No. 20-787

In The Supreme Court of the United States

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, ALICE TAWRESEY, ROBERT DAY, BAINBRIDGE SHORELINE HOMEOWNERS, DICK HAUGAN, LINDA YOUNG, JOHN ROSLING, BAINBRIDGE DEFENSE FUND, POINT MONROE LAGOON HOME OWNERS ASSOCIATION, INC., and KITSAP COUNTY ASSOCIATION OF REALTORS,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ENVIRONMENTAL LAND USE HEARING OFFICE, and GROWTH MANAGEMENT HEARINGS BOARD CENTRAL PUGET SOUND REGION,

Respondents.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals

BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Washington law prohibited the Petitioners from raising their federal constitutional claims before the state administrative agency. But the law also required them to go through that state administrative proceeding first, before they could appeal or otherwise bring their claims in court. State law also barred the Petitioners, upon seeking judicial review of the agency's action, from introducing in court the evidence they needed to substantiate their constitutional claims. Consequently, the Petitioners were deprived by state law of any forum in which to bring their constitutional claims regarding the agency's actions. Does this violate Due Process of Law?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI attorneys have represented parties before administrative agencies, on appeal from agencies, and in cases involving administrative law's intersection with due process. *See, e.g.*, *Flytenow, Inc. v. F.A.A.*, 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, 137 S.Ct. 618 (2017); *Hobbs, et al. v. City of Pacific Grove, et al.*, Monterey Cnty. Super. Ct. No. 18CV002411 (Cal. App. H047705, appeal pending). GI scholars have also published extensively on the subject, *see, e.g.*, Timothy Sandefur & Jonathan Riches, *Confronting the Administrative State: State-Based Solutions to Inject Accountability into an Unaccountable System* (Goldwater Institute, 2019).[2]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of

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[1] All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

[2] https://goldwaterinstitute.org/administrative-state-blueprint.

liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Due process requires that a person have a genuine opportunity to be heard before being deprived of property. Yet thanks to overlapping rules of deference and procedure, the Petitioners here were denied that opportunity. They were required to pursue the administrative process before going to court; but they were not allowed to present their argument to the agency; then, when they were allowed to go to court, they were barred from introducing evidence necessary to state their case, because they had not presented it to the agency.

This Catch-22, resulting from the intersection of administrative law requirements, is a matter of increasing concern. Agencies enjoy such broad power, and are subject to so few checks and balances, that they effectively operate as a "headless fourth branch of government." *City of Arlington v. F.C.C.*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) (citation omitted). Yet they are exempt from the rules of evidence and procedure that apply to courts, and are accorded so much deference that any person who seeks to challenge their decisions will be barred from introducing the evidence necessary to state her case before a

neutral decision-maker. This problem is perhaps most severe at the state level.

Federal and state courts are in disarray as to how to resolve this problem. Some let litigants introduce extra-record evidence to show that the agency's decision violated the Constitution. Others do not. Still others have byzantine, intersecting rules governing when litigants may do this. Courts have thus characterized the law governing the question presented here as "unsettled," *Mayor & City Council of Baltimore v. Trump*, 429 F.Supp.3d 128, 138 (D. Md. 2019), and a "morass." *State v. Ross*, 358 F.Supp.3d 965, 1047 (N.D. Cal. 2019).

This Court has long respected the principle that states may design their laws, and organize their agencies, in whatever manner their citizens consider best suited to their needs. But that cannot justify falling below the due process baseline. This Court has made clear that administrative entities must respect basic due process principles, in order to ensure that constitutional rights are meaningfully secured against state intrusion. The Court should take this case to declare that state law must provide *some* meaningful opportunity to assert federal constitutional rights against a regulatory agency.

REASONS FOR GRANTING THE PETITION

I. The overlap of administrative and judicial jurisdiction often leaves parties with no opportunity to be heard on constitutional claims.

Due process of law gives an aggrieved party the right "to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Yet administrative law often deprives people of this right by separating the proceedings against them into administrative and judicial stages, then denying them the right to assert their claims in the administrative stage so that, when they reach the judicial stage, they are barred from pursuing those claims because they cannot introduce the requisite evidence. This creates a "Catch-22," where the person's constitutional claim "dies aborning." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019).

Due process means "something more" than a futile opportunity to complain to an agency that ignores complaints. In *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385–86 (1908), property owners were ostensibly allowed to object to a tax assessment, but when they did, the city council simply held another meeting and adopted a resolution confirming its initial assessment without considering their objections. *Id.* at 384–85. This Court found that this was not a hearing. "[A] hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief: and, if need be, by proof, however informal." *Id.* at 386.

But these Petitioners were denied that right, due to a situation that is all too common nationwide: a party cannot make her constitutional arguments before the agency, because it lacks jurisdiction to hear them or because the constitutional violation arises post-proceeding—but she also cannot ask a court to act until after completing that administrative proceeding. So she pursues the administrative step, and when she later asks a court to intervene, the court is barred from considering any evidence other than what was introduced before the agency to begin with—which means the court cannot resolve her constitutional claims.

This trap deprives parties of the right to be heard both in situations where agencies act in their legislative capacity and where they act in their judicial capacity.

A. In both rulemaking and adjudication, parties are often denied the right to present their cases.

Examples of this trap abound in state cases. In *Perez v. Illinois Concealed Carry Licensing Review Bd.*, 63 N.E.3d 1046 (Ill. App. 2016), *appeal denied*, 77 N.E.3d 86 (Ill. 2017), the plaintiff applied for a concealed carry permit. Without holding any evidentiary hearing, the agency denied his application on the grounds that he had a criminal history. But he had actually been found not guilty of that criminal allegation, and the other "evidence" on which the agency relied was hearsay. *Id.* at 1051–53. That did not matter to the

reviewing court, which held that agencies may rely on hearsay. *Id.* at 1053. The plaintiff, who appealed *pro se*, argued that he should at least have been given a hearing where he could prove that the agency's conclusions about him were wrong. But the court said he should have asked the agency for a hearing, and his failure to do so constituted waiver. *Id*. at 1054. Nor could he introduce evidence to the court. *Id.* at 1050. The consequence was that an unsophisticated layman, convicted of no crime, was deprived of his Second Amendment rights through an administrative proceeding that relied on hearsay and gave him no hearing at all.

Or consider *Ocean Harbor House Homeowners Association v. California Coastal Commission*, 77 Cal.Rptr.3d 432, 451 (App. 2008). A Northern California beachfront property owner was forced to pay $5.3 million to the California Coastal Commission for permission to build a seawall to prevent its property from being washed away by waves. The agency based this dollar figure on two estimates of the value of beach land. But those estimates were of beaches in Southern California, 300 miles away, in an entirely different climate. Had they been introduced into a *court* proceeding, they would have been excluded as irrelevant. But because they were used in an *administrative* proceeding, they were not only admitted, but under California law, they were the *only* evidence that any later court could consider. *See Town of Tiburon v. Bonander*, 103 Cal.Rptr.3d 485, 498 (App. 2009). Consequently, the property owner was forced to pay an amount that could never have been substantiated in an actual legal proceeding, thanks

solely to a procedural trap that lets agencies ignore evidentiary standards—and impose their will free of judicial intervention.

The same trap is often found in federal cases. In *Chang v. U.S. Citizenship & Immigration Servs.*, 289 F.Supp.3d 177 (D.D.C. 2018), the plaintiffs argued that the federal government denied them visas in violation of administrative law and that it also violated the Constitution in doing so. For their arbitrary-and-capricious claim, they naturally relied on the administrative record. But to establish their constitutional claims, they needed other evidence, which the District Court refused to allow. *See Chang v. U.S. Citizenship & Immigration Servs*., 254 F.Supp.3d 160, 161 (D.D.C. 2017). Acknowledging the "disagreement among district courts" about whether plaintiffs may introduce extra-record evidence to support constitutional claims, it denied the plaintiffs that right, to prevent them from "'trad[ing] in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure.'" *Id.* at 161–62 (citation omitted).

Likewise, in *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F.Supp.3d 1191 (D.N.M. 2014), the plaintiffs argued that federal regulators denied them grazing permits in retaliation for their opposition to the agency's land-management policies. *Id*. at 1205–10. They sought to introduce evidence showing a pattern of retaliatory conduct. *Id.* at 1207. The court initially allowed this on the theory that the plaintiffs "could have brought only a First Amendment claim in a separate case and enjoyed robust discovery." *Id.* at 1211.

But it later reversed that conclusion and limited the plaintiffs to the administrative record—a record that, of course, lacked the evidence necessary to make their retaliation claim.

The court excluded the evidence based on the proposition that "[t]he relationship between the [agency] and the Plaintiffs is fundamentally that of tribunal and litigant, and not that of adversarial parties." *Id*. at 1238. Not only did that beg the question—the entire point the plaintiffs wished to prove was that the agency was *not* acting in that manner—but it was also, frankly, naïve. *Cf. Wilkie v. Robbins*, 551 U.S. 537, 560–61 (2007) (agency officials broke into landowner's house and engaged in other tortious conduct in an effort to pressure the owner to sell his land to the government). Yet despite acknowledging that the plaintiffs' First Amendment claim "materialized only after" the administrative proceeding, and that "the administrative appeals process does not afford the Plaintiffs the [evidentiary] tool they need to develop a First Amendment retaliation claim," the court denied them the right to prove their constitutional case. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv*., 61 F.Supp.3d 1013, 1067–68 (D.N.M. 2014).

Bad as those cases were, this case is worse. *State law* denied the Petitioners any opportunity to press their constitutional claim in the administrative forum to begin with. As the petition explains (at 9), Petitioners cannot prevail upon state courts until completing the administrative procedure, but cannot present their constitutional claims there, nor can they present those

claims afterwards without introducing evidence that state law bars the court from receiving.

As *Perez* and *Ocean Harbor House* suggest, this procedural trap is worsened by the fact that agencies are exempt from rules of evidence or procedure. Federal agencies may rely upon "uncorroborated and untested testimony and hearsay testimony," and even "unsworn" and "contradicted" testimony. *EchoStar Commc'ns Corp. v. F.C.C.*, 292 F.3d 749, 753 (D.C. Cir. 2002). State agencies can do the same. *See further Monte Vista Prof'l Bldg., Inc. v. City of Monte Vista*, 531 P.2d 400, 402 (Colo. App. 1975); *Diehsner v. Schenectady City Sch. Dist.*, 543 N.Y.S.2d 576, 578 (N.Y. App. 1989); *Reynolds Metals Co. v. Indus. Comm'n*, 402 P.2d 414, 416–18 (Ariz. 1965).

But because courts may only consider the evidence in the administrative record when the party appeals, a court reviewing an agency action is not only *allowed* to rely on contradicted, uncorroborated hearsay—it may *only* rely on that contradicted, uncorroborated hearsay. *See New Dynamics Found. v. United States*, 70 Fed.Cl. 782, 796–97 (2006) (reliance on administrative record of "hearsay" permitted because "courts generally have refused to consider collateral attacks upon the materials in administrative records based upon the *post hoc* application of evidence rules."). *See also* Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 Fordham L. Rev. 63, 87 (1986) ("Administrative tribunals are not bound by the rules of evidence. . . . Thus,

at administrative or arbitral hearings, an issue may be decided on the basis of evidence that would be inadmissible or insufficient in a court of law.").

As to whether a court may consider evidence beyond the administrative record when evaluating a constitutional claim, federal courts are divided. *Compare Jarita Mesa Livestock Grazing Ass'n*, 58 F.Supp.3d at 1237 (court is confined to the administrative record even where the party's claim arises under the Constitution), *with Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("[C]ourts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making."); *see also* Travis Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 Lewis & Clark L. Rev. 981, 984 (2017) (detailing the "organic and *ad hoc* experimentation in the federal courts" that has developed "a hodge-podge of conflicting and contradictory standards that vary between and within the federal circuits").

States are in total disarray on how to deal with this problem. *See* Adam Gavoor & Steven Platt, *Administrative Records and the Courts*, 67 U. Kan. L. Rev. 1, 31 (2018) (noting "the tangled, inconsistent doctrines" on this issue). Connecticut requires trial courts to hear evidence outside the administrative record when necessary for resolving a constitutional claim. *Cioffoletti v. Planning & Zoning Comm'n*, 552 A.2d 796, 799 (Conn. 1989). Florida allows this but does not appear to require it. *Cafe Erotica v. Fla. Dep't of*

Transp., 830 So.2d 181, 183 (Fla. App. 2002). Maryland bars courts from receiving new evidence but lets them force agencies to reopen proceedings to receive additional evidence, *Consumer Prot. Div. Office of Atty. Gen. v. Consumer Publ'g Co.*, 501 A.2d 48, 57–58 (Md. App. 1985)—a procedure that Michigan, by contrast, prohibits. *Mich. Ass'n of Home Builders v. Dir. of Dep't of Labor & Econ. Growth*, 750 N.W.2d 593, 595 (Mich. 2008). California forbids the introduction of evidence outside the administrative record with only "very narrow[]" and "rare" exceptions. *San Joaquin Local Agency Formation Comm'n v. Super. Ct.*, 76 Cal.Rptr.3d 93, 100 (App. 2008). Texas has three different standards to use when reviewing administrative decisions, with different levels of evidence allowed. *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 586 (Tex. App. 2006). Alabama has different rules depending on which agency is involved: citizens may introduce new evidence in appeals from the Agriculture Commissioner but not the Oil and Gas Board, while in appeals from the state Tax Tribunal, they may introduce new evidence but bear the burden of proving the agency decided wrongly. *See* Marc James Ayers, *A Primer on Alabama Administrative Appeals and Judicial Deference*, 79 Ala. Law. 406, 409–11 (2018).

Federal courts have reached "no consensus" on the question. *Almaklani v. Trump*, 444 F.Supp.3d 425, 432 (E.D.N.Y. 2020) (citation omitted); *see also Brown v. United States*, 396 F.2d 989, 993–94 (Ct. Cl. 1968) (examining difference of opinions on this issue).

Barring a court from considering evidence outside the administrative record is typically justified on the grounds that this increases efficiency by delegating fact-finding to a specialized entity. But it also runs the risk of "reduc[ing] judicial review to a rubber stamp." David Currie & Frank Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 59 (1975). And while the rule might be defensible in circumstances involving complex factual issues on which the agency is an expert, it is often used more broadly, with the consequence of blocking parties from a meaningful opportunity to be heard on constitutional matters. As Brandon observes, *supra* at 1026, the rationale for confining parties to the administrative record "is unclear where the plaintiffs have had no opportunity to raise their issues and evidence before the agency in the first instance during the decision-making process."

Many states have resorted to forcing litigants to engage in the futile gesture of presenting an agency with constitutional arguments that it lacks authority to address. *See, e.g.*, *Teston v. Ark. State Bd. of Chiropractic Exam'rs*, 206 S.W.3d 796, 804–05 (Ark. 2005).[3] This contradicts "the centuries-old 'fundamental maxim of jurisprudence,' deeply rooted in common sense, that

[3] Other states do not require this, *see, e.g.*, *Mid-City Auto., L.L.C. v. Dep't of Pub. Safety & Corr.*, 267 So.3d 165, 173 (La. App. 2018), and others say it is not necessary but "advisable." *See, e.g.*, *Arvia v. Madigan*, 809 N.E.2d 88, 94 (Ill. 2004). Still others say it is required—but a "public interest" rule allows for *ad hoc* exceptions. *Rivas v. Chelsea Hous. Auth.*, 982 N.E.2d 1147, 1154 (Mass. 2013).

the law does not require 'useless,' 'vain,' or 'futile' acts." Brent Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process 521, 522 (2002). But, in theory, it enables the development of the factual record for an appellate court to later review the constitutional issues. *RBG Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1061 n.24 (Alaska 2015).

These Petitioners tried to obey that rule, but were barred from developing the factual record by state law. *See* Pet. at 13. That deprived them of a forum in a manner notably similar to the illusory hearing this Court rebuked in *Londoner*. Like the plaintiffs in that case, Petitioners were allowed to state their objections—but not given any actual "right to support [their] allegations by argument . . . [or] proof." 210 U.S. at 386.

A solution to these problems would borrow from the law of preclusion, abstention, or comity. In the law of preclusion, a party in a subsequent proceeding is barred from relitigating questions only if she had a full and fair opportunity to litigate those claims in the first proceeding. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 480–81 (1982). In the law of abstention, a litigant is confined to state proceedings if those proceedings afford her "an adequate opportunity" to raise her constitutional claims. *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991). And in the law of comity, a court will give full faith and credit to a judgment from another court if that other court had jurisdiction and accorded due process. *Cf.* Suzanne Stone, *The Preclusive Effect of State Judgments on*

Subsequent 1983 Actions, 78 Colum. L. Rev. 610, 650–52 (1978). But where, as here, a combination of administrative procedure and judicial procedures denies the litigant an adequate opportunity to present constitutional claims, and thus denies her due process, it is inappropriate to impose the equivalent of preclusion, abstention, or *res judicata*.

B. Barring parties from introducing evidence to support their claims deprives them of procedural due process.

Petitioners here were barred from presenting their constitutional claims to the agency. But even where state law allows a party to do so, *requiring* parties to present constitutional claims to an agency in the first instance is problematic.

First, such a requirement front-loads the burden on the individual, imposing the heaviest burden in just those situations where she is at the greatest disadvantage. She must present her full case before an entity that lacks jurisdiction (and may lack expertise) to decide that case. She must do so even though the facts of her case may not yet exist. And she must do so in an environment where procedural formalities and evidentiary standards are vague or non-existent and where she stands adverse to the decision-maker. She must do so even though regulated parties are often not represented by counsel at all in administrative proceedings. Finally, she must do so in the midst of an ongoing process where the tribunal's decisions may suddenly

implicate constitutional rights that were not at issue at some earlier stage.

As a result, citizens find administrative agencies to be traps for the unwary. Many waive rights unknowingly, sometimes as a result of "manipulation and threats." Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 2024 (1999). Others are pressured to overload the record to preserve some basis for an appeal before a neutral decision-maker. *See* Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1321–22 (2010) ("Rather than filtering information, the incentives tilt in the opposite direction and encourage participants to err on the side of providing too much rather than too little information.").[4]

Worse, state agencies frequently employ "informal" procedures, bound by few rules, in which parties are not represented, and are even discouraged from obtaining counsel. *Cf. Mohilef v. Janovici*, 58 Cal.Rptr.2d 721, 737 (Cal. App. 1996) (letting agencies disregard evidentiary rules because doing otherwise would "inject[ ]

[4] The requirement also creates a perverse incentive for agencies, who have no reason to consider input from parties who—due to the preclusion rule—cannot sue afterwards. "Issue exhaustion, . . . effectively removes the leverage necessary for negotiating with agencies at the administrative level. It slams shut the door of the smoke-filled room on those most vulnerable to being excluded." Markoff, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 Tex. L. Rev. 1065, 1085 (2012).

legalisms and attorneys" into the process).[5] But precisely because these individuals are unrepresented lay citizens, the unjust consequences they experience rarely end up in published case reports.

The principle that courts should rely only on administrative records was adopted out of a sense of deference to the executive when it weighs complex factual matters as called for by statute. It was never intended to insulate agencies from independent judicial consideration in justiciable cases. As the Texas Supreme Court has noted, "while state and lower federal courts are presumed competent to handle constitutional matters, administrative agencies, for all the deference they are typically given, occupy a subordinate status in our system of government." *City of Dallas v. Stewart*, 361 S.W.3d 562, 577 (Tex. 2012). Therefore, while agency fact-finding is accorded deference with respect to "initial questions of historical fact," the legal evaluation, "which applies those historical facts to the legal standards," is "outside the competence of administrative agencies." *Id*. at 578.

In short, a rule confining courts to an administrative record when reviewing agency actions can and

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[5] In some states (e.g., Florida), a person's choice of an "informal" hearing amounts to an admission of all facts and a waiver of the right to dispute one's guilt. Fla. Stat. § 120.57(3)(d)(2). As a result, a citizen who is misled into thinking that an "informal hearing" means a less expensive hearing, or a lesser risk of punishment, or a fairer and easier-to-understand proceeding, will likely end up admitting guilt or otherwise depriving herself of a right to an appeal.

often does equate to a surrender of the judiciary's obligation to properly interpret and apply the law. *See* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 Admin. L. Rev. 197, 240 (1991) ("[I]f the courts are to have plenary control of the law, they need plenary control of the facts as well."). That is why this Court has often said that its "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *accord, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 578 n.2 (1968); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). The procedural trap imposed on Petitioners here denies the courts that opportunity.

Whether an agency acts as an adjudicator or a rulemaker, it must exercise its powers consistently with due process—meaning that the legislature must "constrain[] administrative decisionmaking substantively, procedurally, and structurally in such a way that delegation does not engender domination by manifestly increasing the government's capacity for arbitrariness." Evan Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga. L. Rev. 117, 121 (2011). The basic purpose of the due process requirement is to prevent arbitrary government actions—yet arbitrariness is made more likely by standardless delegations of authority, the elimination of democratic accountability, or rules that

let officials act without reasoned deliberation and justification. *Id.* at 158–59.

"The Due Process Clause's substantive and procedural constraints on . . . delegation would be largely meaningless in practice if administrative agencies could sidestep those constraints without legal review or repercussions." *Id*. at 182. But here, the statutory bar against introducing evidence to challenge the constitutionality of the agency's action makes such sidestepping virtually mandatory. This Court has made clear that due process requires at least some right to present a case and have it rationally evaluated. *See, e.g.*, *Londoner*, 210 U.S. at 385–86; *Moore v. Dempsey*, 261 U.S. 86, 89–90 (1923). And the Court has made clear that when a citizen's rights are violated by the decisions of an agency, that person must have a genuine opportunity to present facts to a neutral decision-maker to determine whether the agency acted unconstitutionally. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 187–88 (1964); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). This idea, which some scholars call the "constitutional fact doctrine," is based on "the bedrock requirement of due process: that there be a neutral, independent decision-maker." Martin Redish & William Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 310 (2017). But here, the statutory bar against introducing evidence to challenge the constitutionality of the agency's action deprived Petitioners of that bedrock right.

II. Denying a plaintiff any opportunity to introduce facts to show a constitutional violation is especially problematic in takings cases.

While the administrative law questions presented here are important across the board, they are especially relevant in cases involving takings of property. This is for two reasons: first, in most administrative proceedings, agencies either promulgate rules that will be enforced in future cases, or—when acting in a quasi-adjudicative capacity—determine whether the agency believes the person should be subjected to enforcement in a future proceeding.[6] But in a takings context, the rule the agency makes *itself* causes the taking. The injury *is* the agency action—which means the party cannot present all the evidence to support a takings claim to the agency, since it has not yet taken her property.

In fact, agency determinations that result in takings are often about entirely separate subjects, and the process of determination focuses on factors different from those relevant to a takings determination. *Cf. United Affiliates Corp. v. United States*, 147 Fed.Cl. 412, 417–18 (2020) ("[A] constitutional taking and agency action that is improper under the APA are 'two separate wrongs' and require courts to use different factors to evaluate the character of the Government's conduct."). A property owner who seeks a zoning variance

[6] Although deemed "quasi-adjudicative," such an action (in theory) still remains within the realm of the executive branch. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

or a development permit must typically satisfy certain statutory standards—but those standards are not the same as the factors a property owner must prove to establish a regulatory taking. To force the owner to prove both—not only that she is entitled to a permit under some statute, but also that denying the permit would amount to a taking under the *ad hoc*, multifactor balancing test of *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)—is to demand the impossible.

This is particularly true given this Court's emphasis on the proposition that regulatory takings decisions depend on "complex factual assessments." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). Under existing precedent, whether a restriction on property use constitutes a taking often depends on testimony from expert appraisers, financial analysts, real estate agents, and so forth. It is proper for a factfinder to receive this information and weigh the credibility of testimony. This is the second reason the question of letting parties introduce evidence in court is so important in the takings context.

Whatever the propriety of delegating fact-finding to an agency, the Petitioners here were given no opportunity to even attempt the required showing. It is arbitrary and irrational to require someone to prove something and deny her the means of proving it. "The

law does not require impossibilities." *Pointer v. United States*, 151 U.S. 396, 413 (1894).[7]

It was with similar considerations in mind that this Court held in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that it was appropriate for a property owner to present a takings claim to a jury, in part because the owner "was denied not only its property but also just compensation *or even an adequate forum for seeking it*." *Id*. at 715 (emphasis added).

Denied any forum in which to seek compensation, the owner brought a civil rights claim, and argued to the jury that the city irrationally deprived the owner of the right to use the property. *Id.* at 699. The jury agreed and found that the City had taken the property.

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[7] The court below brushed away the Petitioners' argument that they needed to develop a factual record on the grounds that their constitutional argument is a facial challenge, and "facial constitutional challenges can be decided without reference to additional facts." Pet. App. A-11–12. But this is not true. Facial challenges are not fact-free challenges. Rather, the difference between facial and as-applied is simply that a facial challenge asserts that the law in question is always unconstitutional, whereas an as-applied challenge holds that something specific about this case renders an otherwise constitutional law unconstitutional. While it is more common for facts to be *disputed* in as-applied cases, and while the factual issues in facial challenges are usually resolved in the *standing* inquiry, it is never true that facts do not matter. For example, a law that prohibited people of one race to own land would be facially unconstitutional—but the fact that the plaintiff is a member of that race and desires to own land would be essential prerequisites to a judgment. These considerations would be evaluated at the standing stage, but they would still be *factual* questions subject to discovery.

Id. at 701. This Court found that it was proper to submit this question to the jury, because "the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question." *Id*. at 720. In short, *Del Monte Dunes* recognized that where the state provides no process for the property owner to defend its rights, the owner may ask a federal court to intervene—and may present the relevant facts to a neutral factfinder.

As *Del Monte Dunes* suggests, the promise of federal protection against state violations of property rights will be drastically undermined if this Court allows the procedural trap established here to remain undisturbed. When citizens must submit to an administrative proceeding before seeking redress in court, it becomes all too simple for the state to fashion that proceeding in ways that preclude later federal enforcement of constitutional rights, by exploiting preclusion, abstention, and similar requirements. That is exactly why this Court held in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that exhaustion of administrative remedies is *not* a prerequisite to bringing a civil rights claim—a principle frequently ignored with respect to property rights. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring) (noting this inconsistency).

This Court has recently taken steps to protect property owners against similar administrative law traps. *Knick*, for instance, overruled *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), which required property owners to seek

compensation in state court before pursuing federal takings claims in federal court. The "unanticipated consequences" of the *Williamson County* requirement were that if a state court ruled against the property owner, preclusion barred the owner from seeking federal court redress—and the owner could not even reserve her federal claims for federal adjudication without being subject to preclusion. *Knick*, 139 S.Ct. at 2169. In other words, *Williamson County* preclusion worked as a form of waiver, and "'hand[ed] authority over federal takings claims to state courts.'" *Id*. at 2169–70 (citations omitted).

Similarly, in *Sackett v. EPA*, 566 U.S. 120 (2012), this Court rejected the notion that agencies could exert jurisdiction over citizens without giving them a meaningful opportunity to challenge that assertion before a neutral decision-maker. The agency was empowered to cite property owners for violation of the Clean Water Act, and fine them $75,000 per day, but also to deny them a day in court until the agency itself chose to initiate an enforcement proceeding—a process Justice Alito called an "unthinkable" violation of due process. *Id.* at 132 (Alito, J., concurring).

The same concerns apply here. The rule barring the Petitioners from making their constitutional argument essentially hands authority over federal takings claims to state administrative agencies—agencies that are not even required to consider those claims. And it unthinkably deprives property owners of the right to present their case.

The requirement that individuals submit claims to an agency before bringing them to court is often called "exhaustion," but it "is really a matter of waiver," which is often used "as a deterrent" against people who would otherwise "systematically bypass[]" the administrative agency. Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims (Part 2)*, 60 Va. L. Rev. 250, 294–95 (1974). Even if such an objective were legitimate with respect to *state* constitutional rights, it "is wholly inapplicable when the gravamen of the federal claim is the abridgement of [federal] constitutional rights. . . . The need to prevent administrative bodies of the states from acting in derogation of federally guaranteed rights should be sufficient to defeat application of the waiver doctrine." *Id.* Just so here: a state's adjudicative procedural rules must not be allowed to deprive Petitioners of their due process right to bring a federal takings claim against an agency that takes their property.

CONCLUSION

What Chief Justice Roberts said of federal agencies in his *City of Arlington* dissent, 569 U.S. at 312–15, is even truer of state agencies: they are practically independent, blend the executive, judicial, and legislative powers, and are often the actual legislating entity. Where insulated from judicial review, they are effectively free to confiscate property without paying for it, by the stroke of a pen. It is improper to deprive citizens

of the most basic element of due process: the right to present evidence to defend their constitutional rights.

The petition should be *granted*.

Respectfully submitted,

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Petitioners,
v.
CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ENVIRONMENTAL LAND USE HEARING OFFICE, and GROWTH MANAGEMENT HEARINGS BOARD CENTRAL PUGET SOUND REGION,
Respondents.

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As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF AMICI CURIAE GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONERS in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 5982 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 8th day of January, 2021.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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