

EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Carnival Corporation d/b/a Carnival Cruise Lines;
South Carolina State Ports Authority; and City of
Charleston..... Petitioners, Defendants

v.

Historic Ansonborough Neighborhood
Association, Charlestowne Neighborhood
Association, the Coastal Conservation League, and
Preservation Society of Charleston..... Respondents, Plaintiffs.

AFFIDAVIT OF CHRISTINA DODD

PERSONALLY APPEARED BEFORE me CHRISTINA DODD, who, after being
duly sworn, deposes and says that:

1. I am a property owner, resident, citizen, and taxpayer of the City of Charleston, Charleston County, South Carolina. I own my home, which is located at 42 Hasell Street, Charleston, South Carolina 29401, and I have lived there since 2001. I have personal knowledge of the matters herein.
2. My home is located approximately two blocks from the Union Pier Terminal and within eyesight and earshot of the Carnival *Fantasy* operation there.
3. I am a member of the Historic Ansonborough Neighborhood Association

(HANA), The Preservation Society of Charleston, and the Coastal Conservation League.

HANA is a non-profit corporation that represents approximately 240 members in the Ansonborough neighborhood, just west of the Union Pier Terminal. Its role and position in this litigation was authorized by its membership, is consistent with its mission, and vindicates the interests of the members it represents, including me. As should go without saying, this litigation is germane to the purpose of these organizations and furthers the common interests of their memberships in preserving my neighborhoods remarkable historic integrity, as well its livability.

4. Before 2009, I did not notice any traffic, congestion or noise from cruise ships in my neighborhood.

5. Beginning in 2010, the *Fantasy* began the first year-round home port cruise operation in Charleston. I can see the *Fantasy* and its trademark funnel emitting dark soot into the air from my street.

6. In the last two + years, I have noticed a layer of black soot on the exterior of my house and porch. I believe that the *Fantasy* causes or contributes to this soot. The soot detracts from my use and enjoyment of my residence and increases maintenance and cleaning costs. Soot also makes its way into my house where it must be cleaned from window sills. Having read about the harm caused by diesel soot emissions - including cancer and cardiopulmonary disease - I am concerned that the soot entering my home poses risks to my health.

7. Although noise has been addressed and modified by Carnival, I still hear occasional announcements from the *Fantasy*, as well as music from the ship as passengers embark. I understand that my neighbor down the street called and complained to the police about the noise. When departing, the ship still sounds a very loud horn multiple times. These

noises are loud, disruptive and annoying.

8. The *Fantasy* home base operations cause serious traffic problems in my neighborhood. The closing of two public streets and the influx of thousands of passengers and crew add significant congestion to a small downtown area already challenged by too much traffic. On cruise days, pedestrian traffic also greatly increases as cruise passengers seek supplies such as liquor, (which I understand is not covered by the cruise ticket price), before boarding the ship. When the *Fantasy* is in port, traffic is a major inconvenience and annoyance which interferes with the access to my home and my quality of life. I have had difficulty completing everyday errands and reaching my own residence. On occasion I have found myself ½ block from home, only to be redirected many blocks in the opposite direction. On days when the cruise ship is in town, between the increased automobile and pedestrian traffic, it has been very difficult to navigate and enjoy my neighborhood and community, with errands lasting many times longer than they normally would.

9. I can see the Carnival *Fantasy* from my street, while walking around my neighborhood, and in the Historic District generally. The site of the *Fantasy's* funnel belching smoke, visible from my street, diminishes my quality of life and enjoyment of Ansonborough. I understand that real estate agents have told residents desirous of selling their home that sellers must disclose if their property is adjacent to a home porting cruise operation, because of the negative impacts on the property. I am concerned that ongoing unregulated operations by Carnival are impacting the value of my home.

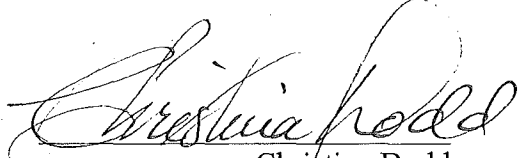
10. I chose to live in Charleston because of the strong history of preservation and historical protection, and because Ansonborough is a well-situated, quiet residential area. The historical atmosphere, local business, quiet streets, and view of harbor are assets that I enjoy

and which are being negatively impacted by the Carnival cruise operation. I love Charleston because of the value it places on historical and architectural preservation. I observe and appreciate Charleston's historic aesthetic, walking throughout my neighborhood of Ansonborough and across the peninsula. This is one of the primary reasons I choose to live in Charleston in general and Ansonborough in particular. The balance the city and neighborhood have cultivated is fragile. I do not believe the backdrop of an early 19th century neighborhood can coexist with a disproportionately modern behemoth of a vessel looming on the skyline without that neighborhood losing the values and aesthetics that I appreciate.

11. I am not opposed to cruise operations in Charleston, and neither is anyone I know in Ansonborough. What we would like to see is compliance by Carnival with local and state laws. We have no desire to limit cargo ship operations at Union Pier or elsewhere.

12. Because of Carnival's home port operation, I suffer individualized injury that compromises my interests as a citizen, resident, property owner, and taxpayer in the City of Charleston. This injury in fact is fairly traceable to Carnival's operations challenged in this action. These injuries would be redressed by a favorable decision in this case.

FURTHER AFFIANT SAYETH NOT.


Christina Dodd

SWORN TO before me this
18th day of September, 2013

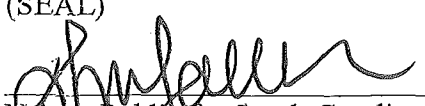
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Notary Public for South Carolina
My Commission Expires: Jan. 20, 2019

EXHIBIT B

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UNIDENTIFIED FEMALE SPEAKER: Ladies and gentlemen, just a reminder. Please make sure that all of your cell phones and other electronic devices are turned completely off.

6

THE BAILIFF: All rise.

7

CHIEF JUSTICE TOAL: Please be seated. The first case for oral argument this morning is Carnival Corporation against Historic Ansonborough and others. You may proceed.

11

MR. INFINGER: If the Court pleases, my name is Marvin Infinger of the Nexsen Pruet firm, which represents the State Ports Authority in this proceeding. Accompanying me are general counsel for the Ports Authority, Philip Lawrence, and Mr. Pat McKinney, a member of the board of the Ports Authority. Unfortunately, others could not attend because today is the State of the Port address, coincidentally.

20

CHIEF JUSTICE TOAL: Mr. Infinger, what I'm going to ask you to do is, adjust that microphone to -- we've got a new sound system for these tired, old ears, including mine, almost as tired as the mayor's. So if you'd speak into that so we could all hear you, that would be great.

25

1 MR. INFINGER: My goodness. And if it's too
2 loud, please let me know. I have been asked to
3 deliver the argument in chief. Since this is not an
4 appeal, there, there may be some help, if needed,
5 from my co-counsel, Ms. Cantwell, who represents the
6 city, and, of course, Mr. Schreck or Mr. Collins of
7 the Womble firm, who represent Carnival Cruise Line.

8 It goes without saying that the determination of
9 the issues in this case can have a profound effect on
10 the maritime commerce of this state and, indeed, of
11 this country. There, there -- the plaintiffs in this
12 action have asserted that the call of the Carnival
13 *Fantasy* at Union Pier in Charleston is an illegal
14 call, and the remedies which they seek in their
15 pleadings is to enjoin the illegality of that.

16 The profoundness of the effect in the, in the
17 way in which this dispute is determined is
18 exemplified by two examples that I would like to
19 share with the Court. One is -- deals with an
20 industry which existed -- which, which placed here
21 largely because of the Port of Charleston, BMW.
22 BMW's cars are manufactured in the Upstate, and
23 they're delivered to the Port of Charleston on the
24 peninsula terminal, the Columbus Terminal. They are
25 conveyed across the ocean in something called "row

1 row vessels.” Under the theory of the plaintiffs in
2 this case, those vessels call illegally. If this
3 sort of claim is a viable, actionable claim, the
4 question must be asked, will other BMW’s be dissuaded
5 from placing their manufacturing facilities in the
6 State of South Carolina?

7 JUSTICE PLEICONES: Mr. Infinger, I hate to
8 interrupt you, but --

9 MR. INFINGER: Yes.

10 JUSTICE PLEICONES: -- you know, I would be
11 interested in, you know -- perhaps the other members
12 of the Court would not be, but I would be interested
13 in hearing your -- talk about standing. What’s the
14 predicate? How do we get here to begin with? As
15 opposed to just the substantive portions of what you
16 argue and the merits of the case and that kind of
17 thing, where do we -- how do we get here?

18 MR. INFINGER: Well, well, Your Honor, an
19 excellent question because the, the plaintiffs in
20 this case are, are assuming the role of unelected,
21 unappointed surrogate regulators, in effect. The,
22 the city has refused to act in, in accordance with
23 their wishes. The state and the federal government
24 have embraced Charleston’s port for the very
25 operations of which they complain, and the complaints

1 of the plaintiffs in this case are exceedingly
2 generalized. I'm going to cheat a little bit if I
3 can and refer to the amended complaint, the very
4 beginning of the amended complaint. And I'm quoting
5 from paragraph 1 of it.

6 "This lawsuit aims to protect Charleston's
7 neighborhoods, families, and environment by having
8 the defendant, Carnival, play by the longstanding
9 rules and norms that have made and make Charleston a
10 wonderful place to work, live, and visit. The relief
11 sought includes a declaration that the defendant is
12 not above the laws."

13 This is a generalized grievance, assuming, or
14 presuming to speak on behalf of the citizenry of
15 Charleston. The standing rules, of course, in this
16 court, require a particularized injury, and the
17 reason for that is, is u -- there could be a
18 usurpation, if you will, of, of legislative and
19 political -- excuse me -- legislative and executive
20 function by the Court if standing is allowed and the
21 judiciary is invoked for redressing the grievances of
22 generalized grievances. So we would say that, with
23 respect to the standing and the particularized injury
24 requirement, that no particularized injury has been
25 asserted and that --

1 JUSTICE HEARN: In other words, Mr. Infinger, you
2 would take the position, I suppose, that the
3 allegations made by the plaintiff of their injuries
4 are just sort of the price of living in this world
5 of, of progress, if you will; of the changing
6 landscape.

7 MR. INFINGER: There, there, there's no question
8 about that, Justice Hearn. There's a case -- we have
9 no case of this magnitude in our jurisprudence
10 concerning the application of zoning laws and
11 nuisance laws to these instruments of, of interstate
12 and foreign commerce conveyances. But it's
13 interesting. There's a, there's a case that I think
14 puts it in context in, in less importance terms, and
15 that's the case of Strong against Winn Dixie. Very
16 interesting case in that there was a supermarket that
17 was sought to be built, a Winn Dixie, of course, in
18 the town of Easley, and in that case, the
19 supermarket, of course, unlike the port operations,
20 was not mandated, but a supermarket in an urban
21 setting, of course, is a convenience toward urban
22 living. Nuisance claims were brought on the basis
23 that there would be an increase in traffic, fumes,
24 soot, et cetera, on account of the increased activity
25 by the store. The Court noted, Oh, no, that is a

1 normal inconvenience of living in urban life, and if
2 your -- even if your property is devalued by it, that
3 is, in effect, a coincident risk of living in an
4 urban environment.

5 Now, grocery stores aren't mandated. The Port
6 Authority's development is mandated by legislative
7 mandate. That's -- that puts it in some context, but
8 with respect to --

9 CHIEF JUSTICE TOAL: But, but respect to their
10 standing, they've got to -- if they're -- if we're
11 talking about constitutional standing --

12 MR. INFINGER: Yes.

13 CHIEF JUSTICE TOAL: -- they've got to have an
14 injury in fact that's concrete, that's
15 particularized. They've got to have a, a connection
16 between the injury and the conduct, and --

17 MR. INFINGER: Redressability.

18 CHIEF JUSTICE TOAL: -- anticipate a favorable
19 decision. And what they -- these, these people are
20 not property owners, as I understand it.

21 MR. INFINGER: The, the associations represent
22 literally thousands of people.

23 CHIEF JUSTICE TOAL: These associations, the
24 plaintiffs in this matter, are not property owners,
25 are they? Accept for --

1 MR. INFINGER: No.

2 CHIEF JUSTICE TOAL: -- perhaps, the ownership of
3 an easement at the office of one of them.

4 MR. INFINGER: That, that is correct. The
5 Preservation Society might own an easement, and the,
6 and --

7 CHIEF JUSTICE TOAL: This -- these organizations
8 are complaining of traffic congestion, pollution,
9 road closures, large crowds, noises, and obstructed
10 views. What is particularized about any of those?

11 MR. INFINGER: There, there's nothing
12 particularized about that. It, it, it --

13 CHIEF JUSTICE TOAL: Isn't that, all by itself,
14 enough to answer Justice Pleicones's question about
15 standing?

16 MR. INFINGER: It is, and, and that was what,
17 what I was attempting to do, and, and, and I think
18 they do not have standing, based on that. If I may -
19 -

20 JUSTICE HEARN: Is there any reason to look at
21 the nuisance claims differently than the zoning
22 claims in regard to standing?

23 MR. INFINGER: I don't think there is, and, and,
24 and let me suggest why. The, the nuisance claims, of
25 course, seek injunctive decree, and the injunctive

1 decree that, that they seek require either the
2 abatement of the activity or the modification of it.
3 It is, it is the crudest form, if you will, of, of,
4 of regulation, and this sort of issue was addressed
5 in, in the Willatt (PHONETIC) decision, which is
6 cited, I believe, by both, by both parties in, in the
7 matter.

8 But indirectly through use of the judicial
9 process, through mandatory or prohibitory injunctive
10 relief, you're still regulating the calls of these
11 vessels and affecting them. And if they constitute -
12 - if their, if their otherwise lawful operation
13 constitutes a nuisance, and if, of course, the, the
14 vessel is precluded from calling, you, you're
15 stopping interstate commerce, one, which is, is, is a
16 no-no, so to speak, but secondly, what you're doing
17 through nuisance law is, you're, you're stepping into
18 the shoes of the public officials who have the
19 primary responsibility for using nuisance for
20 abatement or indictment purposes for vindication of
21 the public interest. And so the answer to the
22 question on standing really is the answer to the
23 stand -- to the issue of whether the, the nuisance
24 laws can be applied by these plaintiffs as well
25 because they assert the same generalized,

1 nonparticularized injury for thousands who reside on
2 the -- in the Historic District of the peninsula of
3 Charleston.

4 JUSTICE HEARN: Now, while that might be fatal
5 to their public nuisance claim, how would that impact
6 their private nuisance claim?

7 MR. INFINGER: The, the way it, it would impact
8 their private nuisance claim is that the injuries
9 that are asserted are common to all the thousands.
10 It --

11 CHIEF JUSTICE TOAL: It's still those generalized
12 allegations. They don't have in the private nuisance
13 claim any different recitation, specific recitation
14 of particularized damages, do they?

15 MR. INFINGER: There's no particularization of
16 that whatsoever. There, there, there is a conclusory
17 statement of unique injury, but, when, when the
18 complaint is looked at as a whole, there -- no -- how
19 shall I put it? No reasonable construction of it
20 could be otherwise.

21 JUSTICE PLEICONES: Moreover, Mr. Infinger, as I
22 look at this complaint, I don't see any allegation of
23 ownership in -- by any of the plaintiffs. I
24 understand that there's an allegation that the
25 headquarters of the Society is located nearly

1 adjacent to, to this place, but the remedy in private
2 nuisance, the special damages, is the diminution and
3 value of the prop -- one's ownership interest in
4 property. I don't see -- this is not an unfriendly
5 question to you. I don't see any allegation of
6 ownership in this complaint. Is there? Have I
7 missed it?

8 MR. INFINGER: Your Honor, there -- in the
9 amended complaint, to be fair, there is an allegation
10 of ownership of easement and of --

11 JUSTICE PLEICONES: Ownership of easement, okay.

12 MR. INFINGER: -- and, and, and of a, a leasehold
13 held by the Coastal Conservation League.

14 JUSTICE HEARN: So their headquarters are
15 leased?

16 MR. INFINGER: The headquarters are leased, yes.
17 But, but back, Justice Pleicones, to your original
18 question, the peninsula of the City of Charleston is
19 a very compact, fairly largely populated area.

20 JUSTICE PLEICONES: Yeah, I've been there.

21 MR. INFINGER: I -- we wish you'd come more. And
22 to the, the extent that 301 East Bay Street, which is
23 the easement address, I think, that was pled in the
24 complaint, suffers somehow from the call of these
25 vessels, so does 200 East Bay Street, which is owned

1 in fee simple by somebody. So does 140 Meeting
2 Street, which is owned in fee simple by somebody, and
3 so on, along -- among the thousands which reside in
4 the peninsula city. The, the, the same harms of
5 violence done to the skyline, to the aesthetic
6 appeal, to the, to the traffic congestion problems,
7 to all of those things apply to all of the residents
8 of the peninsula city of Charleston, and they're not
9 particularized nor unique to any of their members or
10 to the plaintiffs themselves, who represent the
11 thousands and who are attempting to vindicate the
12 interests of the Historic District of Charleston.

13 CHIEF JUSTICE TOAL: Well, they even alleged that
14 Charleston may be in danger of losing its Historic
15 Trust designation if this pier is allowed to continue
16 to accept the calls of this vessel. And it -- I
17 wonder, when that allegation is made, how history
18 would be forgotten of the Tidewater Terminal, the
19 Clyde Lines Terminal, and going all the way down to
20 where this place is, the calls of the container
21 ships, et cetera. That's been going on for quite
22 some time.

23 MR. INFINGER: Your Honor, I must say that it, it
24 occurred to me that it, it's such an irony that, that
25 fate, or, or, or providence or geology or, or however

1 you wish to attribute it blessed Charleston with this
2 wonderful, natural, close-to-the-ocean port, which
3 caused it to prosper, which caused it to become the
4 thing that the, the plaintiffs are trying to protect
5 by preventing shipping. It was the shipping history
6 of Charleston that made it what it is today, and it's
7 ironic, and, if, if I may, and I don't mean to be
8 flippant, is there a cutoff point in time when, when
9 things become so beautiful and individual taste
10 becomes so vested that they relegate Charleston to a
11 museum or, or, or, worse yet, a "Truman Show" without
12 cameras, where vessels can't call? And I think your
13 point is so well taken, and, and it's so ironic, the
14 gravamen of this complaint and what it, it is, it is
15 attempting to do.

16 CHIEF JUSTICE TOAL: Now, with respect to
17 standing on the zoning claims, can an organization
18 like this make a violation of zoning ordinance-type
19 claim?

20 CHIEF JUSTICE TOAL: Your honor, I don't think
21 so. The, the ATC case, which we cited in the brief,
22 says, says this. A private citizen -- and this was
23 in a zoning context -- a private citizen cannot
24 attack the action and, I'm sure, inaction of the
25 legislative officials or the executive officials

1 unless they have a special, particularized injury.
2 And the statute which they rely upon, which is 6-29-
3 950, I believe, talks in terms of, of neighboring
4 property owners having standing where they suffer a
5 specialized injury. And so that is a codification
6 of, of the standing requirements at law, and if my
7 recollection serves me correctly, was lifted out of
8 some old case law. And so, no, they do not have
9 standing under that statute, in my judgment.

10 JUSTICE HEARN: Well, that statute alone
11 couldn't confer standing. It wouldn't just be a
12 springboard. They would still have to meet the
13 three-part test of constitutional standing, wouldn't
14 they?

15 MR. INFINGER: Well, they would. They would, but
16 that is, again -- it sort of collapses. It's sort of
17 synonymous with that constitutional standing
18 definition.

19 CHIEF JUSTICE TOAL: Now, they also, of course,
20 contend that they have public importance standing,
21 and we are all over the block in this court on public
22 importance. What do you see as the status of our
23 jurisprudence there?

24 MR. INFINGER: Well, Your Honor, I've mused on
25 this a bit, and I've considered this. The, the

1 petitioners -- or, excuse me, the plaintiffs in this
2 action have stated, this is a unique, first-of-a-kind
3 lawsuit brought against this industry, and it should
4 be brought in Charleston. We think, based on the
5 arguments, the legal arguments in our brief, that
6 this claim is, is, is meritless; that it would
7 appoint, or it would presume, no matter how well
8 intentioned, that these private citizens could serve
9 as unelected, unappointed surrogate regulators, where
10 the city has chosen not to, where the State has
11 chosen not to, and, indeed, have, have taken an
12 absolutely contrary position to the, the position
13 which, which they take. It, it is publicly important
14 only to the extent that this court sanctions it as a
15 viable cause of action. And it's -- so it's sort of
16 the world turned backwards. You bring a unique cause
17 of action that, in our view, has, has no legal legs
18 upon which to stand, but if it is allowed, would do
19 violence to the ocean-going commerce of this state
20 and this, this nation. And --

21 JUSTICE HEARN: Mr. Infinger, could I, could I
22 ask you something? Two questions --

23 MR. INFINGER: Yes.

24 JUSTICE HEARN: -- really. Obviously, the
25 Court's interested in standing, and my first question

1 is, do you know why that issue was not addressed by
2 Judge Newman at all? My second question, though, is,
3 before your time's up, don't you want to address a
4 little bit the merits of the zoning, whether or not
5 zoning laws can even apply to an ocean-going vessel?

6 MR. INFINGER: Why Judge Newman did not address
7 standing in, in the initial circumstances -- he did,
8 in a way, through public nuisance. But certainly, no
9 court that I have seen ever has zoned -- or
10 sanctioned zoning, and no local regulatory body has
11 ever zoned an ocean-going vessel in commerce. The
12 power to zone is, is to -- is the power to prevent.
13 And if ocean-going vessels and commerce can be
14 subject to zoning, then there are restrictions that
15 can be placed in Charleston, in North Charleston, in
16 Philadelphia, in New York, in Norfolk, all of which
17 would pull and tug and decimate the ability of these
18 vehicles of ocean-going commerce to engage in a free-
19 flowing commerce in a national economy.

20 JUSTICE PLEICONES: It would be okay if they did
21 that in Savannah, though, wouldn't it?

22 MR. INFINGER: Your Honor, Your Honor, I have to,
23 not as a legal principle, but I certainly would like
24 to file -- to carve out an exception, Your Honor, in,
25 in, in that respect, yes. But, but, Justice Hearn, I

1 hope that this, this hits upon what you're, what
2 you're getting at. You know, Charleston --

3 JUSTICE HEARN: In order for zoning to apply,
4 doesn't, doesn't it have to concern land, a building,
5 or a structure?

6 MR. INFINGER: Oh, absolutely. From the
7 standpoint of the textual construction of the zoning
8 ordinance, there's no question that Justice -- I mean
9 Judge Newman got it right in his Report and
10 Recommendation. Zoning is a land-use planning tool.

11 CHIEF JUSTICE TOAL: They rely on the idea that
12 when they dock, they are attached to land. That's,
13 that, that's a big argument that's made for extending
14 the zoning to impact the vessel itself.

15 MR. INFINGER: Well, it starts with a proposition
16 that a structure, under the definition of "zoning
17 ordinance," is something which demands a connection
18 to land, and to say that, that this vessel, which
19 calls less than a day at Charleston when it calls,
20 because it is moored through mooring lines to the, to
21 the pier, is subject to that definition is, is, is
22 strained at, at best, and would work really a
23 nonsensical result, and, and Just -- Judge Newman's
24 Report and Recommendation, I think, reflected that.
25 So if I may have one last example in, in answer to

1 Justice Hearn, although I do see I'm over time.

2 CHIEF JUSTICE TOAL: That's all right. You may
3 complete the thought, of course.

4 MR. INFINGER: The, the, the second example, and
5 it hits on the Commerce Clause implications, which
6 were briefed, is, is this. As the Court knows,
7 recently Charleston was, was blessed by the federal
8 government in taking expedited steps to make,
9 hopefully, a 50-foot harbor deepening possible at
10 Charleston. The purpose of that is to allow
11 tremendous vessels, post-Panamax vessels, to be able
12 to call at Charleston in, in, in some quantity. If,
13 during the run-up to that, which we're in now, there
14 is a legitimate -- a legitimization of this sort of
15 claim, that you can have a colorable claim that is
16 fact specific against a vessel calling at Charleston
17 because of size, which is, which is a gravamen of, of
18 their argument, what effect will that have on the
19 federal government's attitude which has declared
20 Charleston deepening as one of the seven biggest and
21 most important infrastructure projects in this
22 country for an economic strategy going forward? I
23 shudder to think what effect that might have. Also,
24 the legislature has created a reserve fund for that
25 of 300 million. What if that 300 million is spent

1 and we don't get the benefits from the deepening
2 because there are a parade of nuisance and zoning
3 claims brought by citizens whose -- who, who attempt
4 to stand in the shoes of the regulators who are
5 embracing these calls, but who are trying to prevent
6 it in their role as surrogate regulators? It would
7 be a disaster to this state's maritime commerce
8 economy and to the nation's. And with that, I
9 appreciate your patience, and...

10 CHIEF JUSTICE TOAL: Thank you, Mr. Infinger.
11 You will have some time in reply, of course.

12 MR. HOLMAN: May it please the Court, I'm Bl an
13 Holman. With me is John Massalon on behalf of the
14 plaintiffs here today. This case arose when the
15 Carnival Corporation chose to locate a cruise home-
16 base operation unprecedented in kind, scale, and
17 impacts next to residential families in a
18 constrained, confined small area of the Charleston
19 peninsula. Nothing of this sort had ever happened
20 before. There had --

21 JUSTICE KITTREDGE: What law had they violated in
22 doing that?

23 MR. HOLMAN: Excuse me, Your Honor?

24 JUSTICE KITTREDGE: What law did they violate in
25 doing that?

1 MR. HOLMAN: Your Honor, we, we contend that the
2 operation on the land side and as it connects to
3 these vessels creates a nuisance and violates a
4 number of ordinances; for example, the tour boat
5 ordinance.

6 JUSTICE KITTREDGE: Well, you can tell from the
7 questions, the Court's very interested in standing.
8 So why don't you take that segue to, to tell us a
9 little bit about how these plaintiffs have
10 individualized or particularized harm that would
11 allow this case to go forward.

12 MR. HOLMAN: Yes, Justice Kittredge, we have
13 alleged that special injury in our complaint, and as
14 --

15 CHIEF JUSTICE TOAL: What is the special injury
16 you have alleged?

17 MR. HOLMAN: Your Honor, I would -- we have
18 special -- the facts that would support on a motion
19 to dismiss, which, it's kind of strange --

20 CHIEF JUSTICE TOAL: Well, as I, as I read your
21 complaint, what you've alleged is traffic congestion,
22 pollution, crowds, matters of that kind. Is that
23 right?

24 MR. HOLMAN: Chief Justice Toal, we've alleged
25 loss of National Register status. We've alleged

1 concentrated traffic, closed roads, noise, soot in
2 the Historic District, impairment of historic
3 easements, obstructed views by nonhistoric
4 structures, and rupture of the historic fabric, and
5 we've also submitted an affidavit from one of the
6 members of the organization who's alleged directly
7 that this involves her property interests, and we
8 think we have associational standing under the
9 precedent of this court that gives associational
10 standing.

11 CHIEF JUSTICE TOAL: Well, those -- so far, all
12 of the things you've listed, including the affidavit
13 of the individual, do not allege harm that is
14 particularized to a particular piece of property.
15 They allege historic status. They allege pollution.
16 They allege traffic congestion and so forth. Those
17 are not the sort of things that result in
18 particularized damage to a particular piece of
19 property in the normal nuisance action, either public
20 or private. And that's what we're searching for, is
21 something beyond just a generalization.

22 MR. HOLMAN: Your Honor, if I might, I think
23 the, the, the hesitation, perhaps, may center on the
24 fact that we have asserted associational standing.
25 At --

1 CHIEF JUSTICE TOAL: Well, associational
2 standing's not going to get you out of the question
3 we're asking about particularized damage. Let's say
4 we recognized associational damage. In the context
5 of nuisance, you've still got to have some
6 particularized damage as I understand jurisprudence.

7 MR. HOLMAN: Your Honor, with associational
8 standing, of course, an association can represent
9 parties that have particularized interests.

10 CHIEF JUSTICE TOAL: Yes, sir, and again --

11 MR. HOLMAN: That is the, entire doctrine.

12 CHIEF JUSTICE TOAL: -- it's the particularized
13 damage we're driving at, and --

14 MR. HOLMAN: Well, well, take the Dodd
15 (PHONETIC) affidavit.

16 CHIEF JUSTICE TOAL: Well, all, so far, that
17 individuals of the association have alleged is
18 generalized damages that are the product of living in
19 an urban environment. They have not alleged this
20 particular piece of property has this particular
21 piece of particularized damage as a result of a
22 violation of this particular law. That's what we're
23 hunting for.

24 MR. HOLMAN: Your Honor, we have alleged in the
25 complaint that there is particularized, unique injury

1 to the members of these organizations, and we have
2 supported that.

3 CHIEF JUSTICE TOAL: What is it?

4 MR. HOLMAN: Well, for example, Ms. Dodd walks
5 out of her house, and she has traffic, and she has a
6 hard time getting in and out of her house --

7 CHIEF JUSTICE TOAL: Yes, sir --

8 MR. HOLMAN: -- which is like Mr. Huggins
9 (PHONETIC).

10 CHIEF JUSTICE TOAL: I, I, I understand that.
11 It's amazing, but even here in Columbia, where we are
12 not a historic city, when I walk out of my house on
13 Wheat Street, I have the same kind of traffic; hard
14 to back out, hard to get out sometimes. I mean, that
15 is not what has traditionally been recognized as
16 particularized damage.

17 MR. HOLMAN: Well, well, actually, in the
18 Huggins case and also in the Brown (PHONETIC) case,
19 this court has recognized that a -- there can be a
20 public nuisance where a private property owner has
21 the means of egress and ingress limited by some
22 closure of a road or blockage of the road, even if
23 they have another way of getting in and out. And
24 that's exactly one of the injuries that is alleged
25 here. I might also add that, that public nuisances

1 and ordinance violations, the standing for those,
2 it's -- the point, as, as I would understand it, and
3 Mr. Infinger said that special damages and special
4 injury, they basically view them as the same -- that
5 it's very similar to injury in fact, as was noted in
6 the Connor (PHONETIC) holdings -- concurrence -- that
7 the point is to find the right party in interest.

8 Are these aggrieved persons?

9 JUSTICE PLEICONES: I'm glad you brought up the
10 Connor holdings because -- and, and you brought up
11 the predicate for standing because nobody doubts the
12 sincerity of your clients or their cause, in terms of
13 wanting to preserve the beauty of Charleston, and we
14 all can sympathize with that. But you allege, as
15 your basis for asserting zoning claims, Section 6-29-
16 950 of the code. Am I right?

17 MR. HOLMAN: That's correct.

18 JUSTICE PLEICONES: Okay. Which reads, in part,
19 and follow me, if you will, and tell me where I'm
20 wrong on this. "In case a building, structure, or
21 land," and we can quibble about that later, "is
22 proposed to be used in violation of an ordinance
23 adopted pursuant to this chapter, the zoning
24 administrator or," in getting down to your 'or's,'
25 "an adjacent or neighboring property owner who would

1 be specially damaged by the violation may, in
2 addition to other remedies, institute injunction.”
3 You don’t have an adjacent or neighboring property
4 owner in this case, as I understand it, and tell me
5 if I’m wrong on that.

6 MR. HOLMAN: Justice Pleicones, we have one
7 direct owner, and that is the Preservation Society,
8 which has easements, and we have -- it is correct.
9 The other organizations are neighborhood
10 organizations who represent property owners.

11 JUSTICE PLEICONES: In your citation of the
12 Connor case, was, as you recall, it was a tenant
13 seeking to enforce this, not the owner, an ordinance
14 that was adopted pursuant to this selfsame statute,
15 and in that case, the holding was that the tenant
16 couldn’t enforce it because he could not allege
17 special damages, i. e., the diminution in value of
18 their property. So we’re, you know -- help me with
19 this. I’m --

20 MR. HOLMAN: Justice Pleicones, I think that,
21 under that holding, a tenant would not have those
22 damages, but that’s not all that we allege here. Of
23 course, we’ve got, we’ve got an owner of an easement,
24 and we also have -- I think we do get back to this
25 associational standing question. We have -- we

1 allege we have injured people, the way they have been
2 hurt by this operation, and they have alleged it's
3 particularized to them. The, the hang-up here is
4 that they formed an association, and they've brought
5 that action.

6 CHIEF JUSTICE TOAL: Well, well, don't be worried
7 about that. Don't be concerned about the
8 associational versus individual. What we're asking
9 about is, what is the individually suffered damage?

10 MR. HOLMAN: Your Honor, it is, as the Dodd
11 affidavit makes clear, the kinds of damages are --
12 there is air pollution. There is visual blight, in
13 their -- to their mind. There are crowds. There is
14 noise. And there is such concentrated traffic -- not
15 everyday kind of traffic we all deal with, but in
16 this small area. This is a big operation. Thousands
17 of vehicles -- every time the two months of the year
18 that this thing is in town, thousands of vehicles,
19 tractor trailers, what the Ports Authority has called
20 an absolute, convoluted mess is in this concentrated
21 area, and under Brown and Huggin, those are the kinds
22 of injuries that this court has recognized as being
23 the basis of the special damage for a public nuisance
24 claim, and I might add --

25 CHIEF JUSTICE TOAL: If we, if we were to agree

1 with you, where would the sweep of this nuisance-type
2 regulation begin and end? Mr. Infinger argues that
3 we would be impacting commercial container ship
4 traffic as it exists right now, much less what would
5 happen with the post-Panamax vessels. But Maersk has
6 that enormous container ship that already calls at
7 Charleston in the very vicinity, down Columbus a
8 little bit further, as the Union Pier will be. What
9 if you had, what if you had another Tidewater
10 Terminal with vessels calling? Where, where is the
11 line drawn between what you assert is the ability to
12 bring nuisance with respect to the call of this
13 particular vessel and bringing nuisance actions with
14 respect to all of these commercial vessels that
15 provide the heart of the shipping industry for
16 Charleston?

17 MR. HOLMAN: Chief Justice, I should stand here
18 with one arm tied behind my back because we are on a
19 motion to dismiss, and every factual allegation that
20 has been made, we have not had the chance to counter.
21 But if we are given the chance, we would counter it
22 and say that that is hyperbole and overstatement.
23 The line would be drawn -- as with typical nuisance
24 cases, they could bump up against federal maritime
25 law and operations, and that's a question of

1 preemption. And that was the question that this
2 court has asked to be briefed, and we briefed that.
3 We think our case falls far short of preempting any
4 kind of federal law concerning --

5 JUSTICE BEATTY: Would you expound upon that,
6 please?

7 MR. HOLMAN: Sure, sure. The, the, the, the
8 defendants in this case said that the federal -- I
9 think it is to the layperson and to the lay lawyer,
10 like myself, the notion that nuisance might affect
11 something that is involved in interstate commerce
12 raises a red flag. But the actual analysis turns out
13 to be, is there field preemption, and there's not.
14 So is there a conflict, and would having there be a
15 nuisance case here and abatement, would that affect
16 interstate commerce or any kind of federal program
17 and cause disuniformity? There's been no
18 demonstration of that. We've shown that in like
19 cases -- for example, the United States Supreme
20 Court, *Huron v. the Port of Detroit*. Detroit imposed
21 an ord -- a smoke abatement ordinance, and the
22 objection was raised, Well, that -- you can't do
23 that; these are in interstate commerce. And the
24 court held that that was a permissible exercise of
25 local authority. So there are other laws that have

1 been cited --

2 CHIEF JUSTICE TOAL: Does it matter that in this
3 particular instance, you're not, we're not
4 adjudicating the exercise of authority by a
5 governmental entity, locally? We are adjudicating
6 the bringing of a nuisance action by your clients and
7 even the assertion by your clients of the right,
8 standing-wise, to bring actions with respect to the
9 enforcement of zoning ordinances. That, that, that
10 does cast it in a very different light from the
11 example you're giving, does it not?

12 MR. HOLMAN: Chief Justice Toal, I'd, I'm not
13 sure, in terms of preemption, whether or not that
14 does make a difference. For example, the AEP case
15 that was cited, a nuisance case, and the Clean Air
16 Act, whether or not it is the citizens who are trying
17 to protect their rights and having the law enforced,
18 be it a nuisance common law, the, the analysis would
19 be the same. And here, it's important to note, that
20 this is state common law, so the laws, such as they
21 are, that they've cited, supposedly preempting
22 nuisance law, there really aren't many. What we
23 could discern -- there's one that's called Marpole.
24 It has an express savings clause, a local law.

25 CHIEF JUSTICE TOAL: How about with respect to

1 your attempt to bring an action based on enforcement
2 of the zoning ordinances? Where's your standing to
3 do that?

4 MR. HOLMAN: Our standing is, it's -- we think
5 we have, as justice Pleicones was, was asking about,
6 we have alleged the special damages necessary to
7 state a claim. Now, can we prove it? That is a
8 question of fact, and I would say on that question of
9 fact, the, the, this, these motions to dismiss that
10 were filed included affidavits, and they referenced
11 the petition for original jurisdiction, which had 20
12 exhibits, and all of that made it into the Report and
13 Recommendation; not every single piece of evidence,
14 but certainly the factual materials, for example, on
15 the merits of our tour boat claim or the
16 accommodations claim.

17 JUSTICE HEARN: Mr. Holman, it seems to me
18 you're asking this court to take a rather bold step,
19 and that is to say that zoning laws could apply to an
20 ocean-going vessel. Is there any case anywhere that
21 has found that?

22 MR. HOLMAN: Well, this certainly has gone to
23 vessels. Zoning ordinances -- I'm, I'm blanking on
24 the case, but there's a case up in New York where
25 there was a fast ferry, and the question was whether

1 or not there could be an ordinance applied to that
2 fast ferry, and the Second Circuit held that it
3 could. So -- and in Detroit, those vessels were in
4 interstate commerce, so there's nothing that makes an
5 ocean-going vessel itself legally special in the
6 sense of having it not have zoning ordinances apply.
7 But, of course, we're not just talking about the
8 vessel. We're talking about what happens in the
9 neighborhood because there's a massive operation
10 every time the vessels attaches with these ramps and
11 gangways, there are --

12 JUSTICE HEARN: Well, that goes more to your
13 nuisance claims, though, doesn't it?

14 MR. HOLMAN: It -- Justice Hearn, we think
15 that's part of the ordinance claim. So, for example,
16 the accommodations ordinance, which is designed to
17 deal with parking -- it's basically a parking
18 ordinance -- there are 2,000 people who come to the
19 premises every time this happens and 2,000 who leave,
20 and there are 900 crew, and there's supplies, there's
21 alcohol, there's fuel for five days, and there's
22 thousands of vehicles traveling, parking, and that's
23 on the land side, and that's what effects our
24 clients.

25 CHIEF JUSTICE TOAL: Judge Newman found that

1 unless could show that these, this vessel was
2 attached to land, that these accommodations
3 regulations simply don't apply to this kind of ocean-
4 going vessel, which calls, deposits people, and then
5 leaves.

6 MR. HOLMAN: We, we respectfully disagree with
7 that conclusion as to the accommodations and the tour
8 boat ordinance. There, there's no requirement that
9 there be a structure, but the holding actually
10 adopted their test for attachment, which is
11 substantial and durable, and we've cited cases to
12 this court saying that, those are classic issues of
13 fact. This case keeps getting back --

14 JUSTICE PLEICONES: I would say unfortunately,
15 allusion to a mere tow line as opposed to what
16 actually is the --

17 MR. HOLMAN: 'Mooring line' was the word, and it
18 was from their factual assertion. Of course, they're
19 not just mooring lines. There's a hydraulic -- it's
20 an engineered attachment. These are all questions of
21 fact. The associational standing, have we alleged
22 it? That is a question of fact. We've alleged the
23 basic prem -- the premises for our claim. It's --

24 JUSTICE KITTREDGE: Mr. Holman, if I could ask
25 you something, and I apologize for interrupting, but

1 I've got to -- want to ask it, and I want to preface
2 this but this by just telling you how impressed I am
3 -- and this applies to Mr. Infinger too. What a
4 treat it is to have such quality lawyers that are so
5 well prepared, know the case in and out, and hope the
6 clients understand the quality of representation
7 they're receiving on both sides.

8 MR. HOLMAN: Thank you.

9 JUSTICE KITTREDGE: I want to return to
10 something you said at the beginning. There were some
11 questions asked in the context of zoning. You
12 answered it by tying your response to your nuisance
13 claims. And I'm interested: Does the viability of
14 your nuisance claims, either public and/or private,
15 turn on the ability of the plaintiffs to assert a
16 valid zoning ordinance violation? What's the
17 relationship between the viability of the nuisance
18 and the nexus to your zoning violation allegations?

19 MR. HOLMAN: Justice Kittredge, we think that
20 there, there's no necessary relationship, that there
21 can be -- we can allege nuisance even if we failed to
22 allege that they were violating any kind of ordinance
23 whatsoever. A legal activity can be a nuisance if
24 conducted in the wrong manner, in the wrong place.
25 So as to, to that, I think that there is no

1 prerequisite for one to have the other. I, I do
2 think there is -- as the questions from the Court
3 indicate, there is a question about the injury
4 requirements, and I think that the, the special
5 damages and, and special injury requirements are
6 similar. I don't think this court has said that
7 they're exactly the same. But for us, these get to
8 the questions of fact. We've alleged the claims we
9 think -- we've alleged the necessary injury for both
10 types of action. They're elements of the claim.
11 We've stated the claim. It's not like we've said
12 that somebody changed lanes on a highway, and
13 therefore, they committed bank fraud. I mean it, you
14 know, that's -- when I hear failure to state a claim,
15 those are the facts that don't fit with the claim.
16 We've alleged special injury. We've alleged facts
17 that have, that have been found in other courts which
18 --

19 JUSTICE HEARN: And, and let me ask you about
20 that --

21 MR. HOLMAN: -- support that.

22 JUSTICE HEARN: -- Mr. Holman. We all agree
23 that at this procedural stage, we're limited to
24 considering the well-pleaded facts of your complaint,
25 giving you the benefit of all the inferences that may

1 be drawn therefrom. In your private nuisance action,
2 it seems to me you allege, "These activities and
3 impacts hurt, harm, inconvenience, discomfort, damage
4 or injure Plaintiffs and unreasonably interfere with
5 the free use and enjoyment of plaintiffs' property so
6 as to constitute a common law nuisance." Are there
7 any other allegations in your complaint other than
8 that that relate, you believe, to the private
9 nuisance claim?

10 MR. HOLMAN: Um --

11 JUSTICE HEARN: As far as damages?

12 MR. HOLMAN: Justice Hearn, we think that -- in
13 South Carolina, you can have a mixed nuisance, so
14 something that is, that is injuring the public but
15 also injuring private parties can be a private and a
16 public nuisance. And the, the injuries that we've
17 alleged here apply to both, and so the concentrated
18 extreme traffic congestion that stops egress and
19 ingress, that's a public nuisance and a private
20 nuisance, we've alleged. But -- because it occurs on
21 a public street, but it affects these private
22 property owners in a way that is unlike nonlinear
23 effects of anybody else in the entire area, because
24 of where they're located, next to this thing, and
25 because of the way this, the operation is held. So

1 we have alleged those facts, and, of course, we've
2 supported that with an affidavit supporting that and,
3 and giving some detail, which we're allowed to do
4 under the rules.

5 CHIEF JUSTICE TOAL: What would be -- if we were
6 to agree with you and allow this suit to go forward,
7 what would be the distinction between the kind of
8 traffic congestion, extreme traffic congestion that
9 you say is a platform for the association to bring
10 this nuisance action and an association bringing an
11 action against the Spoleto Festival or against the
12 Farmers Market that exists in Marion Square and the
13 huge traffic congestion it causes on King Street or
14 any number of other transient activities that take
15 place in the peninsula city that cause extreme
16 traffic congestion, soot, et cetera?

17 MR. HOLMAN: I see I'm out of time, but if I
18 could --

19 CHIEF JUSTICE TOAL: No, no. We sure want you to
20 answer that.

21 MR. HOLMAN: Yes, ma'am. The, the difference
22 would be in the facts, and ultimately, nuisance cases
23 are judged by their facts and whether or not there is
24 a claim there and there's an unreasonable use of
25 property.

1 CHIEF JUSTICE TOAL: Well, is the short answer,
2 then, that there -- we would be opening the door to
3 allowing those kinds of suits? Because they -- let's
4 say they allege just what you allege --

5 MR. HOLMAN: Mm-hmm.

6 CHIEF JUSTICE TOAL: -- that the location of the
7 Spoleto Festival at a particular church that's in the
8 middle of a residential area in Ansonborough causes
9 extreme traffic congestion when the festival is
10 taking place and interferes with the enjoyment of the
11 private property. If we allow that here, how could
12 we deny it if a similar suit were brought, as I
13 describe it, asking that Spoleto Festival be enjoined
14 from having a part of its concert series be in St.
15 John's Church or St. Matthew's or -- just pick one
16 that's in the middle of an otherwise residential
17 area.

18 MR. HOLMAN: It's hard for me to imagine a, a,
19 a confluence of facts that would be as oppressive as
20 this is on a neighborhood, for now, I mean, over two
21 months a year. And so, so I, I don't think that
22 these facts are likely to be repeated. But of
23 course, in the past, this court has recognized public
24 nuisances on things like a street that's been blocked
25 next to a, a private residence or a driveway or

1 something like that. Thank you for your time.

2 CHIEF JUSTICE TOAL: Thank you, Mr. Holman. Ms.
3 Cantwell?

4 MS. CANTWELL: Chief Justice Toal, may it please
5 the Court, I'm Frances Cantwell. I'm here on behalf
6 of the City of Charleston, and in light of Justice
7 Kittredge's remarks, I'm a little bit hesitant to
8 speak. I hope you feel the same way after I --

9 JUSTICE KITTREDGE: I include you in that too.

10 MS. CANTWELL: -- finish my, my reply.

11 CHIEF JUSTICE TOAL: All right, Ms. Cantwell, if
12 you'll pull that microphone right to you and speak
13 into it.

14 MS. CANTWELL: All right.

15 CHIEF JUSTICE TOAL: That's great.

16 MS. CANTWELL: This case does have profound
17 importance and will have profound effects, depending
18 on the ruling that you issue. But to answer a few of
19 the things that my colleague brought up in his case,
20 this is a case, when it boils down to it -- it is a
21 pleading case, but it's also a case of statutory
22 construction. That's the purview of this court. No
23 amount of facts are going to change whether this
24 court believes or determines that the City of
25 Charleston zoning ordinances, as we propose they are

1 interpreted and as they have been implied, whether
2 that's correct or not. No amount of facts will
3 determine the effect of applying those laws to these
4 vessels. They're too tall, so they can't moor at the
5 Union Tier -- Union Pier. They block views, so they
6 can't moor at Union Pier. Those -- the factual --
7 there is no factual issue that needs to be explored
8 to address those claims, and the same holds with
9 respect to the nuisance, and here's why.

10 There's been a lot of discussion by the Court
11 concerning the injury, the injury to property. That
12 is a fundamental premise of nuisance law. It's a,
13 it's a part of the cause of action. I mean, you have
14 to be able to prove that in order to state your
15 claim, and the way that the, the nuisance has been
16 set up in this case, all of the alleged damages and
17 injuries are undeniably public.

18 JUSTICE BEATTY: What about the Dodd affidavit?

19 MS. CANTWELL: The Dodd affidavit does -- she
20 complains of, of injuries that would affect me if
21 I'm, if I'm downtown.

22 JUSTICE BEATTY: She complains that they affect
23 her.

24 MS. CANTWELL: Well, they affect her, but they
25 affect her, Your Honor -- the kind of injury that she

1 has is no different than the kind of injury that any
2 member of the general --

3 JUSTICE HEARN: Why does that matter with
4 respect to the private nuisance claim?

5 MS. CANTWELL: Because --

6 JUSTICE HEARN: I'm with you on public nuisance,
7 but why does that matter with respect to the private
8 nuisance?

9 MS. CANTWELL: Because you, you have to allege,
10 for public -- for a nuisance, if they're going to
11 have an actionable nuisance, an injury that's
12 different in kind and not degree, and all of I've
13 heard is that, well, we are affected more because we
14 live close by. And it was interesting. To, to, to
15 bring a cause of action for nuisance or for the
16 zoning, you have to have a specialized injury, and
17 the statutory authority that's been cited does
18 require that you be an adjacent owner of property,
19 and if you read the face of the complaint, they talk
20 about a property owner who's a tenant who's almost
21 adjacent or nearly adjacent, which I think were the
22 terms that they used.

23 So if you look at the, the entire premise of
24 this case, it is an effort to address inconveniences
25 that these associations and their members are

1 experiencing that are no different than the
2 inconveniences than any nonmember who lives in these
3 neighborhoods experiences when these vessels call.

4 JUSTICE PLEICONES: Or as Mr. Infinger pointed
5 out, somebody who's at 105 Meeting Street or somebody
6 who's where my grandmother's store stood for a
7 hundred years, at the corner of Calhoun and
8 Elizabeth, which is just a couple of blocks from
9 there. Is, is, is that your --

10 MS. CANTWELL: That, that's correct. That's
11 correct.

12 JUSTICE HEARN: Ms. Cantwell, in order to
13 properly plead a private nuisance, doesn't a
14 plaintiff just need to allege that he or she has been
15 unreasonably interfered with in the use of their and
16 enjoyment of their land? And why hasn't that been
17 done here?

18 MS. CANTWELL: Well, because if you look at the
19 examples they give -- you know, I mean, I don't know
20 if you would pass muster if you say, you know, it's
21 just -- it's -- I'm, I'm interfered -- this morning
22 when I was trying to get downtown, it took me longer
23 than it usually does because the lights aren't
24 working and the lights never work, and so therefore,
25 I've been inconvenienced. You have to allege

1 particularized injury. I think just calling
2 something unique isn't sufficient to pass the rules.
3 And when you look at what they've pleaded with regard
4 to what those injuries are, they're undeniably
5 general and undeniably public. And everybody,
6 everybody who is downtown, whether you're a property
7 owner, whether you are a visitor, whether you conduct
8 business down there, are all affected, have the same
9 -- are affected in the same manner by the vessel
10 operations at Union Pier, whether they're the cargo
11 ship or the cruise ship.

12 JUSTICE HEARN: And this is really the only
13 thing the defendants argue with respect to the
14 private nuisance claim, is it not? The fact that
15 it's actually a public nuisance claim, and therefore,
16 it should be dismissed for the same reasons that, if
17 we agree with you, that we would dismiss the public
18 nuisance claim.

19 MS. CANTWELL: We, we, we allege, we under -- I
20 -- we acknowledge that you can have a public
21 nuisance, a mixed nuisance, as Mr. Holman indicated,
22 that can be privately prosecuted, but you still have
23 to have, and you have to plead, the requisite injury,
24 and they have not. In fact, it's interesting because
25 if you read the private -- excuse me, the public

1 cause of action for nuisance, it recites a, a
2 Charleston city ordinance, the same examples, and
3 then they carry it over and they say, That's our,
4 that's our private nuisance because we're uniquely
5 damaged, but those unique damages are the same
6 damages that inure to the public under the public
7 nuisance statute. There is no standing here. There
8 is no particularized injury, and the complaints
9 really are the results of inconveniences of living in
10 a city or living downtown. Justice Toal, you posed a
11 question, where is -- where do you draw the line?
12 Where do you draw the line with these nuisance cases?
13 You cannot. You cannot. It's obliterated because
14 you -- a well-pleaded complaint that says, you know,
15 I'm, I'm -- traffic is worse outside my house could
16 shut down a Spoleto, could shut down the Cooper River
17 Bridge Run, could shut down any innumerable public
18 events that happen all the time. Could shut down,
19 you know, city buses going through neighborhoods. So
20 the, the, the premise upon which their, their case is
21 based is flawed.

22 JUSTICE PLEICONES: Ms. Cantwell, let me ask you
23 this. As I said earlier, no, nobody, I think, even
24 you, doubts the sincerity of these folks who are
25 bringing this, this action. But what do you -- are

1 you telling me that their remedy is not what they've
2 alleged in these, in this complaint, but rather,
3 their remedy is a governmental one that generally
4 applies to citizens across the board? That maybe,
5 and I don't mean to say this with the mayor sitting
6 here, but at the ballot box or, you know, in cajoling
7 city government, you know, making their case that
8 way? The real regulators? Is that what you're
9 telling us?

10 MS. CANTWELL: I do. I do. I, I believe --

11 JUSTICE PLEICONES: Is the overarching
12 (INDISTINCT).

13 MS. CANTWELL: I believe that the issues of
14 this case are addressed by the people who are making
15 and implementing public policy, and that is not the
16 judiciary. That are -- those are the administrators,
17 the elected officials. The issues that they have
18 posed really, because they have not been able to get
19 the relief that they want from the, their -- people
20 who are electing them, they have resorted to the
21 Court, but with, for lack of a better work, clumsy
22 remedies, and they just don't work in this context.
23 The bottom line is, Carnival operations, as is, as
24 are all of the other operations that are being
25 conducted at Union Pier and at the Port of

1 Charleston, within the city limits, comply with the
2 law. They comply with local law, they comply with
3 State law, and they comply with federal law. And the
4 effects of those operations are effects that apply
5 generally to apply to every person who is downtown on
6 the particular days when it's particularly busy, and
7 the harm is no different in kind than what we all
8 suffer. And that fails to state a cause of action
9 for nuisance or for violation of a zoning ordinance
10 for that matter. And those are the two causes of
11 action, really, that are left in the case.

12 We would ask the Court -- first of all, I would
13 appreciate -- first of all, I wanted to say at the
14 beginning, I appreciate very much, we all do, your
15 taking this case in your original jurisdiction
16 because the ramifications are so huge. The stakes
17 are big. We appreciate the Court taking the case.
18 We know that you appreciate the seriousness of what's
19 before you, and I'm not diminishing at all, at all,
20 the sincerity of the people who really do have a
21 concern for the -- for where they live and for their
22 neighborhoods, and, and I applaud that. But there is
23 a bigger picture here, and without getting into the
24 nuances of commerce -- I think you've all heard that
25 -- or the nuances of preemption, particularly not

1 just federal preemption, but you have to look at what
2 the State has said. And the State's made it very
3 clear, very clear that they, they want to grow
4 maritime industry. They have specifically said
5 'cruise,' and they have specifically told local
6 governments, which I think is telling, You -- we will
7 delegate authority to you to regulate a vessel when
8 it's one of those cruise-to-nowhere vessels, but if
9 you touch the passenger cruise lines or if this court
10 or any court were to say, That gives you the right to
11 also regulate passenger cruise lines, the Court says
12 the exemption -- if that exemption fails, the act
13 fails, which would take away the authority of cities
14 to even regulate cruises to nowhere. So our, our
15 city local, local government regulation in this, this
16 area is, is restricted to a degree. The city
17 ordinances allow the operations to occur, and city
18 ordinances control the land-side effects of those, of
19 those ordinances equally and across the board to
20 everybody that affect the public at large, and that's
21 what they're supposed to do.

22 CHIEF JUSTICE TOAL: Thank you, Ms. Cantwell.

23 MS. CANTWELL: Thank you so much.

24 CHIEF JUSTICE TOAL: We'll be in recess.

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Kim von Keller

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December 10, 2013

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