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Case No: 98365-8

IN THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc.,
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,

and
Kitsap County Association of Realtors®,
Intervenor Below.

On appeal of an order of the Kitsap County Superior Court,
the Honorable Jeffrey P. Bassett, Case No. 15-2-00904-6

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitution

Rules of Court

Other Authorities

INTRODUCTION

This case raises an important constitutional question of first impression in Washington: whether due process is violated when an administrative review statute bars an individual from presenting evidence necessary to prove a constitutional violation when such claims are properly raised for the first time to the superior court, and where the underlying agency lacks authority to adjudicate constitutional claims. The answer is yes. The Supreme Court of the United States has repeatedly held that due process requires that litigants have an opportunity to present facts in support of their constitutional claims to the trial court. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23–24, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483–84, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991); *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 320, 73 S. Ct. 307, 97 L. Ed. 2d 337 (1953). Yet in the decision below, the Court of Appeals construed Washington's APA to forbid precisely what due process requires. Decision at 8–9. This critical conflict of law warrants review. RAP 13.4(b).

Review is also necessary to ensure that the law is applied in a consistent and predicable manner. Three recent decisions illustrate the current state of confusion among the courts. In the decision below, Division I construed the APA to forbid evidence of a substantive constitutional

violation. Decision at 8–9. A decision from a Division II commissioner, however, interpreted the same APA provision to allow additional evidence in this circumstance, explaining that "[d]espite the largely legal nature of a facial challenge, it appears that in a land use context, facts going to the impact of the challenged legislative enactment has on the economically viable property uses and other potential negative effects are relevant. . . ." CP 320–21 ("Because the Board did not have the authority to review constitutional challenges and because additional facts are relevant, [petitioner] demonstrates that its request meets the requirements of RCW 34.05.562(1)."). And in *Washington Trucking Associations v. State Employment Sec. Dep't*, this Court dismissed as "mistaken" the argument that the APA prohibited the trial court from allowing evidence of a substantive constitutional violation on judicial review of an agency decision. 188 Wn.2d 198, 221 n.17, 393 P.3d 761 (2017).

As the City pointed out in its motion to publish, the decision below sets the APA apart from other administrative review statutes, including LUPA and the federal APA, which allow parties to put on evidence of a constitutional violation when such claims are properly raised for the first time to the superior court.[1] Pet. App. C at 3–5. This case provides the Court

[1] Case law interpreting similar administrative appeal statutes also holds that a trial court may consider additional evidence when a petition for judicial review raises constitutional

with an opportunity to address widespread confusion on the basic question whether a trial court can exercise original jurisdiction over claims subject to its exclusive authority.

Respondents' attempts to downplay the importance of this unsettled question should be taken with a grain of salt. The City, in its motion to publish, conceded that the Court of Appeals had decided an important question of first impression when it interpreted the APA to strictly bind a constitutional claimant to the agency record. Pet. App. C at 4–5. In making this argument, the City conceded that, prior to the decision below, the law in this regard was uncertain and confusing. *Id*. at 5–6. Thus, the City insisted a clear and binding decision is a matter of "broad and significant importance" to "all local government administrative law litigants, practicing land use attorneys" and the judiciary because the decision below set Washington's APA apart from other administrative review statutes (like LUPA and the federal APA), which have been construed to allow the precise type of evidence PRSM sought to introduce below. *Id*. at 5. This case unquestionably raises a question of broad public significance that can only be settled by this Court. Review is both warranted and necessary.

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questions. *See*, *e.g.*, *Responsible Urban Growth Grp. v. City of Kent*, 123 Wn.2d 376, 384, 868 P.2d 861 (1994) (allowing additional evidence on a petition for a writ of review of an agency decision upholding a zoning ordinance); *Webster v. Doe*, 486 U.S. 592, 604, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (holding that discovery is available on constitutional claims raised to the trial court under the federal APA).

CORRECTION TO RESPONDENTS' STATEMENT OF FACTS

The City and Ecology omit three key facts from their response briefs. First, respondents fail to disclose that PRSM's motion for additional evidence primarily sought leave to address fact-based defenses that the City and Ecology raised for the first time to the trial court. CP 73–74 (disputing scope of review), 276 (contesting expressive nature of landscape design), 283 (scope of review). The record establishes the City and Ecology did not contest any of the threshold requirements for bringing a constitutional claim when they were advised of potential violations during the legislative process. *See*, *e.g.*, AR 5508–28 (Ecology response to public comments), 5594–99 (City response). Respondents' decision to delay these arguments until judicial review undermines their argument that the court is strictly bound by the record, because the assertion that "no facts exist" is itself a factual claim.[2]

Respondents also omit key language from the trial court's decision in an attempt to make it appear that the court actually exercised its discretion to review the proposed testimony in light of the Growth Board's record. City Br. at 5; Ecology Br. at 5. That did not occur. The trial court denied PRSM's motion based on "Respondents' assertions that the Board below

[2] *See Higgins v. Salewsky*, 17 Wn. App. 207, 210–11, 562 P.2d 655 (1977) (explaining the burden of proof attached to an argument that facts do not exist).

heard much of the proffered testimony"[3] (CP 350)—a sweeping claim that neither respondent supported with citations showing where the record is duplicative of the proffered evidence. CP 273–77; CP 283–87. The trial court, nonetheless, adopted their argument, concluding that "supplemental testimony is not 'needed' in order to decide the disputed issues in this case" despite admitting that the court "has yet to review the record below." CP 350. Neither respondent addresses this prejudicial error.[4]

The City and Ecology also omit the legal and factual bases argued by PRSM in support of supplementation, relying instead on partial excerpts intended to mischaracterize the substance and purpose of the proposed testimony. *See* Ecology Br. at 3–4, 14–15; City Br. at 5, 14–18. In truth, PRSM's motion proposed testimony that is specifically tailored to address (1) respondents' factual dispute regarding standing and establishing the scope of facial review, (2) the Growth Board's unlawful decision-making process, (3) acknowledged gaps in the legislative record, and (4) complex and technical matters. CP 253–67, 302–11, 353–63; *see also* Opening Br.

[3] The record establishes that PRSM did, in fact, contest the governments' assertion that all of the proffered testimony is duplicative of the record. CP 309–11; RP 18–19.

[4] *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007) (On APA review, the court has a duty to independently review the record; it cannot rely on the "assurances" of government attorneys.); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) ("[W]here constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case.").

at 32–46; Reply Br. at 18–23. PRSM supported each category of proposed testimony with legal authority authorizing such testimony on judicial review. *Id.* Respondents cannot avoid review by rewriting the pleadings.

ARGUMENT

I

THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS OF STATUTORY AND CONSTITUTIONAL LAW

The City and Ecology do not contest that this case raises a "significant question of law under the Constitution of the State of Washington or of the United States." RAP 13.4(b)(3). Indeed, respondents ignore the federal constitutional conflicts altogether. That is because there is no basis for reasonable opposition. Due process, at its most basic understanding, requires that each litigant have an opportunity to present evidence in support of his or her claims to an adjudicative body. *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Without addressing due process, however, the Court of Appeals interpreted the APA's additional evidence provision, RCW 34.05.562(1), to bar an individual from offering evidence of a substantive constitutional violation to the first court with jurisdiction over such claims. Decision at 8–9 (holding that the APA limits supplementation to evidence of the agency's

illegal decision-making process). That conclusion conflicts with on-point Supreme Court precedent. *See Yim v. City of Seattle*, 194 Wn.2d 682, 690, 451 P.3d 694 (2019) (Washington courts follow decisions of the Supreme Court of the United States interpreting the due process clause). As a result, the lower court's decision also conflicts with the APA, which instructs that "[n]othing in this chapter may be held to diminish the constitutional rights of any person." RCW 34.05.020; *see also* RCW 34.05.001 (one of the stated purposes of the APA is "to achieve greater consistency with other states and the federal government in administrative procedure.").

The Supreme Court of the United States has repeatedly held that an administrative review statute may preclude agency adjudication of constitutional claims, consistent with due process, so long as the petitioner is permitted to later raise such claims to a trial court that is empowered to take evidence and resolve the factual and legal basis of any constitutional claim that the agency was unable to decide. *Shalala*, 529 U.S. at 23–24; *American Trucking*, 344 U.S. at 320 (The "right to introduce evidence to support the [constitutional] claim . . . may be enforced in the District Court, if the [agency] bars an opportunity to do so."); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 159, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (facial constitutional claims are independent of, and not bound by, an administrative record).

The High Court's decision in *McNary* shows the significance of this issue. 498 U.S. 479. There, the attorney general sought to enforce the administrative review provisions of a federal immigration statute, which provided that judicial review "shall be based solely upon the administrative record," even though the agency had no authority to decide constitutional claims and provided no opportunity for individuals to present evidence on those claims. *Id*. at 493. The Court rejected the government's argument, concluding that the statute's review provision was limited to those issues actually decided by the agency and did not contemplate claims that are within the district court's original jurisdiction. *Id*. at 493; *see also id*. at 483–84 (a statute cannot be construed to deprive the courts of original jurisdiction without "clear congressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief"). The Court explained that, although deferential review is appropriate for issues within the agency's authority, "such a standard does not apply to constitutional or statutory claims." *Id*. at 493; *see also id.* (a rule prohibiting the trial court from hearing evidence of a constitutional violation when the claim must be raised to the trial court in the first instance "would make no sense"). "Were we to hold otherwise and instead require respondents to avail themselves of the limited judicial review procedures set forth [by the

statute], meaningful judicial review of their statutory and constitutional claims would be foreclosed." *Id*. at 484.

The same analysis applies here. The Board is a quasi-judicial agency "that serve[s] a limited role under . . . with [its] powers restricted to a review of those matters specifically delegated by statute." *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005). Critically, the Board has admonished—*in this case*—that its limited authority does not allow it to "engage in fact-finding." AR 1975 (Board decision on motion to supplement). Nor does the Board have authority to determine constitutional questions. *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196, 274 P.3d 1040 (2012). Thus, although an individual must administratively litigate all matters subject to the agency's authority before raising constitutional claims to the superior court,[5] the Board's limited role prevents parties from adjudicating constitutional claims. The APA preserves the trial court's original jurisdiction over such claims. RCW 34.05.570(3)(a); *United States v. District of Columbia*, 897 F.2d 1152, 1158 (D.C. Cir. 1990) (review of constitutional claims under the APA "mirror[s] review under the Constitution" itself).

[5] *Stafne v. Snohomish Cty.*, 174 Wn.2d 24, 38–39, 271 P.3d 868 (2012).

Critically, as was the case in *McNary*, there is nothing in the APA showing that the legislature intended to limit the superior court's original jurisdiction over constitutional claims.[6] Thus, the Court of Appeals' interpretation of the APA "is the practical equivalent of total denial of judicial review of generic constitutional . . . claims." *McNary*, 498 U.S. at 497. Review by this Court is necessary to bring Washington administrative law in line with the State and Federal Constitutions as the Legislature intended. Rule 13.4(b)(3).

II

REVIEW IS NECESSARY TO RESOLVE CONFUSION REGARDING THE TRIAL COURT'S JURISDICTION

The question whether a trial court acts in its original or appellate jurisdiction when considering constitutional claims also raises a significant question of constitutional law. Article IV, § 6, of the state constitution defines the court's original and appellate jurisdiction. *In re Third Lake Washington Bridge by City of Seattle*, 82 Wn.2d 280, 288, 510 P.2d 216 (1973). The critical distinction is this: original jurisdiction is the authority to decide an issue in its first instance; whereas, appellate jurisdiction is the

[6] *Stafne.*, 174 Wn.2d at 38–39 (concluding that the APA does not interfere with the court's Article IV authority); *James v. County of Kitsap*, 154 Wn.2d 574, 587–88, 115 P.3d 286 (2005) (an administrative review statute cannot "divest the power of the superior court to exercise its original jurisdiction under article IV, section 6.").

power to review issues "which have been determined in some judicial court." *Id*. at 284–85. An issue must be decided before it can be appealed.

This distinction, however, becomes complicated when a court is presented with a petition that raises issues subject to the court's original jurisdiction alongside matters that have been decided by an administrative tribunal. In that circumstance, we are faced with two competing policies. On the one hand, the Court has held that superior court exercises appellate jurisdiction when reviewing issues decided by an agency. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). On the other hand, an administrative review statute cannot deprive the court of its original jurisdiction over constitutional claims. *Stafne*, 174 Wn.2d at 38–39; *James*, 154 Wn.2d at 587–88; *see also ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012).

These two propositions appear to clash. But they can, and should, be harmonized. This Court has explained that the Legislature's decision to place administrative review in the trial courts was because of "the comparatively informal nature of trial court proceedings" which permits a judge to "tak[e] proofs as to alleged irregularities in agency procedure not shown on the record—seems best calculated to assure the attainment of full and equal justice." *Third Lake Washington Bridge*, 82 Wn.2d at 286 (quoting 2 F. Cooper, *State Administrative Law* 612 (1965)). Thus, the

Supreme Court of the United States has referred to agency proceedings as an "administrative review channel leading to judicial review" with the trial court retaining full authority to take evidence on matters outside the agency's authority. *Shalala*, 529 U.S. at 23; *see also New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 600, 374 P.3d 151 (2016) (characterizing the APA as a "procedural scheme" that "channel[s] initial decision-making power into inferior agencies and boards" before the superior court can exercise jurisdiction over the dispute). Review is necessary to ensure that the APA is construed in a manner consistent with this Court's case law interpreting Article IV, § 6, of the state constitution.

III

THE LOWER COURT'S CONCLUSION THAT EVIDENCE IS NOT NEEDED TO SUPPORT FACIAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT OF THE UNITED STATES

Review is also necessary to correct a misunderstanding of constitutional law. The Court of Appeals wrongly concluded—as an alternative basis to uphold the trial court ruling—that evidence is not needed to prove a facial constitutional claim. Decision at 10. This mistaken conclusion relied on a general rule limiting the record on facial review, without acknowledging that rule's well-settled exceptions. A plaintiff alleging a facial violation must, as a threshold matter, show that the

government's action impairs a protected right.[7] Facts and expert testimony are also necessary to determine the proper scope of facial review.[8] *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449–51, 192 L. Ed. 2d 435 (2015) (When considering a facial challenge, the reviewing court is instructed to consider "only applications of the statute in which it actually authorizes or prohibits conduct."). The Court of Appeals failed to acknowledge this binding case law which provided the basis for supplementation.

This error warrants review because it will encourage inconsistent and unjust application of the law. This Court need only compare the facts of this case with *Washington Trucking* to see this inconsistency. Here, the City and Ecology do not contest that they waited until the case was pending on judicial review to raise these fact-based threshold constitutional requirements. CP 73–74, 276, 283. When PRSM sought permission to address that factual dispute, respondents offered an interpretation of the

[7] *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (the plaintiff must show that a state actor deprived it of a constitutionally protected life, liberty, or property interest as a threshold matter in a facial due process challenge); *ACORN v. City of Tulsa, Okla.*, 835 F.2d 735, 741 (10th Cir. 1987) (relying on testimony to establish proper scope of review in a facial unconstitutional conditions claim); *see also*, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (landowner must provide proof that an ordinance impacts property in a facial takings challenge); *Garneau v. City of Seattle*, 147 F.3d 802, 807–08 (9th Cir. 1998) (holding that facial takings plaintiffs have the burden of "introducing evidence of the economic impact of the enactment . . . on their property").

[8] *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (relying on expert testimony to limit the scope of facial review); *see also Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 257–58, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (same).

APA that would forbid PRSM from responding to its defenses. In *Washington Trucking*, by contrast, the State advocated in favor of an interpretation allowing additional evidence—even where the agency had excluded evidence from the record as irrelevant to the administrative proceeding. 188 Wn.2d at 221 n.17; *see also Washington Trucking Associations v. State Employment Sec. Dep't*, Supplemental Brief of Petitioners, No. 93079-1 at 1, 13, 16–17 n.11 (Dec. 2, 2016) (arguing that judicial review under the APA provides entitles individuals to "full hearing and judicial determination" of constitutional claims).

The inconsistent positions advocated in these two cases allowed the respondent to avoid judicial review of constitutional claims. In *Washington Trucking*, an argument in support of supplementation provided the government with the grounds to dismiss the association's federal constitutional claims. Here, arguing against supplementation has allowed the government to prevent PRSM from responding to a factual dispute. In both cases, the government took advantage of uncertainty in the law to preclude meaningful adjudication of constitutional claims. Unless and until this Court resolves the questions presented, the APA's additional evidence provision will continue to be used to inconsistent, unpredictable, and unjust results.

IV

RESPONDENTS MISSTATE THE GROUNDS FOR ADDITIONAL EVIDENCE

Respondents' opposition rests on a mischaracterization of PRSM's evidentiary motion. The pleadings, however, speak for themselves. CP 253–67, 309–11, 353–63.[9] PRSM's motion sought leave to submit evidence on four specific topics that are not addressed by the agency record: (1) evidence necessary to respond to respondents' factual defenses, (2) evidence necessary to respond to the Growth Board's unlawful decision-making process, (3) evidence necessary to address gaps in the legislative record, and (4) expert evidence relating to complex and technical matters. *Id*. PRSM supported each category of proposed testimony with legal authority authorizing such testimony on judicial review.[10] *Id*. Respondents' reluctance to address PRSM's arguments cannot advise against review.

[9] *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (the plaintiff is "master of the complaint").

[10] *See McNary*, 498 U.S. at 493 (allowing additional evidence pertaining to constitutional violations not subject to agency authority); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified,* 867 F.2d 1244 (9th Cir. 1989) (supplementation is authorized to address gaps in the record, questions not considered by agency, and to define complex and technical terms); *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (same); *Asarco, Inc. v. U.S. Envtl. Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) (same); *San Francisco Bay Conservation & Dev. Comm'n v. United States Army Corps of Engineers*, No. 16-CV-05420-RS(JCS), 2018 WL 3846002, at *3 (N.D. Cal. Aug. 13, 2018) (an admission by the government that the record is incomplete will establish the need for additional evidence).

A. Property Related Testimony

Respondents broadly claim that all three witnesses offered to speak to property-related matters intended to respond to "scientific information regarding buffers and shoreland habitat." *See* Ecology Br. at 3–4, 14–15; City Br. at 5, 14–18. That is not true. PRSM's motion stated, for example, that Ms. Robbins would testify to the impact of SMP regulations on property values (CP 261–63; CP 311), which is specifically tailored to address a threshold element of PRSM's facial due process claim.[11] Respondents do not contest the need for this evidence, and cannot do so where the Board indicated that the record does not include any evidence of impacts to constitutional rights. AR 5815 n.52, 5886 n.150, 5890 n.158.

PRSM offered Ms. Phillips to testify to the Growth Board's adoption of a "conceptual applicability" standard, which is contrary to accepted scientific norms and violates the SMA. CP 263. This testimony is aimed at showing that the Board engaged in an unlawful procedure and is additionally intended to address an acknowledged gap in the record, both of which are recognized grounds for supplementation. This evidence is necessary to the facial due process and unconstitutional conditions claims because the SMP requires that permit applicants rely only on the studies

[11] *Action Apartment Ass'n, Inc.*, 509 F.3d at 1026 (requiring evidence of impact to support a facial due process claim); *City of Redmond v. Moore*, 151 Wn.2d 664, 672, 91 P.3d 875 (2004) (considering illustrative evidence of impacts in a facial due process challenge).

contained in the legislative record (which employ the unscientific "conceptual applicability" standard in lieu of direct evidence). AR 109, 306. Respondents do not address the legal and factual basis for this testimony.

Finally, PRSM offered expert testimony from Ms. Schaumberg to address significant gaps in the record by identifying the types of studies that are necessary to assess nexus and proportionality (studies that applicants are forbidden from submitting on permit review) and by demonstrating that this information is absent from the legislative record. CP 311. This testimony is specifically tailored to establish that the SMP impacts property rights by demonstrating the extent to which the mandatory buffers seek to impose public burdens on individual property owners, which is a threshold requirement of PRSM's unconstitutional conditions claim. CP 261–63; CP 311; Opening Br. at 32–39; Reply Br. at 20–21. Neither respondent contests the legal basis for supplementation. Instead, Ecology argues that the record includes this information. Ecology Br. at 15. Not true. The citations that Ecology provides in support of this claim do not speak to the topic of Ms. Schaumberg's proposed testimony. *See* AR 5330–48 (a 19-page bibliography with no accompanying text); AR 4356–72 (a report providing recommendations for buffer widths without discussion of the nexus and proportionality limitations). Even so, Ecology's claim merely begs the question whether the trial court abused its discretion when it denied the

motion without reviewing the record to confirm the governments' assertions. CP 350; *Swinomish*, 161 Wn.2d at 435 n.8.

B. Free Speech Testimony

Respondents also mischaracterize Ms. Young's proposed testimony. No one disputes that she submitted a public comment in which she asserted that a City proposal to control what plants may be planted on regulated property will impair residents' free speech rights. AR 742–44. PRSM moved to supplement that comment with testimony explaining how, and in what circumstances, landscape design is expressive. CP 264; CP 308; Opening Br. at 39–42; Reply Br. at 21–22. Respondents' opposition is perplexing. In their trial court pleadings, the City and Ecology questioned whether PRSM can prove that landscape design constitutes protected speech, which raised a mixed question of fact and law on which there is no evidence in the record.[12] CP 276. But on appeal, respondents insist that supplementation is not necessary because the conclusory statement in the comment letter is sufficient to address each and every element of the free expression claim. Ecology Br. at 15. This argument, once again, does not comment on the advisability of review; it merely highlights a factual

[12] *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974).

question about the adequacy of the record that the trial court failed to resolve.

C. Vagueness Testimony

PRSM's motion sought leave to submit evidence demonstrating significant confusion among City staff and expert testimony showing precisely where in the 400+ page SMP (which an independent expert confirmed is riddled with incorrect citations and uses legal terms in an inconsistent manner) contains vague and confusing standards. CP 263–64; CP 302–06; Opening Br. at 42–46; Reply Br. at 22–23. *Asarco*, 616 F.2d at 1160 (allowing expert testimony to assist with complex matters); *see also Colautti v. Franklin*, 439 U.S. 379, 384, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (considering expert testimony in facial vagueness challenges). Although PRSM's petition for judicial review expressly alleges that the SMP's vague standards impair free expression rights (Amended Pet. for Review at 14–15; CP 339–40), respondents continue to claim that the vagueness claim is predicated on property rights—a purposeful misrepresentation intended to foreclose review of this meritorious claim. City Br. at 17–18; Ecology Br. at 12–13 (citing Decision at 15 (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) ("When a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness.")).

Again, their argument only amplifies the need for independent review of the record when deciding disputed questions of fact. *Swinomish*, 161 Wn.2d at 435 n.8.

CONCLUSION

Review by this Court is necessary to settle widespread confusion and inconsistent application of the APA's additional evidence provision and to resolve the numerous conflicts between the Court of Appeals' decision and opinions from other state and federal courts.

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Respectfully submitted,

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Attached is a copy of the Transmittal Letter sent to the court.

The court will treat this email as proof of service on you.

If you have technical questions, please contact Customer Suppport via the eService Center and reference Filing Id 20200520145214SC167725.

Questions about the uploaded document(s) should be sent to the person who filed, and questions regarding court procedures should be directed to the court.

The file(s) and transmittal letter were also sent to:
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