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S.C. SUPREME COURT

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

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.

**Reply to Return to Petition for Rehearing by the
South Carolina Ports Authority**

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Pursuant to Rules 221(a) and 240(f), SCACR, the South Carolina Ports Authority (Ports Authority) respectfully files this Reply to the Return of the Petitioners and in support of the Petition for Rehearing of Opinion No. 27949 issued in this case on February 19, 2020 (Opinion).

Although Petitioners employ rhetoric that is unrelentingly strident in its opposition and caustically dismissive of the Project and the Ports Authority's viable objections to the findings and holdings reached in the Opinion, the Return largely avoids the substantive arguments raised by the Petition and ignores the potential sea-change downstream effects the Opinion would have on the practice of administrative law. More concerning, however, is that the Return fundamentally and demonstrably misrepresents the nature of the Project, the existing activities at Union Pier Terminal (UPT), and, importantly, the impact that any ultimate changes to the Permit, including its outright denial, will have on the continuation of the cruise industry in Charleston.

As set forth in the Petition, the Opinion misapprehends the General Assembly's lack of intent to create statutory standing in favor of a *de minimis* threshold for maintaining a contested case challenge at the ALC for persons that achieve "affected person" status merely by requesting notice of a DHEC permitting decision and participating in the initial permit review process at the agency. The Opinion's findings in that regard are not based on the plain language of the statute, which it openly acknowledges does not define affected person and, thus, is not controlling, but instead holds that the legislature created statutory standing even though there is no readable expression of "legislature's unmistakable intent." For its part, the Return concedes that the General Assembly's expressed intent controls, but leaves that concession behind for its bellicose and strident attack on all things cruise. For the reasons stated in the Petition and below, the Ports Authority respectfully submits the Court should reconsider the Opinion, rehear this case, and issue a revised opinion that is faithful to the legislative intent and this Court's prior decisions.

Argument

I. The Ports Authority is not barred from pointing out or discussing the downstream and unintended consequences that result from the Opinion’s misapprehension of the General Assembly’s intent to confer statutory standing by the amorphous and undefined use of the term “affected person” in S.C. Code Ann. § 44-1-60.

In addition to the bluster and misrepresentation of the facts surrounding the Permit and the Ports Authority’s cruise operations, addressed *infra*, Petitioners first seek to erect a number of procedural impediments to the arguments made in the Petition. All are inapplicable dead ends and meritless.

Before addressing Petitioners’ actual arguments, however, it is important to note that Petitioners misapprehend the application of the traditional concepts of error preservation and waiver to the Ports Authority—the respondent—under the posture of this appeal. As the “winning party” below and the “respondent” in the appeal before this Court and the Court of Appeals, this Court has held that error preservation principles are not applied to the Ports Authority and DHEC in the same manner that they are to Petitioners. *See I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“[I]t is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review.”) (emphasis in original) (citing Rule 220(c), SCACR). In short, “different preservation rules apply to an appellant-the losing party in the lower court.” *I’On*, 338 S.C. at 421, 526 S.E.2d at 724. But even if above-stated principles did not apply, this Court has routinely held that requesting rehearing or reconsideration of issues that could not have been made in advance of an order or opinion, or that respond directly to new holdings contained therein, is not only appropriate but required under the state’s error preservation rules. *E.g., Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (discussing the parallel concept of a motion for reconsideration and holding that “[a] party *may* wish to file

such a motion [for reconsideration] when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.”); *see also* Jean Hoefler Toal, et al., *Appellate Practice in South Carolina* 189 (3rd Ed. 2016) (stating that “[p]ost-trial motions are also utilized to raise issues that could not have been raised at trial” and are not only appropriate under those circumstances, but “must also be made where there are errors or inconsistencies in the []order.”).

Turning to the arguments, Petitioners first contend that the Ports Authority is barred from arguing that the practical effect of the Opinion’s new hybrid statutory standing regime for administrative challenges to DHEC permits is tantamount to affording “affected persons” public importance standing. This argument is wrong. The Ports Authority’s arguments are directed at the new statutory standing test that this Court crafted in construing the undefined term “affected person” in the statute, and they respond directly to the Opinion’s holding that an interested person need only show that it is “influence[d] in some way” in order to challenge a permit issued by DHEC to a third-party. The Ports Authority could not have been expected to predict the precise terminology that the Opinion would use to craft its new standing test and Petitioners’ argument to the contrary is illogical. Nor does the Ports Authority run afoul of waiver principles by pointing out that the Opinion’s construction is more akin to the public importance exception¹ to standing.

The crux of the argument is that the public importance exception to standing is a judicially-

¹ By eliminating a 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). Yet, it is actually a lesser standard than even public importance standing, as the new hybrid test for an affected person need not even show the additional requirements of a public interest or the need for further guidance that is required to achieve public importance standing status.

created concept that allows *the Court* to confer standing on plaintiffs or petitioners when they otherwise fail to meet the traditional three-part test for constitutional standing. Prior to the Opinion, this Court has stated that statutory standing is different, because it derives from a clear and unequivocal expression of intent *by the General Assembly*. But in construing the term “affected person” based solely on the Court’s view of what that term means and the belief that the General Assembly must have meant something by its inclusion in the statute, despite no expression of intent by the General Assembly to that effect, the Opinion is creating a new form of standing akin to the public importance exception, in that it allows a Court to confer standing on interested parties on an ad hoc, case-by-case basis that is entirely divorced from the plain language of § 44-1-60 or the General Assembly’s intent. As the Return misapprehends and does not respond to the parallel to public importance standing that the Petition sought to draw, its arguments regarding waiver and in response misapply the Court’s preservation rules and widely miss the mark. The arguments advanced in the Petition are properly before the Court and warrant rehearing.

Petitioners next contend, cavalierly, that the “workability concerns are barred and meritless,” and are something the Ports Authority “could have raised earlier.” *But see Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to allow review by the Court). In doing so, Petitioners fail to explain how the Ports Authority could have raised “workability concerns” about the ALC’s application of a new hybrid test for statutory standing that had not yet been announced by the Court.² Logic and viability aside, this argument is meritless for the same reasons discussed above

² Petitioners also assert that they “have contended that ‘affected person’ should be given its customary meaning throughout this litigation,” Return at p.6, but that is also misrepresentative of the record. The Court need only refer to Petitioners’ response to the Ports Authority’s motion to dismiss for lack of standing, wherein Petitioners acknowledged that the proper standing standard for the Permit is the traditional three-part test of Constitutional standing. **(R.pp.000362-96)**

with respect to the parallel the Ports Authority drew between the Opinion’s new standing test and public importance standing.

The Return seems to acknowledge the fact that the Opinion does not provide the bench and bar with a clearly defined and articulated test, much less any guidance, for what constitutes “affected.” But make no mistake, a nebulous test without any guidance or strictures for applications is precisely what Petitioners and their counsel desire; the Opinion has delivered, in effect, the “holy grail” in that it would allow would-be and professional litigants to challenge and tie up all manner of DHEC permits and licenses on the thinnest of bases.³ Creation of a free-for-

Petitioners did not mention or otherwise argue the statutory standing standard of an “affected person” under Section 44-1-60 *at all. Id.* Likewise, in response to the Ports Authority’s motion for summary judgment for lack of standing, Petitioners relegated statutory standing to an afterthought, acknowledging that the traditional *Lujan-Sea Pines* Constitutional standing standard is appropriate here and arguing the three-part test:

The [ALC] has concluded [in the order denying the motion to dismiss] that if Petitioners sufficiently show “Article III” standing - that is, “injury-in-fact, with a causal connection between the injury and the conduct complained of, which is redressable by a decision of this Court” - then they qualify as affected persons” under the statute. [ALC Order denying motion to dismiss] at 12. *The Community Groups agree*

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

³ While certain—but not all—of the Petitioner-associations have members that live in varying proximity to the existing and proposed cruise operations on UPT and who have alleged plausible claims of interest in the permit sufficient to survive a motion to dismiss, it is not hard to conceptualize—and is hardly “overblown hyperbole” as Petitioners suggest—that a *de minimis* standard that does not require a demonstration of traceability to the conduct or activity that is subject to the permit, or, as is the case here, where the alleged harm relates to existing lawful conduct (even if objectionable) that cannot be remedied a favorable decision of the Court, will lead to all manner of “influence[d]” persons to file challenge actions. Challenges that are driven by disagreements on policy, rather than permitted conduct in question, allow professional litigants and their counsel to claim the righteous high ground as self-proclaimed protectors of the environment, but who more often than not reveal themselves to be nothing more than officious intermeddlers intent on fundraising on the back of filed litigation, *e.g.* (**R.pp.1886-92**), stirring up

all at the ALC could not have been the intent of the General Assembly. Petitioners are so desirous of a *de minimis* standard to be implemented without guidance or guideposts that the Return purports to fill in the gaps by interpreting for the Court the Opinion’s sweeping grant of rights and suggesting what the holdings of the Opinion really are. *E.g.*, Return at p.6 (“*The Opinion thus requires more than a nebulous claim of “influence” to support standing under Section 44-1-60(G); it requires a showing of prospective injurious effect.*”) (emphasis supplied). Never mind that neither the phrase “prospective injurious effect” nor the concept of “prospective” injury appear in the Opinion at all. To Petitioners, the ends of salvaging the *de minimis* standard announced in the Opinion is worth the means of misrepresenting the actual content of the Opinion. Petitioners’ interpretations demonstrate why clarification from the Court is paramount.

Indeed, the Return’s entire discussion regarding the actual level of proof required by the Opinion to acquire the status of an affected person is an exercise in cognitive dissonance and suspension of reality. While Petitioners acknowledge this Court’s holding in *Freemantle v. Preston* that “[t]he traditional concepts of constitutional standing are inapplicable” where the General Assembly confers statutory standing, 398 S.C. at 194, 728 S.E.2d at 44, and while the Opinion (incorrectly) holds that the General Assembly intended to create statutory standing here by virtue of its use of the term “affected person,” the majority of the Return’s analysis is spent attempting to emphasize that the fact that Petitioners have suffered a concrete and particularized injury-in-fact that is traceable to the permitted conduct, and which will be remedied by a favorable decision of the ALC on the merits of the permit. *E.g.* Return at p.6 (“A person alleging standing must show

strife, or otherwise unnecessarily filing or prolonging lawsuits based on a disagreement on the underlying policy. *C.f. Osprey, Inc. v. Cabana Ltd. P’ship*, 333 S.C. 323, 331, 509 S.E.2d 275, 279 (Ct. App. 1998), *aff’d as modified*, 340 S.C. 367, 532 S.E.2d 269 (2000), and *overruled by I’On*, 338 S.C. 406, 526 S.E.2d 716.

that his or her harms are more than generalized grievances ‘falling upon the public at large’ and are ‘not speculative.’”) (citing Op. at p.10-11); *id.* (“To be sure, the fact that a project or permitted pollution causes particularized harm to more than one person does not render the harm an abstract grievance—but that is so even under SPA’s preferred Article III test.”); pp.6-7 (“Common sense application of the term using factors identified by the Court ... will ensure that the recognized impacts are in line with the types of injuries that South Carolina courts have recognized for decades.”) (citing cases applying the three-part test for Constitutional standing); p.8 (arguing that Petitioners’ “injuries” would be remedied by the fact that a permit denial would result in “the SPA’s cruise operation [sic] ... cannot continue without a new permitted terminal.”); p.16 (“In truth, the Opinion recognizes ‘affected person’ standing due to Petitioners’ ‘individualized assertions of real, anticipated harm’ traceable to the permitted cruise terminal.”). By equating this Court’s analysis (and future application of that analysis by the ALC) of the standard to determine who is an “affected person” to the traditional three-part test of injury, causation, and redressability, Petitioners are implicitly acknowledging, if not outright conceding, that the proper test under Section 44-1-60 should be Constitutional standing, as intended by the General Assembly.⁴ They also are trying to read guideposts for future application into an Opinion bereft of any.

⁴ Which is precisely what the ALC found in this case, as well as every other case since the inception of this statutory scheme that dealt with standing:

Petitioners thus may establish statutory standing by establishing they are “affected persons” and are challenging DHEC’s decision to grant the permit to Ports Authority. Here, however, the General Assembly did not define “affected person” for purposes of the permit at issue. Therefore, Petitioners may not establish standing simply by adopting the self-imposed moniker that they are “affected persons.” Furthermore, in this instance, where a clear, specific definition of “affected person” is not available, the *Lujan* test provides a sufficient framework to determine whether the Petitioners qualify as affected persons for the purpose of establishing standing. Petitioners thus must satisfy the elements of the *Lujan* test to sufficiently establish standing, defeat this motion for summary judgment, and proceed to the next stage of litigation.

This criticism is of equal application to the Opinion. Respectfully, it is not possible to square Justice Kittredge’s pronouncement in *Freemantle* that the traditional concepts of constitutional standing are inapplicable to a statutory standing inquiry with the Opinion’s analysis of the fact-intensive inquiry required to determine if a party is “affected” that largely mirror the three-part test for Constitutional standing. The Opinion states that the Court is of the belief that geographic proximity is important, but then minimizes that by engaging in a discussion regarding whether those in closer proximity “are impacted in ways that are distinguishable from the impacts generally falling upon the public at large,” Op. at p.11, which is the precise analysis employed to determine whether an injury-in-fact is concrete and particularized rather than a “generalized grievance[] suffered by the public as a whole which [is] insufficient to establish standing,” *see Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) (discussing generalized grievances).

Petitioners’ manipulation of the Opinion’s vagueness and minimization of the identified factors is already on full display for the Court. Regarding proximity, Petitioners incorrectly assert that “a new, larger terminal” will be “located closer to their homes.” Return at p.16. But this assertion is misleading and not representative of the facts.⁵ Petitioners consist of seven different associations, each with a any number of individual members of diverse locations varying far and

(R.p.81) (internal citations through footnotes omitted).

⁵ As an initial point of contention, the only “terminal” at issue here is UPT, and it is undisputed that it has been located on the Charleston peninsula for well over 100 years. The “new, larger terminal,” apparently a reference to cruise operations, is an existing warehouse (Building 322) that historically has been, and currently is being, utilized for cargo and breakbulk shipping activities. *See* discussion, *infra* at n.13. No change to the location, size, or shape of UPT is proposed by the Permit. All renovations authorized by the Permit, including those to Building 322, will occur entirely within the existing gated UPT perimeter. Also, it is undisputed that passenger ships have called on UPT for over 100 years, and that cruise ships have called on UPT continuously since 1973.

wide from the area immediately surrounding UPT. In terms of the actual Petitioner-associations themselves, neither the Charleston Chapter of the Surfrider Foundation nor the Charleston Communities for Cruise Control list a physical Charleston peninsula office location and there is nothing in this record that supports a finding that it or its members do, while the Coastal Conservation League's new office is located on the western side of the peninsula, and the shift in cruise operations is south to north, not east to west closer to Coastal Conservation League. Meanwhile, the relocation of cruise operations to the northern end of UPT would actually move cruise operations *farther away* from the Preservation Society of Charleston's office, which is located on King Street just north of Queen Street, *farther away* from Historic Charleston Foundation's office, which is located on Meeting Street just south of Queen Street, and *farther away* from all of the homes in the Charlestowne Neighborhood Association, which consists of homes exclusively South of Broad and Exchange Streets. Not "closer," as represented by Petitioners. Indeed, the shift of cruise operations would move closer to arguably only members of one of the Petitioner-associations, Historic Ansonborough Neighborhood Association, yet those individual members would see a total overall reduction maritime and industrial activity at UPT, due to the permanent relocation cargo operations and the associated rail and street closures.

The cavalier nature in which Petitioners refer to these locational impacts is the direct result of treating all of the Petitioners as a *single* plaintiff/petitioner for standing purposes when they are clearly not, and by failing to engage in the individual standing analysis for each Petitioner-association, even under the Court's newly-announced "affected person" standard where proximity "is highly relevant to our analysis in this case." Op. at p.12. Despite declaring its importance here, the Court declines to engage in any actual analysis of proximity as it relates to the either the individual associations, or their respective memberships. Truthfully, the record is devoid of

evidence from which this Court could make such a determination, but that failure lays squarely at the feet of Petitioners, who have the absolute burden of demonstrating standing, even under the Court's newly announced judicial hybrid standing analysis, and that lack of evidence should be construed to their detriment. Respectfully, the Court should not announce a new standing standard and simultaneously abdicate its responsibility to faithfully apply that standard to these Petitioners. If the Court is going to hold that proximity matters to its determination, then it should, at a minimum, engage in the analysis as to the proximity that each of the Petitioners'—and their members'—has to the proposed relocation. Current cruise operations are not at issue in this case, so the only proximity fact that matters is whether cruise operations are getting closer under the move, or farther away. Under the Court's "proximity standard," six of the seven Petitioner-associations would be *farther away* from cruise operations which are re-located to Building 322, to the extent that they are located on the peninsula at all.

The Opinion also identifies other environmental issues like "breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution," Op. p.12, but all of these factors are mainstays in the Court's numerous opinions applying the three-part test for Constitutional standing. Ultimately, the foregoing hodgepodge of potential factors, *see* Op. at p. 12 (acknowledging that even "geographic proximity may not be a determinative factor in every case"), provides no identifiable test for the ALC to apply going forward, yet these factors are all part and parcel of the three-part Constitutional standing test. The Opinion's desire to avoid applying the three-part test in name only, while still employing many its components, is puzzling. Here again, this inescapable fact remains: if the General Assembly clearly and unequivocally stated its intent to establish statutory standing for "affected parties," none of the Opinion's analysis regarding these fact-intensive "injury" requirements would be

necessary. *See Freemantle, supra*. The General Assembly did not do so by words or by intent, which should mean that there is no statutory standing and the analysis defaults to Constitutional standing. *See Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (“When no statute confers standing, the elements of constitutional standing must be met.”). Instead, the Opinion proclaims that there is statutory standing, but then applies many of the elements of the test for Constitutional standing. Rehearing and clarification of these points is paramount and required.

II. Statutory Standing does not exist under S.C. Code Ann. § 44-1-60.

The Ports Authority’s position regarding the existence of statutory standing under S.C. Code Ann. § 44-1-60 is set forth in explicit detail in the Petition, and it does not intend on rehashing those incorporated arguments here. In sum, statutory standing constitutes judicial recognition of the separation of powers; in particular, General Assembly’s authority to prescribe, through legislation, certain situations in which individuals are authorized to maintain claims adjudicating their legal rights. Accordingly, statutory standing only exists by virtue of the General Assembly’s “unmistakable intent.” *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44. No such intent is found in the plain language of Section 44-1-60. The Opinion and the Return admit as much, acknowledging the fact that the General Assembly did not define the term affected person. Instead of ending the statutory standing inquiry, the Opinion construes the *absence* of “unmistakable intent” as an indication that the General Assembly must have meant to confer standing. This holding was error, and misconstrues the statutory scheme enacted by the General Assembly to conduct contested cases and adjudicate “the legal rights, duties, or privileges” of participating parties with standing. S.C. Code Ann. § 1-23-505(3). In the absence of some type of expression of legislative intent regarding the establishment of statutory standing for affected persons by the General Assembly,

the Ports Authority respectfully submits that statutory standing does not exist. “When no statute confers standing, the elements of constitutional standing must be met.” *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. The ALC was therefore correct to construe “affected person” as requiring a demonstration of the default three-part test for Constitutional standing to maintain a contested case challenge:

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 v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (drawing a clear distinction between the standing required of one who is the subject of government action and one who is only indirectly affected) (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)⁶ (“The *Lujan* Court also held that it is ‘substantially more difficult’ to establish standing where a challenge to the government action is

⁶ Further undercutting the Opinion’s rationale that administrative challenges should be treated differently, *Beaufort Realty* was likewise an administrative challenge, albeit one from a Board of Zoning Appeals. There the circuit court, sitting in an initial appellate level but similar review capacity as the ALC here, found that the Board was without legal authority to overturn the zoning administrator because Petitioner Coastal Conservation League lacked standing to challenge the zoning determinations *at the administrative level*. 346 S.C. at 300, 551 S.E.2d at 589. Justice Hearn, then Chief Judge of the Court of Appeals, applied the three-part test for Constitutional standing to the League’s *administrative challenge*, and further held that “[t]he word ‘aggrieved’ refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Id.* at 301, 551 S.E.2d at 589 (citing *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970)); *see also* Rule 20(B)(1), RPALC (requiring a movant to be aggrieved or adversely affected by the final order for permissive intervention).

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 Return does nothing to refute the foregoing. Instead, in a prolific display of adverbs and statements of certitude,⁷ Petitioners contend that there is “unmistakable legislative intent,” that “[t]he Opinion effectuates legislative intent,” that “[t]here is simply no question” that statutory standing was conferred, and that the “inescapable conclusion is that the General Assembly intended Section 44-1-60(G) to confer statutory standing on ‘affected persons.’” Return at pp.3, 9, 12 and 13, respectively. Petitioners are assured of their position, despite the fact that, prior to the Opinion, no court at any level has interpreted Section 44-1-60 as conferring statutory standing in the nearly 15 years since its enactment. And despite the apparent consistent misapplication of the law by the ALC, the Court of Appeals, and this Court in the intervening 15 years, the General Assembly took no legislative action to correct the judicial system’s supposed misinterpretation of its legislative intent, including in the three intervening amendments to Section 44-1-60 occurring in 2010, twice in 2018, and in enacting Regulation 30-6A in 2008, two years after the enactment of Section 44-1-60,⁸ which confirmed the General Assembly’s intent that only an “affected person with standing” can maintain a contested case challenge. Moreover, both the Return and the Opinion are forced to acknowledge that the General Assembly did not define *the operative term* “affect person” on which statutory standing is supposedly based. Op. at p.8; Return at pp.2-3, 11. However, Petitioners and the Ports Authority do agree on one crucial point, as we must, which is that the General Assembly’s intent to create statutory standing by its use of the term “affected

⁷ Which, more often than not, reveals the lack of certainty regarding the topic on which an adverb is deemed necessary.

⁸ Petitioners incorrectly assert in Return that “Section 44-1-60 was enacted *after* Rregulation30-6(A) [sic]” and that it has been alternatively “superseded.” To the contrary, Regulation 30-6.A was amended in its entirety in 2008.

person” controls.

Nothing else in the statutory standing sections of the Return offers any coherent rebuttal to the Petition’s demonstration that the Opinion is not faithful to this Court’s prior pronouncements of how statutory standing is bestowed by the General Assembly. Nor does the Return explain how the complete upheaval of nearly 15 years of consistent application of Constitutional standing principles to the contested case process at the ALC that will result from the Opinion is somehow faithful to either the General Assembly’s acquiescence to the contrary procedure in the interim or in furtherance of its expressed intent in the preamble to 2006 Act No. 387 that “[t]his act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies” The new judicial hybrid test for standing announced by the Opinion is the opposite of maintaining the “uniform procedure” envisioned by the General Assembly and employed to date.

The remainder of the Return’s commentary on statutory standing consists of a whack-a-mole approach that raises misrepresentative straw man arguments in response to the Petition, which the Ports Authority will address in turn:

- Petitioners dispute the fact that standing implicates the ALC’s subject matter jurisdiction, despite the fact that the Petition did not suggest that it does. Return at p.10. Standing does implicate the exercise of the ALC’s jurisdiction, however, a matter that is 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.”). Petitioners’ additional citation to *S.C. Coastal Conservation League v. S.C.*

Dep't of Health & Env'tl. Control, 390 S.C. 418, 702 S.E.2d 246 (2008) is irrelevant and gratuitous, as there was no standing issue in that case at all.

- Petitioners' attempt to compare the General Assembly's use of the term "affected person" in Section 44-1-60 to "any citizen of the State" under FOIA statute of Section 30-4-100(a) is unavailing. Return at p.11. The undefined term "affected" is amorphous and can mean any number of things to any number of people; it is the opposite of "unmistakable intent." *C.f. Freemantle, supra*. By contrast, a "citizen" is a term that has a specific and defined meaning that easily and independently verifiable. A comparison of the General Assembly's specificity between these two statutes is apples and oranges.
- Petitioners' citation to Article I, Section 22 is ironic, as it actually disproves their argument. Return at p.12. Under the analysis of the Opinion, the two separate categories of rights that are to be adjudicated in a contested case hearing under the APA are now in conflict. Section 1-23-505(3) of the APA defines a contested case as "a proceeding ... in which the legal rights, duties, or privileges of a party are required by law," i.e., challenges to permits issued by DHEC like the one at issue here, "or by Article I, Section 22, of the Constitution of the State of South Carolina" In *South Carolina Ambulatory Surgery Center Association v. South Carolina Workers' Compensation Commission*, this Court held that a claim under Article I, Section 22 is the same as a due process violation claim and requires a party invoking its protections to demonstrate a deprivation of a liberty or property interest. 389 S.C. 380, 391-92, 699 S.E.2d 146, 153 (2010) ("Given the absence of distinction in our jurisprudence, we conclude a traditional due process analysis is required to assess whether the Commission's actions deprived Surgery Centers of [the] constitutionally-protected interests [of liberty or property]."). The Opinion's holding that the standard for challenging "legal rights, duties, or

privileges of a party” at law under the APA is a lower standard than the Court’s explication of what is required under Article I, Section 22 under the APA, puts these two analogous and parallel provisions in conflict and does not effectuate the General Assembly’s clear intent.

- Petitioners’ attempt to ignore the fact that the General Assembly included specific definitions for an “affected person” in two other locations within Title 44, including in the section immediately following the one at issue, but did not do so for Section 44-1-60, is unavailing. Return at p.13-14. It also ignores the maxim of statutory construction of “*expressio unius est exclusio alterius*,” as discussed at length in the Petition at p.15.
- Petitioners also dispute the fact that they are required to put forward expert testimony to substantiate allegations which require expert proof under the South Carolina Rules of Evidence. *Compare* Return at p.16 n.9, *with* Rules 701 and 702, SCRE (collectively stating that a lay witness may not testify on a subject that “require[s] special knowledge, skill, experience or training,” which is left to expert witness testimony). The Opinion likewise identifies and assigns error to the fact that the ALC “required Petitioners to prove the existence of an environmental impact on their members and the surrounding neighborhoods as part of establishing standing.” Op. at p.10. The Court’s characterization of that requirement suggests that it believed the ALC’s holding was in error, but the Opinion’s holding demonstrates the apparent fundamental misapprehension of administrative challenges to DHEC permits that permeates the Opinion’s later holdings. *Permit challenges at the ALC are not tort actions*. And a demonstration of (or lack of, as the case may be) an environmental impact on a petitioner is *not* the ultimate question on the merits on which the ALC is concerned. Stated differently, a contested case challenge of a DHEC permit is not akin to a trespass action, where the plaintiff must meet the elements of a trespass at the merits stage of the litigation in order to prevail, in

that a petitioner does not have to prove the existence of an environmental impact to itself in order for modifications to be made to the Permit. The goal of a contested case proceeding is to arrive at the conclusion of what new conduct is *authorized*, not issue an injunction or otherwise restrict conduct that is already occurring.

In fact, an environmental impact for the activity in question in DHEC challenges is normally *presumed*, as otherwise there would be no need for a DHEC permit in the first instance. The goal of DHEC at the staff level, and the ALC in a contested case, is to reach a result that balances the desired conduct of the permittee, which likely has environmental impacts, with statutes and regulations governing the specific activity. The determination of the existence of environmental impacts to persons seeking to contest a permit is thus part and parcel of the ALC's *standing analysis*, not one that is necessarily relevant to or indicative of a *merits determination* on the Permit. Here, the reason why a demonstration of an environmental impact on Petitioners' members was required in this case, is because *Petitioners chose to assert individual environmental impacts* in their affidavits as the basis for their standing. At the summary judgment stage, Petitioners could no longer rely on mere allegations of individual impacts, but based on clear and unmistakable precedent, they were required to put forward actual evidence to support the allegations. *See Arcadia Lakes v. S.C. Dep't of Health & Env'tl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013) (noting that the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case;" therefore, "each element must be supported ... with the manner and degree of evidence required at the successive stage of the litigation") (quoting *Lujan II*, 504 U.S. at 561). Again, such evidence does not necessarily relate to the merits determination of the underlying permit, it related to Petitioners' burden to demonstrate standing. As such, it was not error for the ALC

to require that level of proof at the summary judgment stage, and the suggestion to the contrary demonstrates a misapprehension of the structure and procedures involved in an administrative challenge of a DHEC permit.

The same goes for the ALC's requirement of expert witness testimony on the specific question of a medical link between Petitioners' claimed injuries and the cruise activity which Petitioners allege causes those injuries. Such a finding is not relevant to the Permit at all. And the ALC did not hold that expert witness testimony is always required to survive a motion for summary judgment and Petitioners' assertion to the contrary is nonsensical. *The point here is not that expert witness testimony is required in every case in order satisfy standing or survive summary judgment; the actual point is that Petitioners chose to invoke a medical basis and link for standing that attempted to specifically tie increases in cruise ship activity at UPT to adverse health consequences, based solely on assertions by lay witnesses.* But without any medical or specific environmental training that could isolate cruise ship activity amongst the other environmental impacts that are part and parcel to living in downtown Charleston generally (i.e., crowds, pollution, traffic, etc., see *Carnival*, 407 S.C. at 76-77, 753 S.E.2d at 851 (explicitly discussing same in Charleston resulting from cruise operations)), and the other cargo activity occurring at UPT and nearby Columbus Street Terminal specifically, Petitioners are not qualified to draw that straight line link between cruise activity and health impacts. Rule 701, SCRE.

- Contrary to Petitioners' argument and the Opinion's holding, the *Carnival* decision of this Court is not distinguishable from this case and these facts. Return at p.17. In a 5-0 decision, the *Carnival* court rejected standing as to the exact 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. The Opinion misapprehended the fact that affidavits were filed in support of the plaintiffs in *Carnival*, see Op. at p.10 (stating that the *Carnival* plaintiffs “did not submit affidavits regarding individualized harm”), including several of the exact same affidavits that were filed in support of this Permit challenge. It is of no moment that the causes of action are different between these two cases, or that one was a civil action and the other an administrative challenge, as Petitioners advanced the exact same basis for standing in both matters in order to demonstrate their stake in the litigation.

- Petitioners attempt to downplay the Ports Authority’s supposed “parade of horrors” and hypotheticals regarding the ability of individuals living far and wide to challenge permit decision under the Court’s new standard, Return at p.17-18; however, the Court should note that Petitioners never actually dispute the viability of same under *Lujan*, see Petition at pp.19-20, or the fact that those individuals could assert a viable contested case challenge as an “affected person” under the Opinion’s *de minimis* harm requirement.
- Finally, Petitioners dispute the fact that this Court has previously applied the three-part Constitutional test for standing to administrative challenges generally, and DHEC permit challenges specifically, citing the *Smiley* decision of this Court in particular as proof that Court has stopped short of applying all three parts of the test in favor of Petitioners’ preferred “injury” hybrid analysis. Return at p.19-20. But here again, Petitioners’ interpretation of the case law misses the mark. See also, discussion, *supra* n.6.

In *Smiley*, the ALC, applying the three-part test for Constitutional standing, found that the petitioner failed to sufficiently allege injury-in-fact. Because all three parts of the standing test are required, the ALC did not engage in further analysis regarding the causation and redressability prongs. The application of the three-part Constitutional standing test and the

finding of no injury-in-fact was then appealed and affirmed by the Court of Appeals, and subsequently appealed to this Court. The discrete issue before the Court was only whether the petitioner's affidavit satisfied the burden in meeting the first prong of the standing test. The traceability and redressability prongs had neither been ruled upon nor appealed, and were therefore not at issue in *Smiley*. This Court reversed, implicitly affirming the application of the three-part Constitutional standing test to DHEC permit challenges, and found that the petitioner's affidavit satisfied the injury-in-fact prong and remanded the case for further inquiry. *Smiley* is not "consistent with [Petitioners'] view that 'affected person' standing concerns injury," Return at p.20, as wrongly suggested, but instead merely reflects the limited holdings by the ALC and issues on appeal.

In sum, the Return's attempt at scattershot rebuttals nibble at the edges of the issues raised by the Petition but fail to meaningfully address the primary failings of the Opinion's statutory standing analysis and misinterpretation of the General Assembly's intent. For all of these reasons, the Return does nothing to dissuade or counterbalance the need for rehearing of the Opinion.

III. The Return continues to misrepresent the Project, the traceability of the complaints alleged by Petitioners to the activity authorized under the Permit, and, most importantly, the continued viability of cruise operations in Charleston.

A. Cruise activity in general in Charleston is not at issue under this Permit and is not going away.

In its characterization of the Project and the Ports Authority's cruise operations, the Return is a case study in a party's deliberate attempt to characterize its subjective views and outright wishful thinking as fact. As the clearest example of this concept, the Return exclaims that "undisputed documents show that SPA's cruise operation [sic], and the pollution it causes, cannot continue without a new permitted terminal." Return at p.8. It is difficult to overstate or over-emphasize how misrepresentative of the record the above-quoted statement and concept is. As

definitively stated in the Petition, the Ports Authority will continue to pursue and advance the cruise industry in Charleston, regardless of whether it repurposes an existing warehouse within the UPT boundary into a new cruise terminal or instead continues to utilize its existing facility. In fact, the **only evidence of record in this case** is that the Ports Authority will continue to pursue the cruise industry as a viable maritime commerce activity on behalf of the State, regardless of the outcome in this Permit challenge.⁹ The Ports Authority submitted an affidavit by its Vice President in charge of the administration of the cruise industry in support of summary judgment, dated August 2, 2013, wherein he opined as follows:

9. In the event that the federal or state environmental permits are reversed or denied, the Ports Authority will continue to accommodate and berth cruise vessels at the UPT, including but not limited to the Carnival Fantasy.

10. In the event that the federal or state environmental permits are reversed or denied, cruise lines will continue to operate at the UPT, including but not limited to the Carnival Fantasy.

11. Regardless of whether cruise operations occur on the south end or north end of the UPT, those cruise operations will not be affected by the location, including, for example, the frequency of and the size of cruise vessels that can be berthed.

(R.p.1546); *see also* **(R.p.1189)**, Ports Authority Resp. to Request for Final DHEC Board Review (“Should the north end not be utilized for cruise operations, it will continue its use for cargo operations, increasing air emissions and traffic beyond what would exist for cruise operations.”).

⁹ This is not a new position advanced by the Ports Authority in the Petition, as some would lead this Court to believe, but has been stated honestly and forthrightly in each and every substantive filing in this litigation, starting with the very first document the SCPA submitted to the DHEC Board in response to the request for final review conference. **(R.pp.1187)** (“The reality that Opponents would prefer this Board disregard is that vessels called on Union Pier and Charleston in the past, they do so today, and irrespective of the ultimate determination on this pending Permit, Vessels will continue to call on Union Pier and Charleston in the future. ... Should the permit be reversed, then the existing traffic patterns will be maintained and there will be additional rail and truck traffic generated from the use of the north end of the Union Pier Terminal to handle cargo (in addition to the likely continued use of the south end of the terminal as a cruise terminal).”).

Petitioners' representations are contrary to this evidence of record, yet they are incapable of disputing the Ports Authority's positions on these points, as they are a policy choice adopted by the Ports Authority on subjects that are not at issue in this litigation. It should go without saying, but the Ports Authority is capable of definitively stating that cruise operations will continue in Charleston, at UPT or elsewhere, because the General Assembly has unequivocally conferred that discretionary *policymaking authority* on the Ports Authority by statute.¹⁰ Petitioners may disagree with the policy choice of pursuing cruise operations in Charleston and on the peninsula, but their disagreement is a political discussion and does not translate into an ability to dictate policy of the Ports Authority, acting on authority bestowed upon it expressly by the General Assembly, and it is misrepresentative of the record to suggest otherwise. *See, e.g., Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121-22, 691 S.E.2d 453, 460 (2010) (“[T]he courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial.”) (internal citations omitted).

And the Court should note that the Ports Authority's policy choice to pursue cruise operations in Charleston has the support of both the General Assembly and the City of Charleston. **(R.pp.1500-03)**, Affidavit of then-Mayor (now former) Joseph Riley; **(R.pp.001842-45)**, S.968 Concurrent Resolution, 119th Session (2011); **(R.pp.001846-48)**, Charleston City Council

¹⁰ The Ports Authority was established in 1942 for “promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State, namely Charleston, Georgetown, and Jasper, and works of internal improvement incident thereto.” S.C. Code Ann. § 54-3-110; 1942 S.C. Acts 626, § 2. The Ports Authority is authorized to “do and perform *any act or function* which may tend to or be useful toward the development and improvement of [the harbors and seaports of Charleston, Georgetown, and Jasper] and to the *increase of water borne commerce*, foreign and domestic, *through such harbors and seaports.*” S.C. Code Ann. § 54-3-130(9) (emphasis added). With respect to Charleston Harbor, the Ports Authority has the mission of developing and improving the harbor “for the handling of water borne commerce from and to any part of the State and other states and foreign countries.” S.C. Code Ann. § 54-3-130(1).

Resolution (Sept. 14, 2010). As stated in the Petition, the ability of the Ports Authority to conduct current and future cruise operations generally, or shift cruise operations among or within its Charleston terminals, does not require DHEC's approval, is not authorized by or the subject of this Permit, and is not before this Court. Again, Petitioners may, and obviously do, wish it were otherwise, but the policy choice of the state agency statutorily tasked with making the decision as to whether or not to pursue cruise operations in Charleston is not subject to judicial review, no matter how "preposterous" Petitioners believe it to be. *Segars-Andrews, supra*.

Yet, opposition to the cruise industry is so ingrained in the Petitioners at this point they have apparently confused surmise and fantasy for fact. Petitioners point to a number of random citations in the Record to support its incorrect assertions of "undisputed" facts, singling out statements made by the Ports Authority in presentations about the possible new cruise facility to the effect that "SPA has made 'very clear' the 'urgent need to improve' its 'desolate,' 'undistinguished,' 'out-of-date,' and 'unattractive' facility to meet the demands of the cruise industry." Return at p.8 n.1 (citing **(R.pp.1243, 2470, 2473, 2479, 2481, and 2482)**). Petitioners confuse the Ports Authority's statements supporting its justification for planning new and more modern cruise terminal facilities, all of which were made in the public input gathering phases and in support of the application for the Permit, with an inability to continue to conduct cruise operations at the current facility. However, the Court can plainly see that this wishful thinking by Petitioners is not based in fact, because even a "desolate," "undistinguished," "out-of-date," and "unattractive" cruise facility¹¹ can continue to accept cruise calls, and it is undisputed that the Ports

¹¹ The suggestion that these public comments of the Ports Authority and its officials in presentations about the possibility of a new cruise terminal represent anything other than the Ports Authority's desire to emphasize and market a justification and purpose for proposing a new cruise terminal facility is unserious.

Authority has continued to accept multiple cruise ship calls a week throughout the pendency of the Permit challenge.¹²

Petitioners key in on the truthful—and self-evident—statements by the Ports Authority that its cruise terminal facilities must comply with Federal law and ever-changing security requirement. Return at pp.7-8. Yet, Petitioners draw from the Ports Authority’s true statements that a new, modern facility would be better able to accommodate those requirements the illogical conclusion that the current facility is incapable of continuing to accept cruise ship calls. Petitioners’ apparent suggestion that the Ports Authority and U.S. Customs and Border Patrol (CBP) have been *illegally* colluding to accept upwards of 104 cruise ships annually since 2001, in violation of federal law, is so specious that it warrants reproach. The memorandum between the Ports Authority and CBP, along with its subsequent amendments, that Petitioners misrepresent in order to draw this conclusion merely states the following: “[w]hile the Charleston Temporary Cruise Terminal has limited capacity to meet current passenger workloads resulting in a less than optimal processing time, CBP commits to work collaboratively with SCSPA to identify requirements to improve and upgrade the facility to meet federal security standards.” (**R.p.1679**) (Amendment #003 to the CBP-Ports Authority MOU, entered July 27, 2009, which reflects the fact that the Ports Authority had by then settled upon plans to relocate cruise operations to Building 322). Since 2009, and in collaboration with CBP, the Ports Authority has undertaken a number of changes and upgrades to its current cruise facility in order maintain compliance with federal security standards, a fact that this Court can take judicial notice of based solely on the fact that CBP, whose operations are staged

¹² Of course, as the Court is likely aware, cruise ship calls have been voluntarily and temporarily suspended by the cruise lines as a result of the Covid-19 pandemic, but are expected to resume at prior levels at some indeterminate date in the future.

and conducted within the current cruise facility, has continued to process cruise ship calls at UPT on a weekly basis.

Another head scratcher is Petitioners' suggestion that the Project is anything other than a consolidation of existing cruise operations in a smaller footprint. Or that there are no environmental or health benefits associated with the permanent relocation of other cargo operations¹³ occurring at UPT off of the peninsula, along with the expected sale and redevelopment for private use of the southern end of UPT consisting of approximately 35 of the 63 total acres. In truth, while the new cruise operations located in Building #322 would consist of 108,000 square feet, compared to the approximate 30,000 square feet of the current primary cruise facility building (Building #325) that serves only the limited purpose of an embarking and debarking area for passengers, current cruise operations on UPT utilize more than 196,400 square feet of covered space on UPT (**R.p.001182**),¹⁴ *far more* than the Ports Authority's proposed consolidated cruise operations under the capital improvement plan.

¹³ In attempting to respond to the Ports Authority's accurate statement that moving forward with the Project will have beneficial environmental effects versus the status quo, Petitioners assert that "SPA's own documents show that SPA *ceased* major cargo and rail operations at UPT in 2011." Return at p.8 n.5 (emphasis in original) (citing 2012 documents produced in discovery to that effect). However, the Court can take judicial notice of the fact that this statement is also wrong and misleading. Petitioners and their counsel are plainly aware of the falsity of that representation, as they are *currently challenging in federal district court* in Charleston the existing and on-going use of Building 322 for cargo and break-bulk operations that have been occurring there "since at least April 2017," including utilization of the rail line into UPT, by a tenant of the Ports Authority on UPT. See *Charleston Waterkeeper & S.C. Coastal Conservation League v. Frontier Logistics, L.P.*, C.A. No. 2:20-cv-01089-DCN. This action was brought by one of the Petitioners in this case, the South Carolina Coastal Conservation League, who is represented in that litigation by counsel in the same office, Southern Environmental Law Center, as counsel of record for all of the Petitioners. *Id.* Dkt.#1-1. The willingness by Petitioners to misrepresent the facts to their liking should give this Court pause.

¹⁴ The existing UPT passenger facilities are comprised of six buildings. (**R.p.001182**) The northernmost building in the complex is Building 304, which has approximately 40,000 square feet of covered warehouse space. (**R.p.001571**) Moving east on the property, Building 303 consists of 42,000 square feet of covered warehouse space. *Id.* To the south is Building 305, which consists

B. All that is at issue is a critical area permit to install five pilings.

Ultimately, all of the above is simply context, as 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 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 which might seek to install an entirely new development and use. The claims by these Petitioners relate to *existing* terminal operations, *existing* terminal facilities, and *existing* use of UPT for cargo and cruise operations. Thus, even under 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.

of 27,000 square feet of additional covered warehouse space and is also the southernmost existing railroad spur termini on UPT. *Id.* Buildings 301 and 302 are located to the south of Buildings 303-305, with Building 301 located adjacent to the dock apron and consisting of approximately 40,000 square feet and Building 302 located to the west of Building 301 and consisting of an additional 21,000 square feet of warehouse space. *Id.* Combined, Buildings 301-305 house embarking and debarking baggage operations, as well as intake and security offices for the Ports Authority’s current cruise operations. Finally, Building 325 serves as the principal passenger terminal building. Built on the wharf, Building 325 is a two-story structure comprising approximately 30,000 square feet and serves as the primary embarking and debarking area for passengers, and houses existing CBP personnel. *Id.* Additionally, Buildings 312 (47,000/sf), 313 (38,000/sf), and 324 (80,000/sf) currently serve as covered warehouse parking for cruise passengers. *Id.* Even “lawyers’ math” supports a finding that 108,000/sf is less than 196,400/sf, so Petitioners’ continued insistence on misrepresenting that the project will be a “much larger cruise terminal,” Return at p.8, can only be explained as a desperate attempt to continue to convey a false narrative about the Project to the Court, the press, and the public at-large.

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

For a number of reasons, the Opinion’s pre-emptive findings regarding discovery constituted a clear error and appellate overreach into issues which are inherently 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.”). The Return does not substantively address any of the grounds advanced in the Petition and is therefore irrelevant to the Court’s consideration of the Ports Authority’s arguments on this subject.¹⁵

Critically, neither the Opinion nor the Return address the controlling issue here: because the ALC expressly vacated the Discovery Order in the Standing Order, in addition to finding the discovery issue moot in light of its holding on Petitioners’ standing, the Discovery Order was rendered null and void and ceased to exist. *See Ware v. Ware*, 404 S.C. 1, 11, 743 S.E.2d 817, 822 (2013) (“A void judgment is one that, from its inception, is a complete nullity and is without legal effect.”) (internal quotation marks omitted). A void order is without effect. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice “was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father”).

The Opinion notes in passing that “the ALC vacated its original order regarding discovery” in its recitation of the discovery issue on appeal, Op. at p.14, yet it fails to acknowledge the fact

¹⁵ The one case cited by Petitioners in support of its proposition that discovery orders must be reversed if the trial court abused its discretion, upon inspection, has nothing to do with discovery or a trial court’s inherent discretion to control discovery matters before it. Return at 23-24 (citing *State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991)). *Newell* dealt with an appeal from the failure of the trial court to grant a motion for suppression in a criminal matter and has no application or relevance here.

that the “original order regarding discovery” is the precise order that Petitioners have attempted to appeal. Nor did the Opinion engage in any analysis about the preclusive effect that ALC’s unequivocal vacation of the order has on either Petitioners’ ability to appeal from, or this Court’s ability to review, a vacated order that is null and void, despite that concept being a matter of black letter law. It is therefore inescapable that neither the attempted appeal from the Discovery Order nor any discovery issue is properly before the Court, and at a minimum the discovery portion of the Opinion should be withdrawn. *Brennan’s, Inc. v. Colbert*, 125 So. 3d 537, 541, *on reh’g* (Ct. App. La. Nov. 15, 2013) (holding there can be no appeal “from an absolutely null order”); *Hudson v. S.C. Dep’t of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (dismissing appeal from void order); *Rice v. Alpha Sec., Inc.*, 2014 WL 703760 (4th Cir. Feb. 25, 2014) (“Once Rice successfully moved to have her nonsuit vacated, it ceased to exist, and effectively, it never did. It therefore could not have any further effect on the litigation, because it is as if it never occurred.”).

The Opinion not only failed to give effect to the fact that the Discovery Order no longer existed, but also proceeded to make *de novo* findings of fact on these discovery issues rather than leave the issue to the ALC. In doing so, the Opinion failed to comply with the longstanding appellate practice that this Court’s review “must be confined to the record,” while it also avoided the requirement that “[w]here a point has not been decided by the lower court, we will not consider the point on appeal.” *Timms v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985); *see also Risher v. S.C. Dep’t of Health & Env’tl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011) (holding that the ALC is the “ultimate finder of fact” in contested cases).

While the analysis of the discovery issues in the Opinion suggests that the Court has irretrievably signed onto Petitioners’ tall tales of prejudice regarding discovery, certain facts

should give the Court pause. Not least of which is the fact that, not only is the Court disregarding and contradicting the express “lack of good cause” findings of the ALC set forth in the vacated Discovery Order,¹⁶ which findings were made by the fact finder who was actually present for, observed Petitioners’ discovery and motions conduct firsthand, and considered the arguments made by Petitioners in support of re-opening discovery, but the Court is also making *de novo discovery findings of fact in the first instance as an appellate court* that are inherently beyond this Court’s traditional appellate jurisdiction.

Petitioners’ cries of prejudice rang hollow to the ALC for a reason. They have continued the charade with this Court, but their arguments regarding discovery were clearly shown as efforts to game the system before the ALC in an attempt to erect a non-existent discovery barrier to the ALC’s consideration of the Ports Authority’s motion for summary judgment. Petitioners claim that they “clearly met the good cause standard for expanding discovery by showing a need for more time to conduct depositions in a complex case.” Return at 24. Yet, in the vacated Discovery Order, the ALC, who actually observed and experienced Petitioners’ conduct, expressly found the opposite. **(R.pp.64-66)** Indisputably, Petitioners failed to seek to expand discovery during the 90-day discovery window. But contrary to Petitioners’ assertion that the parties were proceeding with discovery as though everyone, including the ALC, understood that it would continue indefinitely, the reality is that Petitioners conduct *zero* discovery after the 90-day discovery window,¹⁷ while

¹⁶ The ALC evaluated the posture of the case, and it 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 did so in direct response to the Ports Authority notifying the Court (and Petitioners) that it intended to file a motion for summary judgment. Discovery Order at 3 **(R.p.66)**

¹⁷ Neither party served additional party discovery requests after the 90-day discovery window.

the Ports Authority continued to comply with Petitioners' original discovery demands and directions that it supplement its production of responsive documents as they were discovered and reviewed by counsel. *See Derrick v. Johnson Controls, Inc.*, 3:10-CV-3295-CMC, 2012 WL 2072782, at *4 (D.S.C. June 8, 2012) (unpublished) (“‘Good cause’ means that scheduling order deadlines cannot be met despite a party’s diligent efforts. However, ‘[g]ood cause is not shown when the amendment could have been timely made.’ If a party was not diligent, the good cause inquiry should end.”) (internal citations omitted).

And despite asserting to this Court that this is a complex case requiring more time to conduct depositions, the Court should not ignore the fact that Petitioners failed to notice a single deposition during the 90-day discovery window and, indeed, did not notice a deposition in this case until the Ports Authority pointed out that fact in responding to Petitioners' motion to re-open discovery. (**R.pp.2236, 2241-42**) Petitioners first noticed the deposition of three fact witnesses on February 18, 2014, more than one year after filing the request for contested case and nine months after the close of discovery mandated by Rule 21.A, RPALC.

This Court should have never reviewed the vacated Discover Order. In light of that fundamental error, the Court should reconsider the discovery portion of the Opinion and affirm the holdings of the Court of Appeals and ALC. If the Court is inclined to maintain the standing portion of the Opinion and remand the case for further proceedings at the ALC, it is possible that additional discovery, including depositions, may be needed by both parties. However, that decision rests in the inherent discretion of the ALC, not this Court, and under those circumstances the Court should, at a minimum, withdraw the discovery portion of the Opinion and remand the issue to the ALC, in whose province these types of discovery issues should remain.

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

The Return adds nothing substantive to the analysis of whether the Opinion misapprehended the sanctions arguments advanced by the Ports Authority and erred in the application of the standard of review, as it largely parrots the Opinion’s misapprehensions and regurgitates Petitioners’ prior arguments that miss the mark. Contrary to Petitioners’ facile assertion that the Ports Authority’s argument can be “boil[ed] down to the notion that a motion is definitively frivolous if a trial court finds it to be ‘incorrect on the law,’” Return at 20-21, the Ports Authority is merely contending that, because the Opinion concurred in the ALC’s factual determination that Petitioners were “incorrect on the law,” the standard of review of this Court, by its own precedent, is converted into one of an abuse of discretion and the law of this case is that motion to remand was unreasonable. *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)). The Opinion fails to apply an abuse of discretion standard of review, instead stating that the Court’s review is based on “our own view of the preponderance of the evidence,” Op. at p.16, which cannot be squared with concurrence in the factual findings of the ALC on ultimate question.¹⁸

As to the Ports Authority’s procedural argument that consideration of Petitioners’

¹⁸ It should be noted that at every step of this appeal to date, Petitioners have concurred in the interpretation that standard of review of this question is an abuse of discretion. *See, e.g.*, Pet. for Certiorari at p.22 (“The ALC abused its discretion by imposing sanctions upon the Community Groups”); Br. of Petrs. at p.34 (same), and p.37 (“The ALC’s order was a clear abuse of discretion.”). Only now in the Return, and for the first time in this appeal, do Petitioners assert that “the Court may take its own view of the preponderance of the evidence underlying it and overturn the sanctions.” Return at 21.

arguments against the Sanctions Order is constrained by Petitioners' failure to appeal the Remand Order, the Return once again misrepresents the Ports Authority's argument as simply being that the failure to appeal the Remand Order precludes the Court's consideration of the Sanctions Order and its finding that the motion to remand was frivolous. The Opinion likewise misapprehends this point. However, the Ports Authority's argument is, and always has been, more nuanced.

As the Opinion noted, the findings of the Remand Order interpreting S.C. Code Ann. § 44-1-60(F) were unappealed and are "the law of the case." Those findings formed the basis of the ALC's determination that Petitioners' motion to remand was unreasonable, warranting sanction. *See, e.g., (R.pp. 9-10)* Yet, the entire basis for Petitioners' appeal on this subject was that its narrow reading of subsection (F) was correct or, at a minimum, reasonable; therefore, the ALC could not possibly have ordered sanctions against them under those circumstances.¹⁹ However, without having appealed the underlying findings of the ALC regarding Petitioners' construction of the statute, Petitioners are not permitted to reply upon contrary positions to those findings as the sole basis for its challenge to the ALC's determination that the motion to remand was frivolous. Thus, the Ports Authority's argument is *not* that the failure to appeal the Remand Order precludes the Court's consideration of the Sanctions Order; instead, it is that the operative findings of the ALC which supported its determination that the motion to remand was frivolous are found in the Remand Order, which findings were unappealed and, according to the Opinion, are the law of the case. 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 or, at a minimum, modify the Opinion to reflect the application of the correct standard of review.

¹⁹ Br. of Petrs. at p.35 ("While the ALC read the statute differently than did Petitioners, because the Petitioners' reading was reasonable, the imposition of sanctions was an abuse of discretion.").

Conclusion

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

Respectfully submitted,

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