston based on one of these novel theories coupled with an assertion that they visit Charleston from time to time. In other words, under the Opinion, a party's standing to challenge a DHEC permit under § 44-1-60(G) ultimately is based on nothing more than their mere interest in the matter. And the fact that similar conjectural arguments were raised in *Lujan*—and, importantly, rejected due to a rigorous application of the traditional standing analysis—more than obviates any response that these are "academic" claims that would not be raised in an actual case.

In rejecting consideration of causation and redressability under § 44-1-60, the Opinion never considers the fact the statute was enacted by the General Assembly on a backdrop of standing jurisprudence as it has existed in this state for many years. The legislature is presumed to know the existing law when it enacts a statute. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) ("The legislature is presumed to be aware of this Court's interpretation of its statutes.") (citing *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997)). At the time § 44-1-60 was enacted in 2006, absent an express legislative directive to the contrary, this Court's general standing jurisprudence required a potential permit challenger to show a causal connection and redressability. The Opinion rejects the juridical backdrop, concluding instead that the General Assembly decided nearly fifteen years ago to abandon all this and drastically expand the universe of persons who may challenge a permit issued by DHEC based on nothing more than

its use of the term "affected person." And despite that drastic change and the apparent consistent misapplication of a contrary interpretation by the ALC, the Court of Appeals, and this Court in the intervening fifteen years, the General Assembly took no legislative action to correct the judicial system's misinterpretation of its legislative intent, including in the three intervening amendments to § 44-1-60 occurring in 2010 and twice in 2018, respectively.

But this is not consistent with the previously-held general understanding of that term as used in the statute. In fact, no court to have addressed this issue, either directly or indirectly, has reached the same conclusion as the Opinion does. Although the Opinion rejects it as having not "specifically rule[d] on the issue" of constitutional standing, the opinion in *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007) did in fact indicate 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*. *Id*., 374 S.C. at 329, 649 S.E.2d at 32. The ALC certainly has consistently applied the *Lujan* test in adjudicating challenges under § 44-1-60. *See, e.g., 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."); *see also Upstate Forever v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0919-CC (July 14, 2011) (Anderson, J.) (using the *Lujan* test to determine whether petitioners had standing to challenge a DHEC decision).[8] In short, although no

[8] Petitioners did not cite 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 Auth. 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.1123-25)**

other court in this state has used anything but a traditional standing analysis for § 44-1-60,[9] the Opinion concludes that the General Assembly intended to create a *de minimis* standing test in 2006, based on nothing more than the legislature's use of the term "affected," and then sat idly by for nearly fifteen years as the courts consistently misapplied its intent.

C. The problems associated with Opinion's decision to remove the causation and redressability elements from the evaluation of environmental permit challenges is highlighted by the allegations contained in affidavits.

The Opinion further errs in stating that a "broad test" for standing to challenge a permit is appropriate given "the nature and scope of environmental consequences" relating to permits such as the one at issue in these proceedings, *see* Op. at 11-12 (citation omitted). In particular, the Opinion references geographic proximity to a project as to whether a person is "likely to be impacted in ways that are distinguishable from the impacts generally falling upon the public at large" and, therefore, is "affected" for the purposes of statutory standing. Op. at 11. But by rejecting the causal analysis prong of traditional standing in favor of allowing a person to proceed if they simply claim to be "affected," the Opinion removes the requirement that the harm being alleged is actually tied to the permittee,[10] and it articulates no basis for limiting the universe of

[9] "The courts tend to construe these statutes as requiring the same type of showing by a plaintiff as in the standing cases that apply only judge-made law." 2 *State Envtl. L.* § 14:7 (2013); *see also Bosque River Coalition v. Tex. Comm'n on Envtl. Quality*, 347 S.W.3d 366, 375 (Tex. App. Austin 2011) ("the same basic principles governing whether a party has standing to challenge governmental action in court also govern whether a party is an 'affected person' entitled to a contested-case hearing"); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 903-04 (Del. 1994) (after first observing that the Data Processing test "[n]ormally … applies only in the absence of a specific statutory grant of review," the court went on to apply the Data Processing test in determining whether the plaintiff was "substantially affected" under the relevant statute); *Trepanier v. City of Everett*, 824 P.2d 524, 526 n.1 (Wash. Ct. App. 1992) ("We see no reason … why the statutory standing requirements [under the State Environmental Policy Act] should differ from the constitutional standing test established before the statute was enacted.").

[10] This is particularly relevant here, where it is beyond question that even the alleged harm to Petitioners recognized by the Opinion all derives directly from cruise ships calling UPT, not any activity directly attributable to the Ports Authority, which neither owns nor operates the cruise

challengers to those with geographic proximity to the project. The door thus is open for persons located anywhere to challenge permits based on arguments such as the "ecosystem nexus," "animal nexus," and "vocational nexus" theories advanced in *Lujan*. In short, the Opinion sweeps too broadly.

In addition to effectively eliminating any requirement of showing a causal connection, the Opinion also holds that a person may challenge a permit even if their claims would not be redressed by a favorable decision. *See Lujan*, 504 U.S. at 561. That conclusion is inescapable because the Opinion not only rejects the third prong of the *Lujan* analysis, but also affords standing to persons alleging harm that is attributable to *current* cruise and cargo operations already occurring at UPT. Because it is indisputable that these existing operations will continue even if the permit is denied, the Opinion effectively holds that redressability is not a required showing for maintaining a permit challenge. Moreover, the Court of Appeals and the ALC correctly determined that Petitioners never established a cognizable injury-in-fact that was actual and concrete, not conjectural or hypothetical as it relates to a shift in existing cruise operations within the same terminal footprint. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001) (holding that a "[p]rospective concern falls far short of the standard of 'concrete and

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ships. *E.g. Doe v. Obama*, 631 F.3d 157, 162 (2011) (rejecting the causal link for standing where the party challenged the actions of the government in setting a policy, but where the conduct alleged to have caused the injuries resulted from third parties not before the Court availing themselves of that government policy, finding "that injury is not fairly traceable to the government" and "[w]here government policy not only allows [third parties] to choose what to do … but also safeguards the independence of their decision with strict conditions, the connection between injury and policy is a 'purely speculative' one.") (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)); *see also Allen v. Wright*, 468 U.S. 737 (1984). The Court need look no further than counsel for the Petitioners in this case who also served as counsel for many of the Petitioners in the *Carnival* case and, when asked why those plaintiffs did not sue the Ports Authority before this Court in *Carnival*, stated unequivocally that "**[t]he Carnival operation is the one directly causing the injuries to Plaintiffs. They are the cause.**" **(R. p. 2185)** (emphasis supplied).

particularized and … actual or imminent' harm set forth in *Lujan*"). By allowing Petitioners to maintain this action even though a favorable decision would not redress their injuries, the Opinion rejects the redressability analysis and authorizes anyone to challenge a permit who lays claim to being "affected" by the administrative decision without regard to whether their alleged injuries can be remedied by a favorable decision.

Under the newly announced standing regime for environmental permits, the Court has indicated that challenges no longer have to be tied to the conduct being permitted and declared open season on industry and development. The folly of this new judicial standing analysis for DHEC permits that jettisons the causation and redressability prongs of constitutional standing is laid bare when, as with this particular challenge, the injuries advanced in order to support a finding of being "affected" are based solely on existing, permitted conduct not traceable to the specific activity sought to be permitted and which conduct will continue unabated regardless of the permitting decision in this case. A review of the affidavits submitted by Petitioners and determined by the Opinion to establish standing further illustrate these problems.

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.86)**; Rule 56(e), SCRCP. Again, though, perhaps the most fundamental flaw is that, without a single expert affidavit, Petitioners try to connect existing and future operations at UPT to alleged present-day health issues through assertions by lay affiants such as Ms. Robertson. 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 ability to opine on such a subject inherently lies in expert witness testimony. The remainder of her affidavit does no more than articulate inadmissible conclusory opinions and generalized grievances. That does not establish that she has suffered an injury in fact or, for that matter, that she would be "affected" by the newly issued Permit given that her complaints arise from existing operations.

Nor do Petitioners' other affidavits establish standing or even "affected person" status. As she did in *Carnival*, 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. Op. at 10; *see* Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the license), **(R.p.399)**; *see also* Standing Order at 8 n.9 & 9 n.12 **(R.pp.84-85)**. 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.86-87)**. 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.84-85)**. 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.83-84, 86)**.

In short, the Opinion endows Petitioners with standing even though none of these affidavits would survive a *Lujan* analysis—and Petitioners in any event abandoned their causal connection and redressability arguments. *See* n.7, *supra*. The conclusion therefore is inescapable that the Opinion substantially enlarges the universe of persons who may challenge a DHEC permit.

Moreover, by allowing Petitioners to proceed with their challenge based on alleged harm from the cruise terminal as it currently exists, the Opinion effectively overrules *Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), *cert. denied* (S.C. Sup. Ct. filed July 7, 2011) (Shearouse Adv.Sh. No. 24 at 8) (erroneously identifying this case—No. 4673—as *Bailey v. SCDPPPS*), which rejected a permit challenge based on alleged harm arising from existing conditions. In *Bailey*, a landowner challenged a modification permit issued by DHEC to a neighbor's dock on the grounds that the permit facilitated the continued and expanded use of the dock by boats, thereby prejudicially impacting the neighbor's use and enjoyment of the creek and his own property and dock. The ALC dismissed the challenge for lack of standing, finding no causal connection between the alleged injury and the permitted conversion of the dock "because the boats [that are the subject of the neighbor's challenge] had been docked there for years, and they would continue to be docked there regardless of the permitting decision." *Id.*, 388 S.C. at 7, 693 S.E.2d at 429. On appeal, the Court of Appeals affirmed the ALC's decision.

The arguments addressed in the Opinion are substantially the same as those made and rejected in *Bailey*. Cruise ships have called on UPT continuously since 1973 (and passenger vessels for over 100 years), they do so today, and will continue to call on UPT and the Charleston peninsula in the future regardless of whether the Ports Authority shifts operations less than 600 yards north.[11] In fact, based on the longevity of use of UPT as a port of call for cruise ships, the traceability of the alleged injuries to the permitted activity is much more attenuated than that existing in *Bailey*, especially since this case involves a publicly operated marine terminal, the use of which for a marine terminal predates the existence of every Petitioner. Moreover, standing in *Bailey* was absent not simply because the "same boats … would continue to be docked at the same location

[11] *See* Lehman Aff. at ¶9-10 **(R.p.1546)**.

regardless of the permit decision," but, more importantly, also because the "the potential of having boats mooring at the dock would still exist" regardless of the permitting decision. *Bailey*, 388 S.C. at 7, 693 S.E.2d at 430. This is a subtle but critical point: standing in *Bailey* was lacking because a pre-existing use, *i.e.*, letting friends moor at a dock, would be unaffected by a permitting decision, not merely because the same boats or number of boats would moor at the same dock. Similarly, cruise operations have existed at the UPT for decades and the potential of having cruise vessels call at the UPT—with greater or lesser frequency—will still exist regardless of the permitting decision.

By affording standing based on Petitioners' allegations of harm that necessarily arise from existing operations, the Opinion implicitly overrules *Bailey* and allows persons to challenge a permit for expanding a project based on arguments that should have been made to the original permit, effectively forcing permittees to relitigate the original application for their existing permit. Moreover, by holding that affidavits such as Ms. Dodd's afford standing even though her claims of injury are based on existing conditions, the Opinion misapprehends the facts and the law governing permit applications as enacted and approved by the General Assembly.

At bottom, the problem with the Opinion's analysis is that it rejects traditional standing principles and § 44-1-60(G)'s role in the statutory framework in favor of allowing "DHEC to receive input from all persons affected by a project" by allowing challenges from anyone who claims that they would be "generally … influenced in some way" by the permit. *See* Op. at 8. But while expanding the universe of potential challengers, the Opinion fails to provide any sort of benchmark for courts to evaluate who truly is an "affected person." For example, is a person that resides 1000 feet from a project be close enough geographically to be "affected" by a project? How about a mile? Ten miles? One hundred miles? What about a person who lives in the upstate far

from the cruise terminal but alleges their intent to visit Charleston next year and is concerned about the future possibility of increased traffic in the Holy City or that emissions from a docked cruise ship may trigger their asthma? *See* Op. at 12 (stating "[m]embers would suffer the environmental consequences Petitioners *allege* the project will create, such as breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution") (emphasis added). Any limitations on the expanse of the Opinion's holding are not readily apparent from its broad language and rejection of traditional limitations on the universe of permit challengers.

In short, the Opinion renders inconsequential any purported requirements for standing with respect to § 44-1-60 challenges, and thus leads to an absurd result that could not have been intended by the General Assembly. Contrary to the approach taken by the Opinion, the only reasonable way to determine whether a person "would be affected by the proposed project," absent some other express direction by the legislature, would be to determine whether the person has constitutional standing. For this reason, the Opinion should have affirmed the decision of the ALC, which applied a traditional standing analysis under *Lujan*. Moreover, as noted above, because Petitioners failed to seek review of the lower courts' rulings on causation and redressability, the Court of Appeals should have been affirmed on that basis alone. The ALC correctly recognized that Petitioners were required to satisfy constitutional standing requirements to challenge the permit, which is exactly the position the Petitioners themselves have acknowledged is appropriate. *See* **(R.p.639)** ("The South Carolina Supreme Court has held that an 'affected person' must satisfy the 'injury' requirement of Article III standing, i.e., the injury must be concrete and particularized, and actual or imminent.") (*citing Smiley*, 374 S.C. at 326, 649 S.E.2d at 31."). The Court therefore should

grant rehearing in this case and affirm the ALC's decision to grant summary judgment on the basis that the Petitioners did not satisfy the requirements for constitutional standing.

D. The Opinion erroneously concludes that Petitioners are "affected persons" because they were allowed to participate in other stages of the permitting process.

The Opinion also erred by basing its decision in part upon a statement that "there is no dispute that Petitioners were considered 'affected persons' with regard to these other stages of the permitting process" and that "the dispute over their status arose only when Petitioners requested a contested case hearing." Op. at 13. These holdings misapprehend the administrative procedures before DHEC and mistakenly assign significance to events which are irrelevant or impossible. Stated differently, because the Opinion starts with the incorrect proposition that the General Assembly conferred statutory standing under § 44-1-60 by virtue of achieving the nebulous "affected person" moniker, it incorrectly concludes that Petitioners' unchallenged participation at the DHEC staff and Board level confirms the existence of statutory standing.[12] What the Opinion misapprehends, however, is that there is no procedure during the DHEC review process by which DHEC or an applicant could even challenge an assertion by a would-be participant that they are an "interested person." DHEC has no statutory authority to conduct a hearing or exclude someone from the process based on a determination that the person is not "affected." As Justice Kittredge held for the majority of the Court in 2010, a party need only "ask[] to be notified of the DHEC staff decision on the permit[]" in order to attain affected person status under § 44-1-60(E). *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 428, 702 S.E.2d 246, 251 (2010). The Opinion identifies no procedure the Respondents could have

[12] In fact, the opposite is true. The fact that any person can achieve "affected person" status and participate in the permitting process at the DHEC level simply by registering a request with DHEC to be notified of decisions on the permit does not automatically translate into that person's ability to invoke the judicial process to challenge that permit absent a showing of standing.

employed to challenge Petitioners' self-imposed moniker at the DHEC level because no such procedure exists. This is consistent with the Court's holding in *Coastal Conservation League*, which concluded that there was no reason to determine if "affected person" status was present in that case because DHEC had conceded that "the League was on the 'mailing list and should have received a copy [of the permit decision]" is sufficient for purposes of acquiring "affected person" status.'" *Id.*, 390 S.C. at 428, 702 S.E.2d at 251.

In short, under the analysis advanced by the Opinion, someone becomes an "affected person" with standing to challenge a permit before the ALC merely by identifying themselves as such to DHEC. The Opinion thus misapprehends the review process because it incorrectly assigns fault to the Ports Authority for failing to use a procedure that does not exist. For this additional reason, the Opinion reflects misapprehension of the administrative process and procedures governing DHEC permit challenges and the Court should grant rehearing on this matter and affirm the decision of the Court of Appeals and the ALC that Petitioners lack standing.

E. By rejecting the traditional standing analysis for challenges brought under § 44-1-60(G), specifically the causation and redressability prongs, the Opinion effectively affords anyone who wants to challenge a DHEC permit with public importance standing.

The Opinion correctly notes that "Petitioners do not assert standing via the public importance exception," Op. at 6,[13] but then effectively affords them that avenue of relaxed standing by rejecting the traditional standing analysis in favor of allowing challenges from anyone who claims to be affected. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter."). By eliminating a

[13] Petitioners argued public importance standing below, but abandoned that argument on appeal to this Court.

traditional standing analysis for § 44-1-60(G), the Opinion allows these—or any—Petitioners to proceed by showing only that it produces an effect on them, not that they have a particularized injury. *See* Op. at 8. This is public importance standing by another name. *See ATC*, 380 S.C. at 198, 669 S.E.2d at 341 ("In cases which fall within the ambit of important public interest, standing will be conferred without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.") (internal quotation marks omitted). More problematically, the Opinion essentially authorizes public importance standing, or a new judicially-created hybrid approach, for § 44-1-60(G) challenges without any requirement of showing a matter of important public interest or the need for further guidance. *See Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53.

The Opinion supports its "affected person" analysis by noting a distinction between the standards of judicial review versus statutory standing. *See* Op. at 9. But by reading into § 44-1-60(G) a legislative intent to allow a broad universe of interested parties to challenge a permit, the Opinion actually projects a modified version of the judicial doctrine of public importance standing into the legislative permitting scheme. As such, the Opinion judicially legislates an answer to the question of how "affected person" should be defined, which is "forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial." *Creech*, 200 S.C. at ___, 20 S.E.2d at 652. The Opinion should be reconsidered and the decision of the Court of Appeals affirmed.

II. The Opinion erroneously invades the province of the trial court by holding that Petitioners "satisfied the good cause" standard with respect to additional discovery.

The Opinion holds that Petitioner's motion to expand discovery no longer is moot because the grant of summary judgment was reversed. Op. at 15. But instead of remanding the matter for further consideration by the ALC, including whether the lower court determined it would be appropriate to revisit the Order denying Petitioner's Motion to Expand Discovery, the Opinion

instead preemptively finds that Petitioners "satisfied the good cause standard" in seeking to reopen discovery. Op. at 15. Nowhere in this part of the Opinion is there any recognition that matters regarding discovery are committed to the trial court's discretion. *See, e.g.*, *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion."). In fact, a trial court has wide authority to manage discovery in matters before it. *See, e.g.*, Rule 16(a)(5), SCRCP (allowing trial judge to limit "the time allowed for discovery"); Rule 37(b)(2), SCRCP (allowing trial judge to impose sanctions for failure to comply with discovery order). Or, more simply, trial courts "have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, ___ U.S. ____, 136 S. Ct. 1885, 1892 (2016) (discussing district courts).

Instead of applying the deference normally afforded to lower courts, the Opinion just notes the general provisions of SCALC Rule 21(A) without any reference to the appropriate standard of review or of the ALC's authority and responsibility to manage the matters occurring before it. Because the ALC ultimately resolved the discovery motion by ruling that it was moot—and thus not ruling on the substance of the motion—the matter should have been remanded to the ALC to consider the substance of the motion in light of the other issues decided in the Opinion. In short, the Opinion erred in making these findings *de novo*, rather than remanding, because the ALC is the "ultimate finder of fact" in contested cases. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). However, the Opinion does none of this, and thus misapprehends the standard of review with respect to issues involving the conduct of discovery and also misapprehends that the trial court never ruled on the substance of the motion to expand discovery. *See Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (holding that in an

action at law such as this one, an appellate court may not make its own findings of fact and instead may only determine whether the ALC's findings lack evidentiary support).

Moreover, the original Order denying Petitioners' Motion to Expand Discovery fully evaluated the issues present in the case. **(R.p.64)** In that Order, the ALC evaluated the posture of the case, evaluated the actions taken and not taken by Petitioners. **(R.pp.64-66)** The ALC noted that Petitioners did not file a motion to expand discovery until "more than seven months after the discovery period ended." **(R.p.65)** Notably, the ALC also found that Petitioners had "been afforded ample opportunity to conduct discovery," **(R.p.66)** And the Petitioners never have explained 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 that it intended to file a motion for summary judgment. Discovery Order at 3 **(R.p.66)**

Nowhere does the Opinion identify or make reference to these factors identified by the ALC; instead, it sweeps them all aside in favor of unilaterally finding that good cause existed to extend discovery. In so doing, the Opinion ignores—indeed, does not even reference—the well-settled principle that the trial court is entitled to manage its affairs. *Branham v. Ford Motor Co.*, 390 S.C. 203, 242, 701 S.E.2d 5, 26 (2010) (noting a "court's inherent authority to manage and conduct a trial"); *see also State-Record Co. v. State*, 332 S.C. 346, 349, 504 S.E.2d 592, 593 (1998) ("The United States Supreme Court has recently recognized the inherent authority of a court to protect its proceedings."); *Dietz*, 136 S. Ct. at 1892. As such, the Opinion misapprehends the posture of this case and of the proceedings below and, instead of recognizing the ALC's primary responsibilities with respect to overseeing discovery, simply diminishes the lower court's authority in favor of a sweeping holding that good cause was shown for a motion that sought to expand discovery more than seven months after the discovery period had concluded.

In short, the Opinion misapprehends the posture of review for discovery orders and does so without affording the ALC the opportunity to evaluate and review its own orders in light of the Opinion's holding. The Court should reconsider the Opinion and affirm the holding of the Court of Appeals.

III. The Opinion erroneously invades the province of the trial court by holding that the ALC improperly imposed a sanction against Petitioners.

The Opinion misapprehends the standard of review for the trial court's decision to impose sanctions, as well as the legal and factual background that gave rise to the ALC's imposition of sanctions. The Opinion in passing notes that sanctions are committed to the ALC's discretion, but then proceeds to remove that decision from the ALC's purview by stating that the Court "tak[es its] own view of the preponderance of the evidence." Op. at 16. While correct so far as it goes, this statement reflects a misapprehension of the case because there are no disputed facts in this instance and, thus, the question of whether Petitioner should be sanctioned for making a frivolous argument based on the statutory language is committed to the trial court's discretion. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (holding that where the appellate court concurs in the findings of the lower court, the award of sanctions is reviewed under the discretionary standard and will not be disturbed absent a clear abuse of discretion) (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)). Here the Opinion expressly states that Petitioners' interpretation of § 44-1-60 was "incorrect on the law." Op. at 18. Having concurred in the finding of the ALC, its subsequent holding imposing a sanction can only be reversed by this Court is it is unsupported by any evidence. Here again, the Opinion acknowledges that Petitioners did not appeal the Remand Order, which conclusively found that Petitioners' motion to remand was unreasonable, and that such finding by the ALC "interpreting the statute is the law of the case," Op. at 18, yet that unappealed finding of unreasonableness is the basis of the imposition of sanctions and thereby

unquestionably serves as "evidence" to support the ALC's order. This Court's failure to apply the correct standard of review to this issue warrants rehearing.

The Opinion further compounds its misapprehension of the facts and the appropriate standard of review by failing to consider the fact that Petitioner and its counsel previously represented to *this Court* that a final review conference by the DHEC Board is not mandatory. **(R.pp.73 & n.5, 218)**; *cf. Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 167, 758 S.E.2d 483, 499 (2014) (affirming imposition of sanctions where the appellant had "made identical legal arguments in [previous litigation] and did not prevail on the merits"). Moreover, the Opinion misapprehends the ALC's careful review of the factors that gave rise to its decision to impose sanctions. In deciding to impose a sanction, the ALC observed that DHEC Board review repeatedly had been recognized as discretionary by the ALC. **(R.p.72 & n.4)** The ALC further noted that the Board's discretion had been recognized by the Supreme Court. **(R.p.73)** Thus, the ALC did not impose sanctions solely because Petitioners made a mistaken legal argument, but because they knowingly made a now-unappealed argument that was, as the Opinion acknowledges, "incorrect on the law." The Opinion therefore should have upheld the imposition of sanctions because the ALC's decision had a reasonable factual basis. *See 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 short, the ALC exercised its discretion to impose sanctions based on the undisputed facts and its own evaluation of the issues in the case. There is no basis for concluding that the ALC abused that discretion, especially when counsel for Petitioners previously had recognized as much and when the Opinion itself recognizes that Petitioners were wrong about the law. By reversing the imposition of sanctions based on its misapprehension of the evidence of record, the Opinion undermines and ignores the responsibilities and discretion of the ALC—or for any court, for that

matter—with respect to the imposition of sanctions concerning matters occurring before it. The Court therefore should reconsider the holding of the Opinion with respect to the imposition of sanctions and affirm the decision of the Court of Appeals.

Conclusion

For the reasons explained above, the Court should reconsider the Opinion and affirm the decision of the Court of Appeals.

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