No. ____

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 Writ of Certiorari to the Washington Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Bainbridge Island, Washington, dramatically expanded its shoreline development regulations in 2014. Adversely affected homeowners challenged the regulations. State law required them to bring non-constitutional claims first, in an administrative forum with limited jurisdiction to hear only statutory claims. The agency denied the statutory challenges, and the homeowners subsequently asserted federal constitutional claims in state trial court as required by the Washington Administrative Procedure Act (WAPA). They also sought leave to submit evidence in support of their constitutional claims. WAPA, however, deems all claims raised during judicial review to be "appellate"—even if the claims have never been adjudicated—and limits review to the agency's record. The state courts accordingly denied the homeowners the right to introduce evidence outside the administrative record in support of their constitutional claims.

The question presented is:

Does it violate the Fourteenth Amendment's Due Process Clause for a state's judicial review statute to bar the introduction of evidence outside the administrative record where the evidence is needed to resolve federal constitutional claims over which the agency lacked jurisdiction?

CORPORATE DISCLOSURE STATEMENT

All Petitioners are listed in the caption. The Petitioners that are not individuals have no parent corporations and no publicly held companies own 10% or more of their stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Kitsap County Superior Court No. 15-2-00904-6 (order dated Oct. 12, 2017).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Court of Appeals, No. 80092-2-1, 11 Wash. App. 2d 1040 (Dec. 9, 2019).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Supreme Court, No. 98365-8, 195 Wash. 2d 1029 (July 8, 2020).

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Preserve Responsible Shoreline Management (PRSM), 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 petition for a writ of certiorari to review the judgment of the Washington Court of Appeals.

OPINIONS BELOW

The decision of the Washington Court of Appeals is unpublished but is available at 11 Wash. App. 2d 1040 and reprinted at App. A. The Washington Supreme Court's order denying the petition for review is not reported but is available at 195 Wash. 2d 1029 and reprinted at App. C.

The decision of the Superior Court for Kitsap County is not reported but is reprinted at App. B.

JURISDICTION

The decision of the Washington Court of Appeals sought to be reviewed was issued on December 9, 2019. App. A-1. On July 8, 2020, the Washington Supreme Court denied further review. App. C-1–2. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Staub v. City of Baxley*, 355 U.S. 313, 318–19 (1958) (holding that the question whether a lower court gave due consideration to constitutional issues is itself a federal question subject to this Court's jurisdiction).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

This case raises an important question that has divided the lower courts: whether the Due Process Clause permits a state to bar the introduction of evidence necessary to resolve federal constitutional claims raised in a challenge to a final administrative decision. Washington courts have interpreted Washington's Administrative Procedure Act (WAPA) to impose just such a bar.

Petitioners, a group of landowners in the City of Bainbridge Island, Washington, asserted federal constitutional claims regarding the City's revised Shoreline Master Program (SMP), including claims under the Takings Clause, Due Process Clause, Fourth Amendment, and doctrine of unconstitutional conditions. This Petition does not ask the Court to rule on the merits of those claims. Instead, the question is whether the challengers have a due process right to present evidence in court necessary to both establish the applicability of certain constitutional doctrines and prove their claims.

As required by WAPA, before bringing their constitutional claims in the state courts, Petitioners raised statutory challenges to the revised SMP before the state Growth Management Hearings Board (Growth Board). The Growth Board "lack[s] jurisdiction to resolve constitutional challenges." *Aho*

Constr. I, Inc. v. City of Moxee, 6 Wash. App. 2d 441, 462 (2018), and Petitioners had no opportunity to introduce facts related to such claims during the administrative process. The Growth Board denied Petitioners' statutory challenges, after which Petitioners could seek judicial review and raise their constitutional challenges for the first time in state court. There, Petitioners sought leave to introduce factual evidence to, *inter alia*, establish the scope of their unconstitutional conditions claims, as required by *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 888, 894 (1992), and demonstrate that the revised SMP impairs property rights per *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987). The Washington trial court denied the motion and the appellate court affirmed, interpreting WAPA to bar the introduction of evidence outside the administrative record.

Unlike Washington, some state courts hold that, on judicial review of an agency decision, litigants must be allowed to introduce evidence that is needed to prove constitutional claims. Those courts confirm that, regardless of state administrative procedures, a plaintiff must be allowed to introduce evidence to prove constitutional claims in court and "is entitled to a de novo review . . . , unfettered by the [agency's] previous resolution of any factual issues." *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 69 (2002); *accord, e.g.*, *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994). The decision below reached the opposite conclusion and concurred with other courts that find no due process violation when plaintiffs are

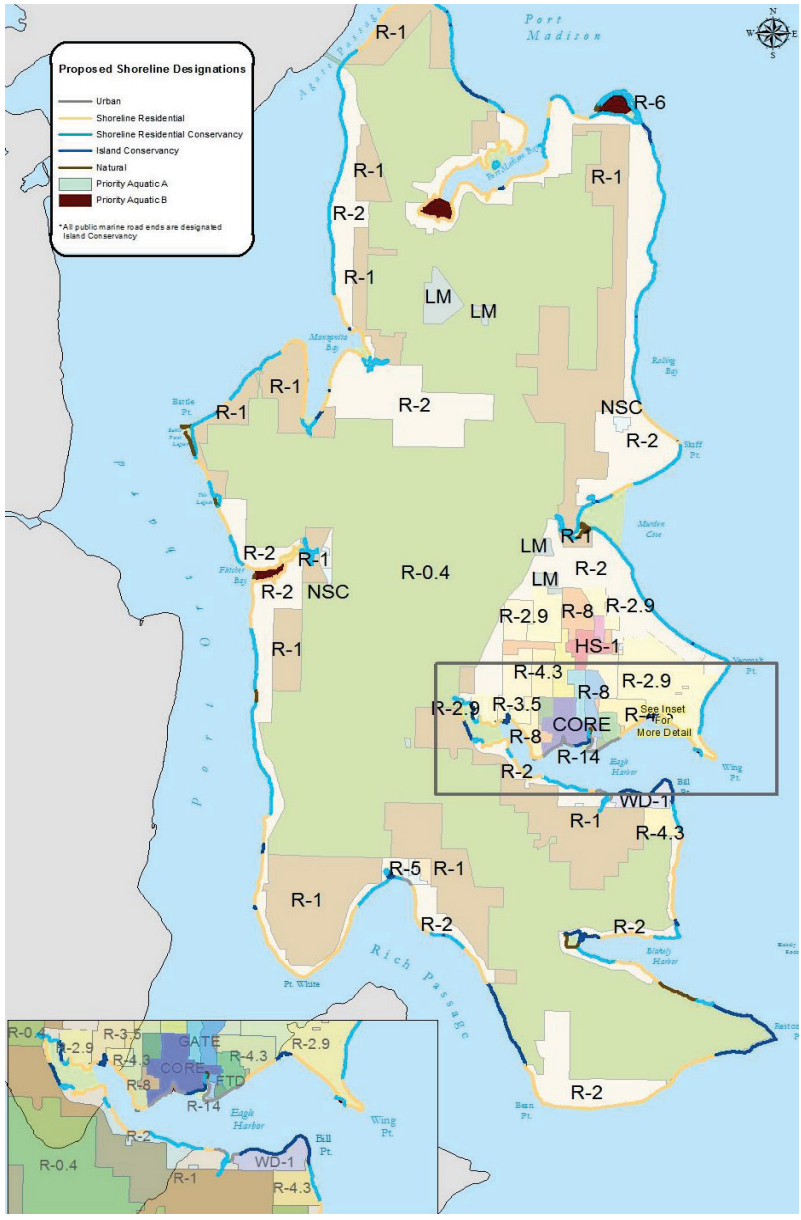
denied the ability to introduce evidence regarding disputed elements of constitutional claims.

This Court should grant certiorari to resolve the split and confirm that a state statute barring the introduction of evidence in the first court with competence to resolve constitutional claims violates the Due Process Clause. The question presented is exceedingly important because regulated parties in states that deny adjudicative factfinding are prevented from *ever* presenting key evidence to support their federal constitutional claims. Those claims are thus left to be resolved on the basis of public comment and agency proceedings, without adjudication, using unreliable administrative procedures that frequently yield incomplete and skewed evidence. This Court's intervention is needed to ensure that litigants challenging unconstitutional agency actions are afforded due process, uniformly applied.

STATEMENT OF THE CASE

I. The Parties and Context for the Dispute

1. The City of Bainbridge Island is a bedroom community located a short 8-mile ferry ride across Puget Sound from Seattle, Washington. The island is approximately 12 miles long and 5 miles wide, with a highly varied shoreline geography that runs approximately 53 miles. Administrative Record (AR) 4001. The following map shows the extensive development of the island, including on its shoreline.



AR 293 (SMP App. A) (dark brown perimeter lines to the west and southeast designate the only areas where shorelines remain largely in their natural condition).

The City's waterfront is zoned primarily for single-family residential use. Approximately 82% of the island's 2,262 shoreline lots are fully developed with single-family homes, housing roughly one-third of the island's residents. AR 4074. Another 4% of the City's shoreline falls within a "park" or "island conservancy" designation. *Id*. In addition to homes and apartment buildings, bulkheads, public roads, and other development have removed much of the native vegetation on the island, such that only a small percentage of waterfront property contains untouched shorelines warranting a "natural" designation. AR 4096.

Petitioners are property owners on the island who joined with their neighbors to form Preserve Responsible Shoreline Management (PRSM). PRSM seeks to protect landowners' rights by advocating for a balanced and site-specific approach to land use laws. It engages in education and outreach, and it provides public comment on proposed land use and environmental regulations. PRSM is the primary local association in the City representing the interests of landowners faced with increasing regulation of their property.

2. Among other sources of regulation, Bainbridge Island's shoreline is subject to the state's Shoreline Management Act (Act), under which the City, coordinating with the Washington State Department of Ecology (Ecology), must enact and periodically update a Shoreline Master Program (SMP) to regulate the development and use of property adjacent to the shoreline. Wash. Rev. Code §§ 90.58.010–.920. The Act envisions that SMPs will be based upon "the most current, accurate, and complete scientific and

technical information available," *id.* § 90.58.020; *see also* Wash. Admin. Code § 173-26-201, to ensure that an SMP's development mitigation requirements are predicated on the actual, current conditions of area shorelines. Wash. Admin. Code § 173-26-201(2)(c); *see also id.* § 173-26-201(2)(e)(ii)(A) (Mitigation requirements must not be "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions.").

Notwithstanding this statutory nod to science, municipalities may choose to adopt or revise an SMP based on assumptions and with significant data gaps in the scientific information, so long as these assumptions and gaps are stated in the legislative record. Wash. Admin. Code § 173-26-201(2)(a). The presence of these assumptions and gaps gave rise to the evidentiary dispute below.

3. The SMP revision process includes public notice and an opportunity for written comment; public hearings are optional. Wash. Rev. Code § 90.58.090(2). Members of the public can submit whatever comments they like, including comments based on hearsay, speculation, or conclusory argument. There is no opportunity to adjudicate conflicting allegations of fact or law. Nor is the government required to engage in complete scientific review or disclose its factual and legal positions related to the constitutionality of a regulatory proposal. Wash. Admin. Code § 173-26-201(2)(a); *see also City of Seattle v. Sisley*, 2 Wash. App. 2d 1033, at *6 (2018) (unpublished) (hearsay permitted because the public comment process is intended only "to gauge public support and address

concerns regarding" a proposal). After the public comment period, Ecology may approve, deny, or recommend changes to the proposed SMP revision. Wash. Rev. Code § 90.58.090(2)(c)–(d). Once approved, SMP revisions become effective immediately and constitute a state agency regulation. *Id.* § 90.58.090(1); *see also Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash. 2d 384, 393 (2011) ("[T]he State must take responsibility for any taking that occurs as a result of the regulations contained in the county's SMP.").

4. Affected landowners who wish to challenge an approved SMP must first litigate all questions of statutory compliance before a regional panel of the state Growth Board. *See* Wash. Rev. Code § 90.58.190(2)(a). The Growth Board is a quasi-judicial state agency created by the legislature and charged with ensuring that SMPs comply with relevant state laws and administrative guidelines. *See Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office*, 199 Wash. App. 668, 684–85 (2017). Because of its limited jurisdiction, the Growth Board bases its decision on the legislative record developed by the local government, although it may supplement that record with additional evidence that it determines is "necessary or of substantial assistance" in reaching its decision as to statutory compliance. Wash. Rev. Code § 36.70A.290(4).

The Growth Board "lack[s] jurisdiction to resolve constitutional challenges." *Aho Constr. I, Inc.*, 6 Wash. App. 2d at 462; *see also Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wash. App. 172, 196 n.21 (2012). Accordingly, there is no basis for property owners to present evidence

pertaining to an SMP's constitutionality to the Growth Board. *See* Final Decision and Order, *Twin Falls, Inc. v. Snohomish Cty.,* Central Puget Sound Growth Management Hearings Board, No. 93-3-0003, 1993 WL 839715, at *44 (Sept. 7, 1993) (refusing to consider evidence of a constitutional violation because the Board's "role is limited to reviewing the legislative decisions of cities and counties").

Despite this complete absence of a role for the Growth Board in deciding constitutional questions, Washington courts will not hear any constitutional challenge to an SMP unless it accompanies an appeal from a Growth Board final decision. *Wash. Trucking Ass'ns v. State Emp't Sec. Dep't*, 188 Wash. 2d 198, 221–23 (2017) (holding that WAPA barred trial court from considering challenge to constitutionality of agency determination and that such a challenge may only be raised on administrative appeal after full agency review). Nor can landowners bring SMP-related constitutional claims directly in federal court. *See*, *e.g.*, *Brody v. Wash. Dep't of Agric.*, 127 Fed. App'x 928, 929–30 (9th Cir. 2005) (WAPA judicial review provision provides the exclusive means for challenging the constitutionality of a Washington state agency action); *Quade v. Ariz. Bd. of Regents*, 700 Fed. App'x 623, 625 (9th Cir. 2017) (a constitutional challenge to an agency action must be brought in the state court with statutory authority to hear an administrative appeal).

Had Petitioners been allowed to file their constitutional challenges directly in state or federal court, there likely would be no controversy. But property owners have only a single option to challenge an SMP: participate in Growth Board review on

statutory compliance issues, then seek judicial review in state trial court under WAPA. *See* Wash. Rev. Code § 34.05.510 (stating that, with some limited exceptions inapplicable here, WAPA establishes "the exclusive means of judicial review of agency action"). That is precisely what PRSM did, only to find itself without *any* forum to litigate its constitutional claims.

II. Problems with the City's Revised 2014 Shoreline Management Plan

The City first adopted an SMP in 1996 and amended it several times in the early 2000s. *See* AR 26. These SMPs contained reasonable regulations spanning 30 pages. When the City started the process to update its SMP in 2010, however, it had far greater regulatory aspirations in mind—aspirations that outpaced the scientific data necessary to justify the revisions and comply with constitutional limits. For starters, the City compiled incomplete studies based on historical—not current—information about potential functions and stressors on the shoreline. Those studies themselves warned that the City needed an updated and site-specific analysis to evaluate the impact of existing and future development on the island—particularly in residential areas. *See* AR 4308, 4097, 4100.

Although these warnings should have spurred additional study, the City opted instead to close the record. It pushed forward under the "precautionary principle," thereby inverting the normal regulatory process and using deliberate ignorance as a reason to impose dramatically expanded regulation, bloating the SMP to more than 400 pages, including

appendices.[1] *See* AR 42 (SMP § 1.2.3) (under the precautionary principle, "the less known about existing resources, the more protective shoreline master program provisions should be"); AR 50 (SMP § 1.5) (adopting precautionary standards that go beyond mitigation and seek to ensure "a net ecosystem improvement over time").[2]

The resulting SMP revisions far exceed typical land use regulations by encompassing all "human activity associated with the use of land or resources"—a definition that includes any activity that could disturb native plants—occurring on property within 200 feet of the shoreline. AR 48 (SMP § 1.3.5.2); AR 97, 224 (SMP § 8); AR 4300 (discussing the potential impact that walking on one's own property could have on plants). And its provisions are intended to be effective even beyond the expiration of the SMP itself.

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[1] The full text of the revised SMP is available as a PDF at https://www.bainbridgewa.gov/DocumentCenter/View/3741/Ordinance-No-2014-04-Adopting-the-Shoreline-Master-Program-Update-Approved-071414.

[2] Among other serious scientific and counter-factual flaws, the City's reliance on the precautionary principle led it to assume, contrary to the evidence, that (1) each shoreline property is fully forested with mature vegetation and (2) the marine shoreline is fully intact, providing all potential ecological functions. AR 4307–08. The over-expansive regulations were a natural consequence of the precautionary principle. *See Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 918 (D.C. Cir. 2017) ("The precautionary principle 'imposes a burden of proof on those who create potential risks, and it requires regulation of activities even if it cannot be shown that those activities are likely to produce significant harms.'") (quoting Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003, 1003 (2003)).

See, e.g., AR 96 (SMP, Table 4-3); AR 114–16 (SMP § 4.1.3.7)).

Even more egregiously, the revised SMP imposes mandatory conservation easements on all shoreline property. *See* AR 96 (SMP, Table 4-3). For example, owners of fully developed lots located in a shoreline residential zone—which includes most of the City shoreline—are now required to dedicate a 50- to 75-foot strip of waterfront property as a conservation area. *Id.* This is no mere buffer or setback requirement, but an easement or deed restriction that designates and separates the land as a conservation area in perpetuity. AR 104 (SMP § 4.1.2.7); AR 115 (SMP § 4.1.3.7(2)). The owner of the underlying estate retains only passive use rights and may not conduct any unapproved activities that could disturb vegetation in the easement area. AR 114–16 (SMP § 4.1.3.7).

The revised SMP also contains numerous enforcement provisions that implicate constitutional rights. For example, a landowner seeking a permit or approval of a development, use, or activity must allow City officials to enter the property, without notice or a warrant, for at least five years to monitor whether the conservation area is being maintained to the City's satisfaction. AR 104–05 (SMP § 4.1.2.8); *see also* AR 250 (SMP § 7.2.1) (deeming an application as consent to conduct a warrantless search of property). The regulations carry civil penalties for a single act of noncompliance and *criminal* penalties if an owner commits two or more violations within any 12-month period. AR 251–52 (SMP § 7.2.8).

Compounding these constitutional infringements, landowners seeking a permit under the SMP must use

only the incomplete and uncertain studies contained in the legislative record and employ *only* City-approved consultants who also are bound to use only the incomplete studies. AR 109, 306. As a result, landowners seeking permits or review of City decisions in court are prohibited from introducing site-specific science necessary to isolate the actual impacts of proposed development and cannot even address the critical data gaps or correct the City's assumptions.

Despite these obvious flaws, the City's revised SMP became effective when Ecology approved it in July 2014.

III. PRSM's Attempts to Challenge the SMP

1. During the public comment process that preceded Ecology's approval, PRSM members commented on various SMP proposals considered by the City and suggested ways to secure the rights of existing homeowners while also protecting the shoreline environment. *See, e.g.*, AR 742–44, 2510–11, 2539–40, 2567, 2767, 2821. These comments were limited to addressing statutory standards, consistent with the Act's requirement that SMPs must prioritize the environment over private property rights. *Olympic Stewardship Found.*, 199 Wash. App. at 690 ("[P]rivate property rights are secondary to the [Act's] primary purpose, which is to protect the state shorelines as fully as possible.").

Although PRSM members also warned of potential *constitutional* infirmities arising from the City's proposal to require mandatory conservation easements based on an incomplete scientific record, they did not engage in a futile attempt to produce facts relating to potential federal constitutional claims. *See,*

e.g., AR 742–44, 2510–11, 2539–40, 2567, 2767, 2821. The City and Ecology likewise offered no comments on potential constitutional issues during this phase. *See*, *e.g.*, AR 5508–28 (Ecology response to selected public comments), 5594–99 (City response); *see also* Wash. Admin. Code § 173-26-186 (citing Wash. Rev. Code § 36.70A.370) (deeming the government's position on constitutional issues privileged and therefore concealed during the SMP update process).

2. After Ecology approved the City's revised SMP, PRSM followed the state-mandated exclusive procedure and filed a petition with the Growth Board, challenging the SMP as "adopted in a manner which directly violates state law and regulations." Petition for Review, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 2014 WL 5309151, at *1 (Oct. 7, 2014). The petition noted that the revised SMP "also violates numerous constitutional provisions," but acknowledged that such claims are "outside the scope of this Board's jurisdiction and will be addressed in another forum." *Id.*

In April 2015, the Growth Board issued a Final Decision approving the revised SMP. Final Decision & Order, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Central Puget Sound Growth Management Hearings Board, Case No. 14-3-0012, 2015 WL 1911229 (Apr. 6, 2015) (AR 5787–905). Unsurprisingly, the decision did not address any constitutional issues, noting that the Growth Board "has no jurisdiction to consider constitutional challenges." *Id.* at *73. Nor did it make factual determinations related to potential constitutional challenges. *See* Order on Motion to Supplement the

Record, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012, 2015 WL 224867, at *5 (Jan. 5, 2015) (explaining that the Growth Board "does not conduct de novo hearings, examine witnesses, determine the authenticity of documents, *or otherwise engage in fact-finding*") (emphasis added, internal quotation marks omitted).

3. Petitioners sought judicial review of the Growth Board decision and raised their constitutional claims by filing a combined complaint and petition for judicial review in state trial court. The complaint named the City and Ecology as defendants and alleged violations of the search and seizure, due process, takings, and free expression clauses of the Washington and U.S. Constitutions, as well as violations of the federal doctrine of unconstitutional conditions. Washington Court of Appeals Clerk's Papers (CP) 1–165, 326–43.

The trial court quickly dismissed the complaint portion of PRSM's filing, however, concluding that "judicial review under the [W]APA provided the only avenue of relief." App. A-3. PRSM accordingly amended its petition for judicial review to incorporate its state and federal constitutional claims (App. D-1–7) and moved for leave to submit evidence necessary to adjudicate those claims. CP 73–74, 253–67. Specifically, PRSM sought to introduce three categories of evidence: (1) testimony demonstrating the impact of the revised SMP regulations on property and privacy rights (CP 262–63, 310–12); (2) evidence identifying the circumstances in which the SMP revisions impair homeowner rights (CP 261–63; CP 311); and (3) expert testimony to address the acknowledged gaps in the City's record by identifying scientific studies needed to assess nexus and

proportionality of the revised SMP's mandatory dedication of conservation easements.[3] CP 260–61, 309–11. PRSM argued that it was entitled to introduce this evidence as a matter of federal due process. *Id.*

In response, the City and Ecology argued that because the constitutional claims were brought in an administrative appeal, the court could consider only the City's legislative file and the record of public comments.[4] CP 272–75, 283–84. Meanwhile, the City simultaneously raised (for the first time) various fact-based defenses to PRSM's constitutional claims, including disputing the scope of review and claiming that the record contained no evidence of impact to property rights. CP 273–77, 283–87.

The trial court acknowledged the disputed issues but denied PRSM's motion to introduce evidence and did not address due process. App. B-6. It held that it was limited to acting in an "appellate" capacity in considering PRSM's constitutional claims—even though they were never previously adjudicated. App.

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[3] This proposed expert testimony was tailored to establish that the SMP imposes public burdens on individual property owners, which is a threshold requirement of an unconstitutional conditions claim. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *see also Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash. App. 250, 272–74 (2011) (enactment of a critical area buffer "must satisfy the requirements of nexus and rough proportionality established in [*Dolan*] and [*Nollan*]").

[4] They also argued that the proposed evidence was duplicative of the legislative record, although that argument mischaracterized the proposed evidence and was unsupported by citation to the record. CP 273–74, 284.

B-3; CP 348–49. The trial court concluded that WAPA forbids the introduction of additional evidence during judicial review of an agency decision unless the moving party can show that it meets one of three narrow statutory exceptions, none of which applied. App. B-4–5; CP 349.

4. The Washington Court of Appeals granted an interlocutory appeal and affirmed. It agreed that PRSM's constitutional claims were "appellate" in nature and construed WAPA to entirely bar litigants from presenting additional evidence to support a constitutional claim during judicial review of a Growth Board decision. App. A-7–9 (holding that WAPA limits supplementation to the "highly limited circumstance" where the proposed evidence establishes an illegal decision-making process by the agency).[5] Specifically, the Court of Appeals ruled that "[r]egardless of the issues raised in the [W]APA appeal, [W]APA judicial review is limited to the record before the agency." App. A-7 (quotation omitted). The only question was whether to apply a statutory

[5] That holding agrees with other Washington cases that have construed WAPA to bar additional evidence on judicial review. *See, e.g.*, *Herman v. Wash. Shorelines Hearings Bd.*, 149 Wash. App. 444, 454–55 (2009) ("The superior court reviews agency orders in a limited appellate capacity" and "may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete."). Under WAPA, where a trial court acts in an appellate capacity, it is bound by appellate rules that "restrict[ ] . . . consideration of additional evidence on review," *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash. 2d 543, 549 n.6 (2000), even where constitutional issues are expressly reserved, *see Samson v. City of Bainbridge Island*, 149 Wash. App. 33, 65–66 (2009) (WAPA barred plaintiffs from putting on evidence necessary to show a law's specific impact on property rights).

exception that allows evidence relating to the "validity of the agency action [i.e., the Growth Board decision] at the time it was taken" and is needed "to decide disputed issues" regarding the "unlawfulness of procedure or of decision making process." App. A-9–10 (citing Wash. Rev. Code § 34.05.562(1)(b)). The Court of Appeals held that this exception applies only if the Growth Board is alleged to have used a process that violated its guiding statutes. App. A-10. Because PRSM did not challenge the authority of the Growth Board itself, the statutory exception did not permit any further evidence. App. A-10–11.

The Court of Appeals also disposed of PRSM's argument that its proffered evidence was necessary to support its constitutional claims by noting that facial constitutional challenges "can be decided without reference to additional facts." App. A-12.[6] Therefore, the Court of Appeals did not address due process or the necessity of evidence to establish threshold requirements of PRSM's federal constitutional claims.

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[6] That holding conflicts with this Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127–28 (2019), which noted that the "line between facial and as-applied challenges can sometimes prove 'amorphous'" and that whether a lawsuit is classified as facial or as-applied matters only as to the remedy; "it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." (Citations omitted.) *See also* David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 969 (2011) (arguing that the distinction between facial and as-applied challenges has collapsed with regard to takings claims); Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 43 (2010) (plaintiffs must prove facts related to jurisdictional prerequisites in both facial and as-applied challenges).

The Washington Supreme Court denied review. App. C-1–2. Petitioners timely filed this Petition for Writ of Certiorari.

REASONS TO GRANT THE PETITION

This Court has not yet resolved whether judicial review of a non-adjudicative agency decision includes the due process right to introduce evidence in support of constitutional claims that could not have been decided by the agency. The lower courts conflict on the answer to that question. Some defer all factual development to the agency and limit their review to the administrative record, while others recognize the need to allow additional factual development to address constitutional claims that could not be resolved by the agency.

Courts that defer to the agency, including Washington courts, violate due process in several ways. First, they deprive plaintiffs of *any* adjudicatory forum for presenting evidence related to their constitutional claims because those claims were not before, and could not be resolved by, the agency. Second, a non-adjudicative administrative process, including reliance on public comment, is not a constitutionally sufficient mechanism for determining facts related to constitutional claims. It is generally non-adversarial and lacks the hallmarks of an adjudicative process, such as evidentiary rules, the ability to cross-examine witnesses, and other procedural protections. Moreover, the government is generally not required to substantively respond to public comments regarding constitutional issues, let alone disclose its own evidence on those issues. *See, e.g.*, Final Decision and Order, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*,

Central Puget Sound Growth Management Hearings Board, Case No. 14-3-0012, 2015 WL 1911229, at *10–*12 (Apr. 6, 2015); Wash. Admin. Code § 173-26-186 (citing Wash. Rev. Code § 36.70A.370).

Accordingly, whatever factual record is before the court on judicial review is at best incomplete, and at worst significantly skewed against the claimant. In this context, the administrative record is simply not a fair substitute for the judgment of an independent court based on judicially found facts, especially because the record consists simply of whatever was submitted to the City in its legislative process. This Court's intervention is needed to resolve the split among lower courts and to guarantee the due process right to introduce evidence necessary for proper judicial review of constitutional claims.

This case is an excellent vehicle to resolve the issue: everyone agrees that the Growth Board lacked jurisdiction to decide constitutional claims. It is also clear that Petitioners had no opportunity to develop the evidence. Yet WAPA nonetheless barred the courts below from permitting the introduction of evidence outside the agency record and public comment process, depriving Petitioners of the opportunity to develop an evidentiary record in support of their constitutional claims.

I. Whether Due Process Includes the Right to Introduce Evidence in Support of Constitutional Claims During Judicial Review of an Agency Decision Is an Important Unsettled Question.

1. The Due Process Clause of the Fourteenth Amendment generally guarantees litigants the right

to present evidence to support their claims. *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."); *see also Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Morgan v. United States*, 304 U.S. 1, 18 (1938); *Balt. & Ohio R.R. Co. v. United States*, 298 U.S. 349, 369 (1936). Accordingly, this Court has repeatedly held that plaintiffs alleging constitutional violations must be allowed to introduce facts to support those allegations. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (process allowing government's factual assertions to go unchallenged or be presumed correct without an opportunity to present contrary evidence violates due process); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 23–24 (2000); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483–84, 493 (1991); *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 319–20 (1953). This due process guarantee is essential to the protection of other constitutional rights because to vindicate those rights, a plaintiff must be able to introduce evidence to prove a violation and to rebut fact-based defenses. *See Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (plaintiff bears "initial burden of proving a constitutional violation").

The due process right to introduce evidence extends not only to as-applied constitutional challenges, but also to facial challenges like Petitioners'. Even though a facial challenge is not addressing a particular application of the law, facts and expert testimony are often necessary to determine whether a constitutional provision is implicated and to establish the proper scope of facial review. *See Keystone Bituminous*, 480 U.S. at 495–96 (in a facial regulatory takings challenge, landowner must prove

that the challenged ordinance impacts his property); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (to sustain a facial vagueness claim, the plaintiff must prove that the challenged regulation impacts constitutionally protected conduct).

For example, in *City of Los Angeles v. Patel*, this Court held that a reviewing court presented with facial constitutional claims should consider "only applications of the statute in which it actually authorizes or prohibits conduct." 576 U.S. at 418. Identifying those "applications" requires an evidentiary record. Other decisions similarly resolved facial challenges based on expert testimony or factual development. *See Planned Parenthood*, 505 U.S. at 888, 894 (relying on expert testimony to limit the scope of facial review to only those persons who would object to complying with a spousal notification law); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (law that required a newspaper to print a candidate's reply to an unfavorable editorial was facially unconstitutional, even though most newspapers would adopt the policy absent the law); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1370 (2000) (concluding that facts are necessary to determine the applicable constitutional doctrine and standard of review). Facial constitutional claims thus implicate the due process right to introduce evidence establishing the applicability of constitutional doctrines and the proper scope of review.

2. The right to present evidence in support of constitutional claims—facial or as-applied—does not require that the facts be initially adjudicated in

federal court. Thus, state court decisions regarding federal constitutional rights have a preclusive effect, but only if the parties had a "full and fair opportunity to litigate the claim or issue" in the state court. *Allen v. McCurry*, 449 U.S. 90, 101 (1980). Likewise, the responsibility for finding facts relating to constitutional claims may be delegated to administrative agencies, "assuming due notice, proper opportunity to be heard, and that findings are based upon evidence." *Crowell v. Benson*, 285 U.S. 22, 47 (1932); *see also R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 572 (1941) (the decision of a state administrative railroad commission "satisfie[d] all procedural requirements" because it included "a specific hearing affecting the immediate situation, with full opportunity . . . to develop the facts and arguments"); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (discussing fact-finding by administrative agencies); *cf. Yakus v. United States*, 321 U.S. 414, 433 (1944) (holding that channeling certain cases to an administrative appeal process, with review by a special Emergency Court, did not offend due process "so long as it affords to those affected a reasonable opportunity to be heard and present evidence").

3. Although it has approved generally of agency fact-finding, this Court has never decided the question presented here: whether a state may forbid the introduction of additional evidence during judicial review of an agency decision when such evidence is necessary to decide constitutional issues that the agency lacked the capacity to rule on. Variations of this recurring question have been presented in

petitions for certiorari in recent years.[7] And the Court has recognized that the idea of unreviewable agency decision-making raises "serious" and "difficult" questions. *See Shalala*, 529 U.S. at 17, 23–24 (avoiding a "serious constitutional question" by construing the Medicare statute to allow review of an agency decision by a federal district court with "authority to develop an evidentiary record"); *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 450 (1985) (finding it unnecessary to answer the "difficult question" of whether "legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights"); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (citing cases). But it has not decided the precise contours of due process in this context.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the Court concluded that a case including both federal constitutional claims and state-law claims limited to on-the-record

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[7] *See, e.g.*, Petition for a Writ of Certiorari, *Jewish Home of Eastern Pennsylvania v. Sebelius*, No. 11-433, 2011 WL 4802808 (U.S.) ("[W]hether the Constitution permits Congress to channel all challenges to agency action through a process that does not permit an evidentiary hearing on constitutional defenses."); Petition for Writ of Certiorari, *Stahl York Ave. Co. v. City of New York*, No. 18-1429, 2019 WL 2121700 (U.S.) (whether a takings plaintiff "is entitled to develop the facts supporting the claim in court, rather than being bound by fact-findings the agency itself made in the very proceeding in which it is alleged to have taken the property without just compensation"); Petition for Writ of Certiorari, *Clover Park School Dist. No. 400 v. Steilacoom Sch. Dist. No. 1*, No. 06-1215, 2007 WL 700937 (U.S.) (whether the State of Washington violated due process by disallowing discovery related to constitutional claims outside the administrative process).

review could properly be removed to federal court. The Court stated that even though the federal claims were "raised by way of a cause of action created by [the state's administrative review] law," as to those claims, the federal court would "proceed[ ] independently, not as [a] substantial evidence reviewer on a nonfederal agency's record." *Id.* at 180. Although this assumes the right to introduce evidence to support federal constitutional claims, it falls short of answering the question presented here. As the D.C. Circuit noted, "courts and legal scholars routinely *assume* that there is a due process right to have the scope of constitutional rights determined by some independent judicial body—and the Supreme Court has never held or hinted otherwise." *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987) (emphasis added). But neither has this Court expressly affirmed that right.

The question is significant because administrative agencies frequently are unable to resolve constitutional questions, for one of two reasons—either because such questions are outside their jurisdiction or because it is the agency's decision itself that allegedly violates the Constitution. As to the first category, this Court has noted that constitutional questions are generally "unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see also Petruska v. Gannon Univ.*, 462 F.3d 294, 308 (3d Cir. 2006) ("[A]s a general rule, an administrative agency is not competent to determine constitutional issues."). Many federal and state administrative agencies are accordingly precluded from resolving constitutional

issues.[8] When the agency lacks jurisdiction to decide a constitutional claim, as is true of the Growth Board in this case, interested parties have neither the incentive nor the ability to introduce facts related to constitutional issues.

As to the second category, an agency cannot competently decide facts related to a constitutional violation where the agency's decision itself causes the violation.[9] A good example of this second category is a takings claim premised on the denial of a zoning variance. In that setting, the taking is not complete until the agency issues its decision denying the variance. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), *overruled on other grounds*, *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019). Consequently, the affected property owner would have no prior opportunity to develop and present evidence relevant to the taking.

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[8] *See, e.g.*, *Shalala*, 529 U.S. at 23; *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975); *Com. v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) ("[A]n administrative agency cannot decide constitutional issues."); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 452 (Tenn. 1995) (similar); *Christian Bros. Inst. of N.J. v. N. N.J. Interscholastic League*, 86 N.J. 409, 416 (1981) ("Administrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction."); *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977) ("[T]he constitutional issue was not and could not have been presented to or passed upon by the administrative bodies below.").

[9] A related question is currently under consideration by this Court in *Carr v Saul*, No. 19-1442, which asks whether "a claimant seeking disability benefits under the Social Security Act . . . forfeits an Appointments Clause challenge to the appointment of an administrative law judge by failing to present that challenge during administrative proceedings."

Recognizing that fact, the Connecticut Supreme Court in such a case refused to "vest the [zoning] board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim" because "the board's decision itself is the action that gives rise to the constitutional claim." *Cumberland Farms*, 808 A.2d at 1119–20 (emphasis omitted); *see also Hensler*, 8 Cal. 4th at 15–16 ("[A]n administrative agency is not competent to decide whether its own action constitutes a taking . . . .").

In either setting, the administrative agency is unable to address constitutional claims that are presented for the first time on judicial review. Whether due process requires that litigants be allowed to introduce evidence supporting those claims in court is an open question.

4. This case presents an ideal opportunity for the Court to resolve the question. Because WAPA establishes "the exclusive means of judicial review of agency action," Wash. Rev. Code § 34.05.510; *see also Wash. Trucking Ass'ns*, 188 Wash. 2d at 219–22, Petitioners had no recourse to challenge the revised SMP other than going through the administrative process before the Growth Board, which they did in good faith, although the Growth Board lacks jurisdiction to address constitutional claims. *See* Final Decision & Order, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012, at *73 (Apr. 6, 2015) (AR 5787–905). The Growth Board likewise has no administrative law judges or other adjudicative officers because its review is limited to addressing questions of statutory compliance, not constitutional fact-finding or adjudication. Yet the Court of Appeals below

concluded that WAPA limits reviewing courts to the record created during this limited administrative process. App. A-7. Under Washington law, therefore, Petitioners are barred from *ever* presenting facts necessary to establish threshold fact-based questions related to standing and scope of review of constitutional questions.

The injustice of that holding is emphasized by arguments made by the City and accepted by the Washington courts below. The City obtained an unfair litigation advantage by using the lack of evidence—evidence that was barred by statute—to argue that PRSM's members failed to demonstrate their standing and other facts necessary to establish the scope of constitutional review. CP 73–74 (disputing scope of review), 283 (scope of review). Then the City opposed Petitioners' motion for leave to submit the very evidence required to address those threshold questions. CP 73–74, 283. The Washington courts agreed with the City, stripping Petitioners of any opportunity to fairly litigate their claims. Due process demands better. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."); *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process.").

II. Multiple State Courts and the Third Circuit Are Divided on the Question.

1. Some state courts hold that parties raising constitutional questions are not limited to the

administrative record during judicial review of agency action. Even where the agency made factual findings related to constitutional claims (which the Growth Board could not do), these courts conclude that plaintiffs are entitled to de novo review by the court.

Many of these decisions arise in a land use context. For example, in *Cumberland Farms*, the Connecticut Supreme Court held that a takings plaintiff was "entitled to a de novo review of the factual issues underlying its inverse condemnation claim, unfettered by the [agency's] previous resolution of any factual issues." 808 A.2d at 1123. Likewise, the California Supreme Court held that "[i]f the administrative hearing is not one in which the landowner has a full and fair opportunity to present evidence relevant to the taking issue . . . , the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking." *Hensler*, 8 Cal. 4th at 15; *see also Buettner v. City of St. Cloud*, 277 N.W.2d 199, 203 (Minn. 1979) (holding that a takings claim must be decided "based upon independent consideration of all the evidence," because "the trial court cannot abrogate its duty to uphold constitutional safeguards and defer to the [agency]"); *cf. N. Monticello All. LLC v. San Juan County*, 468 P.3d 537, 541 (Utah Ct. App. 2020) (concluding that landowners near a wind farm were denied due process because they were "never provided an opportunity to present [their] evidence of [the wind farm owner's] alleged failure to comply with" a conditional use permit).

Other cases arise outside the land use context. For example, the Alabama Supreme Court held that a dentist who was disciplined by a state board and who

alleged due process violations has a "clear right" to introduce evidence beyond the transcript of the Board proceedings. *Bd. of Dental Exam'rs v. King*, 364 So. 2d 318, 318 (Ala. 1978). The Wisconsin Supreme Court came to a similar conclusion as to a facial constitutional challenge to an agency rule regarding mobile home design. *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 373–74 (1987). The court explicitly rejected the notion that sufficient evidence to support constitutional claims could arise during an agency rulemaking process, where interested persons have only a limited opportunity to participate or present opposing evidence. *Id.* at 379–80 (concluding that the ability to introduce additional evidence on judicial review is necessary "[i]f the court is to act as more than a rubber-stamp of agency action").[10]

These courts recognize that the typically non-adjudicatory nature of administrative procedures and the lack of evidentiary rules at the agency level make public comment and agency review an unreliable foundation for deciding constitutional claims. *E.g.*, *Buettner*, 277 N.W.2d at 204; *Liberty Homes*, 136 Wis. 2d at 380; *Hensler*, 8 Cal. 4th at 16. Thus, these courts hold that limiting judicial review to the administrative record unduly restricts property

[10] The Maine Supreme Judicial Court has also rejected the argument that there is "no federal constitutional problem" with confining a court to an "inadequa[te]" agency record that would preclude "an adequate independent judgment upon the facts material to [the court's] decision of constitutional issues." *Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895, 905 n.12 (Me. 1973).

owners' and other regulated parties' ability to challenge the government's factual assertions.

2. In contrast, other courts hold that there is no right to introduce evidence supporting constitutional claims during judicial review of an agency decision. The Third Circuit in *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*, for example, rejected the argument that due process entitled litigants to present evidence during judicial review of a Pennsylvania administrative agency's grant of a water quality certification. 903 F.3d 65, 68 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648 (2019). The court recognized that due process sometimes requires "an adversarial mode of procedure and an evidentiary hearing," but concluded that "this is not such an instance." *Id.* at 74 (quotation omitted). Instead, even though the petitioners' challenge included a constitutional takings claim, "[d]ue process does not entitle [them] to a de novo evidentiary hearing; the opportunity [for public] comment and to petition this Court for review is enough." *Id.*; *see also Hetrick v. Ohio Dep't of Agric.*, 81 N.E.3d 980, 993 (Ohio Ct. App. 2017) (rejecting the argument that a party is entitled to introduce evidence to support constitutional claims in court where an agency hearing officer excluded the evidence below).

Likewise, in considering constitutional takings claims, courts in D.C. and New York defer to agency fact-finding and decline to allow the introduction of additional evidence on judicial review of an agency decision. *See MB Assocs. v. D.C. Dep't of Licenses, Investigation & Inspection*, 456 A.2d 344, 344–45 (D.C. 1982) (upholding an agency denial of a

demolition permit based on a "substantial evidence" standard); *Stahl York Ave. Co., LLC v. City of New York*, 162 A.D.3d 103, 116 (N.Y. App. Div.), *leave to appeal denied*, 32 N.Y.3d 1090 (2018), *and cert. denied*, 140 S. Ct. 117 (2019) (deferring to administrative agency's determination that a landmark designation did not prevent the property owner from "earning a reasonable return" for purposes of a takings analysis).[11] A Texas appellate court also rejected plaintiffs' request, in support of a takings claim, to introduce evidence in court that was excluded from the administrative hearing below. *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 589 (Tex. Ct. App. 2006) ("The only instance in which a reviewing court may admit new evidence is when the administrative record fails to reflect procedural irregularities alleged to have occurred in the administrative hearing.").

These courts' more restrictive standard does not always favor the government. The Hawaii Supreme Court in *DW Aina Le'a Development, LLC v. Bridge Aina Le'a, LLC*, for example, rejected a local Land Use Commission's argument that the lower court "erred in ruling on [landowners'] due process and equal protection arguments because the [Commission] had no opportunity to present evidence" during judicial review. 134 Haw. 187, 218 (2014). The Commission argued that in forbidding the introduction of evidence to support its constitutional arguments, the court deprived it of due process. *Id.* However, the Hawaii

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[11] *See also* Petition for Writ of Certiorari, *Stahl York Ave. Co. v. City of New York*, No. 18-1429, 2019 WL 2121700, at *15–*19 (U.S.) (describing the property owner's unsuccessful attempt to introduce additional takings evidence during judicial review).

Supreme Court concluded that under the state APA, a court's review of an agency decision is not conditioned on "the opportunity of the parties to present evidence." *Id.*

Regardless of which party is prevented from introducing evidence, these decisions, like those of the Washington courts below, do not provide constitutional due process. An abbreviated and non-adjudicative administrative proceeding like that of the Growth Board is an insufficient alternative to the introduction of evidence. There is no testimony under oath, no ability to cross-examine contrary witnesses, and no fact-finding by a neutral reviewer. Nor is public comment an acceptable substitute for the introduction of relevant evidence. Not only are public comments received at a preliminary stage of the legislative process—often with strict time or page limits and without the benefit of legal counsel—but even if a commenter raises constitutional issues, the government need not substantively respond to them. *Cf. Clark County v. Growth Mgmt. Hearings Bd.*, 10 Wash. App. 2d 84, ¶ 91 (2019) (county need not respond to all public comments submitted regarding a comprehensive land use plan).

3. This split of authority cries out for resolution. States certainly may choose to create, organize, and use administrative agencies in a variety of ways. But whether parties are entitled to introduce evidence in court to prove (or disprove) federal constitutional violations should not vary by jurisdiction.

III. This Case Is an Excellent Vehicle to Address the Question Presented.

This case presents an excellent vehicle for resolving the question presented and providing guidance in this critical area of constitutional law. The issue of whether Petitioners can introduce evidence to support their constitutional claims is squarely and cleanly presented. Petitioners clearly have standing to raise their claims, and there are no other threshold or jurisdictional questions that would frustrate this Court's ability to reach the question presented. The record related to the excluded evidence has been fully developed below, allowing this Court to consider the due process issues in a specific, non-abstract setting.[12]

This case is also a good exemplar of the fairness concerns implicated by the question presented. Washington's laws forbidding administrative adjudication of constitutional claims while simultaneously restricting subsequent judicial review to the administrative record place the state's citizens in a judicial no-man's land where constitutional claims never can be fully heard, much less resolved. The Washington Court of Appeals interpreted WAPA to put plaintiffs in a Catch-22 during judicial review

[12] That the decision below is from an intermediate court (where the state's highest court denied review) and unpublished makes no difference. This Court has resolved constitutional issues in similar circumstances. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1726–27 (2018); *Michigan v. Fisher*, 558 U.S. 45, 46–47 (2009); *Perry v. Thomas*, 482 U.S. 483, 488–89 (1987); *see also Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, O'Connor, and Souter, JJ., dissenting from denial of certiorari) ("Nonpublication must not be a convenient means to prevent review.").

of Growth Board decisions, and the Washington Supreme Court denied discretionary review. These decisions were outcome-determinative as to the federal constitutional issues and wrongly decided. Beyond the state of Washington, though, resolving the due process questions in this case would have significance for many analogous cases. And given the existing split of authority, there is no need for further percolation of the issue. The Court should address it now.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: December 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS 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, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc., Appellants, 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.	No. 80092-2-I DIVISION ONE UNPUBLISHED OPINION FILED: December 9, 2019

MANN, A.C.J. - Preserve Responsible Shoreline Management (PRSM) seeks review of the superior

court's decision denying its motion to supplement the administrative record in its appeal of the City of Bainbridge Island Shoreline Master Program. PRSM unsuccessfully appealed the Shoreline Master Program to the Growth Management Hearings Board (Board). PRSM then appealed the Board's final decision to the superior court under the Administrative Procedure Act (APA), Ch. 34.05 RCW, adding facial constitutional challenges. PRSM then unsuccessfully moved to amend the administrative record with new testimony purportedly supporting its constitutional claims. We granted discretionary review and now affirm.

I.

In July 2014, the City of Bainbridge (City) adopted a new Shoreline Master Program (SMP) with approval of the State of Washington Department of Ecology (DOE). On October 7, 2014, PRSM filed a petition for review with the Board asserting that the SMP violated provisions of the Shoreline Management Act (SMA), ch. 90.58 RCW, and the Shoreline Master Program Guidelines, WAC 173-26-171. The petition asserted that the SMP also raised constitutional issues but because the Board did not have jurisdiction "those issues are not being raised in this petition." Consistent with this statement, the petition for review did not include PRSM's constitutional theories. On April 6, 2015, the Board issued its Final Decision and Order concluding that the petitioners failed to demonstrate that the actions of the City and the DOE violated the SMP or guidelines, and dismissing the appeal.

On May 6, 2015, PRSM filed a petition for judicial review of the Board's final decision in the Kitsap

County Superior Court. The petition raised a number of constitutional issues under the APA and Uniform Declaratory Judgment Act (UDJA), ch. 7.24 RCW. The superior court dismissed the UDJA causes of action, concluding that RCW 34.05.510 dictates that judicial review under the APA provided the only avenue for relief and that RCW 7.24.146 instructs that the UDJA does not apply to state agency actions reviewable under the APA.

PRSM then moved for authorization to supplement the administrative record under RCW 34.05.562(1)(b). To support its motion, PRSM contended

> that there are many provisions in the SMP's 400 page plus new regulatory which are unduly oppressive, such as the provision that regulates every "human activity" in the shoreline (up to 200 feet inland from the ordinary high water mark). The SMP requires permits for any change to vegetation in one's yard. The SMP claims it is not retroactive (Section 1.3.5.2), but the fact that it regulates every human activity makes the non-retroactivity provision practically meaningless. The SMP includes contradictory language about what is permitted in terms of human activities, but then provides that the most restrictive regulation applies to wipe out provisions which appear to allow people to make reasonable use of their homes and yards.

PRSM sought to supplement the record with testimony from Kim Schaumburg, Barbara Phillips, and Barbara Robbins on matters relevant to its

takings theories. Schaumburg, an environmental consultant would testify that "the science upon which the City relied relates to the impact of certain land uses on freshwater bodies" and "that such science should not be applied to salt water bodies." Further, Schaumburg would testify that "the science which the City uses to justify restrictions on land use, such as increased buffers from the water, arises from studies involving fresh water bodies and does not apply to salt water bodies." Phillips, "a person with a scientific background," would testify to "the flaw in using conceptual scientific data to support conclusions that form the basis for the extensive increase in regulation in the SMP." And Robbins, a landowner on Bainbridge Island, would provide testimony about the loss of value to her property. Specifically, Robbins

> whose property she has owned for decades has plummeted in value because of the SM P's restriction on vegetation removal. She has paid high taxes for decades on the reasonable expectation that the property would have views of the water and the Olympics only to find that the SMP has significantly reduced the value of her property. At the heart of the protection from uncompensated taking and damaging of property in Article I, Section 16 of the Washington Constitution is the harm to the property owner. Ms. Robbins' testimony will demonstrate the reality of that harm.

PRSM also sought permission to offer testimony from Peter Brochvogel and Robbyn Meyers, to support its void for vagueness theory. Specifically, PRSM wanted to show that the SMP is "not decipherable by

the average citizen." Brochvogel, a longtime architect on Bainbridge Island, and Meyer, a land-use consultant, would "explain why citizen's [sic] cannot determine the regulatory requirements of the SMP simply [by] reading its wording. Because of the sheer volume and complexity of the SMP, expert testimony will be of substantial assistance to the Court."

Finally, to support its First Amendment theory, PRSM offered testimony from Linda Young, "a citizen and petitioner herein, to testify as to how the SMP's provision giving City administrative staff control over vegetation and landscaping decisions interferes with freedom of expression."

The City and DOE opposed PRSM's motion to supplement, arguing that PRSM failed to show that any of the proffered supplementary evidence met the conditions for supplementation under RCW 34.05.562, the record contained ample evidence of the science used in SMP development, and supplementation was not needed to resolve the disputed facial challenges.

After oral argument, the superior court denied PRSM's request to supplement the record. The court found that the supplementary evidence was not needed to decide the disputed issues in this case.

This court granted PRSM's motion for discretionary review.

II.

This appeal is limited to PRSM's appeal of the superior court's decision denying PRSM's motion to

supplement the administrative record with additional testimony.[1]

'The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion." Lund v. State Dep't of Ecology, 93 Wn. App. 329, 334, 969 P.3d 1072 (1998) (affirming the superior court's discretionary decision denying a request to supplement the record to present evidence and argument on constitutional issues not raised before the administrative tribunal). A trial court's decision is manifestly unreasonable if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

A.

Decisions of the growth management hearings boards must be appealed to the superior court under the APA. RCW 36.70A.300(5); Olympic Stewardship Foundation (OSF) v. State Envtl. & Land Use Hrgs. Office, 199 Wn. App. 668, 685, 399 P.3d 562 (2017), rev. denied, 189 Wn.2d 1040 (2018). In contrast to non-administrative proceedings where the trial court is the finder of fact, in administrative proceedings, "the facts are established at the administrative hearing and the superior court acts as an appellate court." U.S. West Commc'ns, Inc. v. Wash. Utils. &

[1] This is an interlocutory appeal of the trial court's decision denying PRSM's motion to supplement the record. Consequently, our decision does not address the merits of PRSM's constitutional claims. This opinion solely addresses whether the superior court abused its discretion by denying PRSM's motion to supplement the administrative record.

Transp. Comm'n, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997); Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621,633,869 P.2d 1034 (1994).

A court reviewing an agency order under the APA may overturn the action only if the challenger demonstrates that the order is invalid under at least one of the criteria set forth in RCW 34.05.570, including whether "the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a). Where the administrative board below does not have jurisdiction to hear constitutional claims, those claims may be raised for the first time before the superior court as an issue in the judicial review. Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hrgs. Bd., 158 Wn. App. 866, 881 n.8, 244 P.3d 412 (2010).

Regardless of the issues raised in the APA appeal, "APA judicial review is limited to the record before the agency." Samson v. City of Bainbridge Island, 149 Wn. App. 33, 64, 202 P.3d 334 (2009) (citing RCW 34.05.566(1)). Accord, RCW 34.05.558 ("Judicial review of disputed issues of fact ... must be confined to the agency record for judicial review as defined by this chapter"); Kittitas County v. Eastern Wash. Growth Mgmt. Hrgs. Bd., 172 Wn.2d 144, 155, 256 P.3d 1193 (2011); Lund v. State Dep't of Ecology, 93 Wn. App. 329, 333-34, 969 P.3d 1072 (1998) (review of constitutional challenges to shoreline regulation under the APA is limited to the Board's record and decision). While the APA allows the superior court to supplement the agency record, new evidence is admissible only under "highly limited circumstances"

and must fit "squarely" within one of the statutory exceptions set forth in RCW 34.05.562. Motley-Motley v. Pollution Control Hrgs. Bd., 127 Wn. App. 62, 76, 110 P.3d 812 (2005); Herman v. Shoreline Hrgs. Bd., 149 Wn. App. 444, 455-56, 204 P.3d 928 (2009); Samson, 149 Wn. App. at 64-65.

B.

PRSM first contends that the trial court erred in concluding that its constitutional claims were appellate in nature and thus bound by the APA. PRSM argues instead that the trial court should have exercised its original jurisdiction and accepted testimony and evidence outside of the APA's restriction to the record. We disagree.

PRSM cites little Washington precedence in support of its theory that the APA's strict limitation on new evidence is not applicable when the superior court is reviewing constitutional claims. PRSM quotes James v. Kitsap County, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005), for the proposition the "APA imposes only a 'procedural requirement[]' that PRSM litigate all claims subject to the Growth Board's authority to that agency 'before a superior court will exercise its original jurisdiction' over its constitutional claims." PRSM fails first, however, to recognize that James was a Land Use Petition Act (LUPA) case-not an APA case-and did not address supplementation of the administrative record under the APA. Second, what the James court held was "a LUPA action may invoke the original appellate jurisdiction of the superior court, but congruent with the explicit objectives of the legislature in enacting LUPA, parties must substantially comply with procedural requirements before a superior court will exercise its original

jurisdiction." James, 154 Wn.2d 588-89. Here, while the superior court may have original appellate jurisdiction to consider PRSM's constitutional claims, the procedural requirements of the APA limit evidence to that introduced before the administrative agency, or allowed by the superior court consistent with the narrow exceptions in RCW 34.05.562.

Contrary to PRSM's argument, the superior court did not err in concluding that it was acting as an appellate court in reviewing PRSM's claims—including its constitutional claims—under the APA U.S. West, 134 Wn.2d at 72; Waste Management, 123 Wn.2d at 633; Lund, 93 Wn. App. at 333-34; OES, 199 Wn. App. at 705, 710-11.

C.

PRSM argues that supplementation of the administrative record is appropriate under RCW 34.05.562(1)(b). We disagree.

Under the APA, the superior court has discretionary authority to supplement the agency record in three narrow circumstances, as defined in RCW 34.05.562:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material fact in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

PRSM argues that supplementation of the administrative record is appropriate under RCW 34.05.562(1)(b). RCW 34.05.562(1)(b) provides the superior court discretion to supplement the record, only if the evidence relates to the "validity of the agency action at the time it was taken" and is needed to decide disputed issues regarding the "unlawfulness of procedure or of decision-making process." Thus, RCW 34.05.562(1)(b) allows the superior court to supplement evidence when a petitioner claims that the agency violated procedure during its decision-making process.

For example, in Batchelder v. City of Seattle, 77 Wn. App. 154, 159, 890 P.2d 25 (1995), the court analyzed whether the Shoreline Hearings Board erred when it allowed "segmentation" of the permitting process for a waterfront development project. Improper segmentation is an unlawful procedure or decision-making process under the SMA. Batchelder, 77 Wn. App. at 159. Specifically, "a single project may not be divided into segments for purposes of avoiding compliance with the SMA." Batchelder, 77 Wn. App. at 160 (citing Merkel v. Port of Brownsville, 8 Wn. App. 844, 509 P.2d 390 (1973)). Where an agency engages in some unlawful procedure, such as segmenting a project's permits, subsection (b) grants discretionary authority to the superior court to

supplement the administrative record to decide those disputed issues. RCW 34.05.562(1)(b).

Here, PRSM offered evidence to support disputed issues of the constitutionality of the SMP. PRSM did not claim, however, that the evidence is necessary to decide whether the procedure used or the decision-making process of the Board violated due process, the APA, or another statute or regulation governing the Board's procedure. Because PRSM failed to present an argument of how the supplemental evidence was necessary to show that the Board's decision-making process or procedure was unlawful, the superior court did not abuse its discretion when it denied PRSM's request under RCW 34.05.562(1)(b).

D.

While PRSM does not specifically assert that the additional evidence should be admitted under RCW 34.05.562(1)(c), PRSM's argument asserts that the superior court abused its discretion by refusing its request to supplement the record because it needed to develop the factual record to support its constitutional claims.

RCW 34.05.562(1)(c) provides the superior court with discretion to supplement the record with "material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record." It is also within the superior court's discretion to find that the facts proffered are not necessary to decide the disputed issues. The superior court did not err when it concluded that it did not need additional facts to decide PRSM's facial constitutional claims because its facial constitutional

challenges can be decided without reference to additional facts. We address each of PRSM's claims.

1.

PRSM contends that the superior court abused its discretion by refusing to supplement the record with evidence demonstrating that gardening is expressive conduct and protected by the First Amendment.

"Facts are not essential for consideration of a facial challenge to a statute or ordinance based on First Amendment grounds." City of Seattle v. Webster, 115 Wn.2d 635, 640, 802 P .2d 1333 (1990). When a petitioner makes a facial constitutional challenge based on First Amendment grounds, the "constitutional analysis is made upon the language of the ordinance or statute itself." Webster, 115 Wn.2d at 640.

PRSM contends "the City's vegetation provisions constitute an overbroad and unnecessary restrain on expressive conduct." PRSM agrees that "much of this argument could be decided as a matter of law because, if a regulation burdens expression, then the government bears the burden of showing that the restriction is justified," but, because "the City and Ecology have indicated that they plan to challenge whether gardening and landscape design constitute expressive conduct-a mixed question of law and fact," additional evidence is necessary. PRSM sought to supplement the record with testimony from Young about "the personal choices that go into different gardening styles or themes and to explain how those decisions constitute expression."

PRSM fails to explain how this supplemental evidence meets the requirements of RCW

34.05.562(1)(c). PRSM contends that its First Amendment claims are mixed questions of law and fact, because no court has found that gardening is protected expressive conduct under the First Amendment. Young's opinion on the expressive nature of gardening, however, is in the administrative record below.[2]

Young, an attorney, sent the City and DOE a 99-page legal analysis, which included a discussion of the First Amendment. PRSM has not explained why this evidence is insufficient for it to argue that gardening is expressive in nature and protected conduct under the First Amendment. PRSM contends that public comments are insufficient to lay the groundwork of a

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[2] Young's comment in the record states: "The First Amendment right of free expression means not only do people have the right to capture their personalities in their garden choices, but also a government cannot mandate—as the Soviet Union did for years, and the Bainbridge SMP is doing here—what kind of expression is aesthetically pleasing . . . .

The SMP takes the private property owner's right to engage in what a majority of people would consider free expression. Gardens can be an expression of peoples' personalities, their basic 'essence.' For many, gardening is a passion, a joy, a source of fresh fruits and vegetables for the table, as well as a source of an abundance of beautiful flowers for the house. Frequent trips to the nursery are adventures - looking to see what new plants they have. Countless hours are spent dreaming about how to landscape and make one's natural surroundings as beautiful as possible: flowers and plants bring such emotional comfort and joy to mankind! And, what constitutes a beautiful garden is, as they say, in the eye of the beholder. Even if they are 'non-indigenous,' people in the Pacific Northwest love their Japanese maple trees, their tulips and their rhododendrons (brought from China in the 19th century)! Now, with the SMP, these are all things of the past."

constitutional challenge, but fails to cite legal authority supporting this contention.

The superior court did not abuse its discretion in determining that PRSM's proffered evidence was not necessary to decide whether the SMP infringes First Amendment rights.

2.

PRSM contends that the superior court abused its discretion by refusing to allow PRSM to supplement the administrative record with material facts supporting its claim that the mandatory buffer is an unconstitutional exaction.

In a recent opinion, the Washington Supreme Court clarified that, for purposes of the Washington State Constitution's takings clause, Washington jurisprudence follows the United States Supreme Court definition of "regulatory takings" and any other authority to the contrary is overruled. Yim v. City of Seattle, No. 95813-1 (Wash. Nov. 14, 2019). There are two per se categorical takings for Fifth Amendment purposes: one, "where government requires an owner to suffer a permanent physical invasion of her property" and two, where regulations "completely deprive an owner of 'all economically beneficial uses' of her property." Yim, No. 95813-1, slip op. at 22. "If an alleged regulatory taking does not fit into either category, it must be considered on a case-by-case basis in accordance with the Penn Central factors." Yim, No. 95813-1, slip op. at 22.

Both Nollan and Dolan were as-applied challenges and cited Penn Central for their underpinnings. Nollan v. Cal. Coastal Comm'n, 483 U.S 825, 852, n.6, 107 S. Ct. 3141, 97 L. Ed. 2d 677

(1987); Dolan v. City of Tigard, 512 U.S. 374, 403-04, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The nature of the Nollan/Dolan analysis is fact specific, and therefore, must be evaluated on a case-by-case basis and is not easily susceptible to a facial challenge.

The nexus rule from Nollan "permits only those regulations that are necessary to mitigate a specific adverse impact of a development proposal." Kitsap Alliance of Property Owners (KAPO) v. Central Puget Sound Growth Mgmt. Hrgs. Bd., 160 Wn. App. 250, 272, 255 P.3d 696 (2011). The concept of rough proportionality from Dolan "limits the extent of the mitigation measures to those that are roughly proportional to the impact they are designed to mitigate." KAPO, 160 Wn. App. at 272-73.

PRSM contends that the City failed to use the best available science and therefore the mandatory buffer is an unconstitutional exaction. PRSM cites Honesty in Envtl. Analysis and Leg. (HEAL) v. Central Puget Sound Growth Mgmt. Hrgs Bd., 96 Wn. App. 522, 527, 979 P.2d 864 (1999) for the proposition that critical area buffers must satisfy the Nollan/Dolan tests. In HEAL, the court held that "policies and regulations adopted under [the Growth Management Act (GMA)] must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on government authority to impose conditions on development applications." HEAL, 96 Wn. App. at 527. If the best available science is not used to support the agency's decision to designate critical area buffers, then "that decision will violate either the nexus or rough proportionality rules or both." HEAL, 96 Wn. App. at 537, 979 P.2d 864 (1999).

Here, PRSM contends that the testimony of Schaumburg, Phillips, and Robbins is necessary for the court to "determine whether the SMP's mandatory buffers are, in fact, limited to only that land necessary to mitigate for the impacts attributable to the burdened property."

PRSM fails to explain, however, why this testimony is not in the administrative record, since it contested the science before the Board. In its prehearing brief before the Board, PRSM argued, "The City is not in compliance with RCW 90.58.100(1) and WAC 173-26-201 by failing to identify and assemble the most current, accurate, and complete scientific and technical information available, by failing to consider the context, scope, magnitude, significance, and potential limitations of the scientific information, and by failing to make use of and incorporate all available science." In particular, PRSM claimed, "the science was also based on the impacts of use of upland property on freshwater bodies, such as rivers and lakes, and not on the salt water of the Puget Sound." The Board found that "Petitioners have failed to establish that the buffer widths proposed for the Bainbridge SMP were based on farm and feedlot data or were inappropriately based on freshwater rather than marine data" and that "they have not met their burden to establish a failure 'to assemble and appropriately consider technical and scientific information' in regard to buffer widths." PRSM has not explained why it needs further testimony from Schaumburg, Phillips, and Robbins to decide a disputed issue that it briefed before the Board or how the testimony is different from the exhibits in the administrative record.

The superior court did not abuse its discretion when it determined that PRSM's proffered evidence was not necessary to decide whether the SMP is an unconstitutional taking or exaction.

3.

PRSM contends that the superior court abused its discretion by refusing to supplement the record to support its claim that the SMP contains vague and contradictory provisions rendering it indecipherable to the average citizen.

"When a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness." Weden v. San Juan County, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) abrogated by Yim v. City of Seattle, No. 96817-9 (Wash. Nov. 14, 2019). In Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the court held that "vagueness challenges to statutes not threatening First Amendment interests are examined in the light of the facts of the case at hand; the statute is judged on an as-applied basis." Thus, PRSM's facial constitutional vagueness challenge is likely not ripe because PRSM is not challenging the ordinance on an as-applied basis.

The superior court did not abuse its discretion when it determined that PRSM's proffered evidence was not necessary to decide whether the SMP is unconstitutionally vague.

We affirm.

s/ Mann, ACJ

WE CONCUR:

s/ Hazelrigg-Hernandez, J.

s/ Schindler, J.

Appendix B-1

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SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KITSAP COUNTY

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, ET AL. Petitioners and Plaintiffs, vs. CITY OF BAINBRIDGE ISLAND, ET AL. Respondents and Defendants.	No. 15-2-00904-6 ORDER ON PETITIONERS' MOTION TO AUTHORIZE SUPPLEMENTATION OF THE RECORD

THIS MATTER comes before the Court upon Petitioners' Motion to Authorize Supplementation of the Record. In ruling on the Motion, the Court has considered the following:

1. Petitioners' Motion to Authorize Supplementation of the Record;

2. City of Bainbridge Island's Brief in Opposition to Petitioners' Motion to Authorize Supplementation of the Record;

3. Washington State Department of Ecology Response to Petitioners Motion to Authorize Supplementation of the Record;

4. Petitioners' Reply in Support of Motion to Authorize Supplementation of the Record;

5. The pleadings and filings in this matter; and

6. The oral arguments of the parties.

BACKGROUND

The parties largely agree on the procedural background that placed this matter before the Court. Pertinent to the Petitioner's current Motion is the following:

1. This Court dismissed Petitioners' claims for declaratory relief under the Uniform Declaratory Judgments Act ("UDJA") on October 5, 2016;

2. The Petitioners maintain their action seeking judicial review of the determination of the Growth Management Hearings Board ("the Board") pursuant to the Administrative Procedure Act ("APA");

3. The parties have stipulated that Petitioners may amend their initial Petition to move constitutional claims into the surviving action;

The Board below was not empowered or authorized to make determinations regarding questions of constitutionality.

ISSUE

SHOULD THIS COURT AUTHORIZE SUPPLEMENTATION OF THE RECORD BELOW FOR PURPOSES OF DETERMINING CONSTITUTIONAL ISSUES?

ANALYSIS

This Court acts in an appellate capacity with respect to its review of the Board decisions below regarding the City of Bainbridge island's Shoreline Mater Program ("SMP") and its application to the Petitioners. In this capacity, the Court's review of the Board's decision is most always confined to the agency record. Courts apply the standards of the Administrative Procedure Act, chapter 34.05 RCW, and look directly to the record before the board. *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155 256 P.3d 1193, 1198 (2011). The statutes, however, recognize the ability of this Court to grant supplementation of the record. RCW 34.05.558 states that "[J]udicial review of the disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, **supplemented** by additional evidence taken pursuant to this chapter." (emphasis added).

The parties recognize that any supplementation is rare; new evidence is generally not taken by a reviewing court. Respondent City of Bainbridge Island ("City") cautions that "[T]he APA clearly prohibits the superior court from admitting new evidence unless such evidence falls within the statutory exceptions

provided in RCW 34.05.562."[1] That provision holds as follows:

> The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken **and is needed** to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(emphasis added).

Petitioners propound that supplementation in the way of oral testimony is necessary to this Court's understanding of its facial challenges to the constitutionality of the SMP as enacted by the City of Bainbridge Island. They proffer a number of constitutional challenges, including a violation of freedom of expression via the US Constitution's First Amendment, and a violation of the protection against

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[1] City of Bainbridge Island's brief, 3: 9-10. See also, *Motley-Motley, Inc. v. State*, 127 Wn. App. 62 76 110 P.3d 812, 820 (2005); "Generally, however, new evidence is inadmissible. When it is admissible, it is admissible because it falls squarely within the statutory exceptions listed in RCW 34.05.562(1)."

warrantless searches under the US Constitution's Fourth Amendment and Washington State Constitution Article 1, Section 7.

Petitioners place heavy reliance on what they deem the "clear and recent" decisions in *Olympic Stewardship Foundation [OSF] v. State of Washington Environmental Hearings Office*, attaching a December 21, 2015 document to their responsive pleading as Exhibit 1. Petitioners urge the Court to note that the Court of Appeals, Division II, granted a request to supplement the record on constitutional issues somewhat akin to those now before the Court. This "decision" (hereinafter referred to as "OSF 2015"), however, is not a "decision" in the context of appellate law. It is solely an interim ruling on a litigated matter that actually came to fruition two years later, in 2017.[2] While it has no precedential value, it does delineate the status of the existing case law, an analysis which should not be ignored by this Court. The Court of Appeals granted supplementation, finding that such supplementation was necessary to determine facts "going to the impact the challenged legislative enactment has on economically viable property uses and other potential negative effects on property".[3] The ultimate question, then, is whether this Court requires supplementation pertaining to the issues it expects to hear.

Petitioner has proffered a number of witnesses and argues that supplementation would assist this Court in understanding what appears to be a large

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[2] *Olympic Stewardship Foundation v. State of Washington Environmental and Land Use Hearings Office*, 199 Wash.App. 668, 399 P.3d 562 (2017).
[3] *OSF 2015*: 6.

record below. However, the number of pages to be reviewed by this Court is irrelevant with respect to the analysis of the issues in controversy. Respondents oppose supplementation, arguing two things: (1) much of the information the Petitioners seek to introduce was, in fact, introduced before the Board below[4]; and (2) supplementation is unnecessary, as facial challenges such as those proposed by the Petitioners in this particular case go to questions of law, not of fact.[5]

This Court has yet to review the record below, but notes that Petitioners did not take issue with Respondents' Assertions that the Board below heard much of the proffered testimony. This Court, having reviewed the Petitioner's pleadings and the potential witnesses to be presented, find that supplementary testimony would is not "needed" in order to decide the disputed issues in this case. Though *Guimont*[6] appeared to chastise the petitioners' failure to demonstrate that a regulation rendered property useless in all respects, there is no discussion therein as to supplementation of the record in any way. The interim ruling in *OSF 2015* does not set down a **requirement** that this Court take supplemental testimony to address the facial challenges propounded by the Petitioners. This Court still retains the discretion to determine whether the supplementation proffered by Petitioners is **needed** to decide disputed issues; it finds that it is not.

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[4] City of Bainbridge Island's Brief, 7: 16-20, Ecology's Response, 5: 6-11.

[5] City of Bainbridge Island's Brief, 6: 16, Ecology's Response, 4: 17.

[6] *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1(1993).

Having considered the foregoing material, it is hereby **ORDERED, ADJUDGED AND DECREED** that:

Petitioners' Motion requesting to supplement the record in this matter is **DENIED.**

DATED this 12th day of October 2017.

s/ Jeffrey P. Bassett
JUDGE JEFFREY P. BASSETT

Appendix C-1

Filed
Supreme Court
State of Washington
7/8/2020
By Susan L. Carlson
Clerk

THE SUPREME COURT OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al. Petitioners, v. CITY OF BAINBRIDGE ISLAND, et al. Respondents.	No. 98365-8 O R D E R Court of Appeals No. 80092-2-I

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, González, Yu, and Whitener, considered at its July 7, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied. The Respondent's motion to strike the reply to the answer to the petition for review is granted.

DATED at Olympia, Washington, this 8th day of July, 2020.

For the Court

s/ Debra Stephens, C.J.
CHIEF JUSTICE

Appendix D-1

BEFORE THE SUPERIOR COURT FOR THE COUNTY OF KITSAP
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, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc., Petitioners, and Kitsap County Association of Realtors®, Intervenor Below vs.	No. 15-2-00904-6 AMENDED PETITION FOR JUDICIAL REVIEW

Appendix D-2

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 Defendants.	

Petitioners and Plaintiffs allege as follows:

INTRODUCTION

This case challenges the City of Bainbridge Island's revised Shoreline Management Program (SMP), adopted under the Shoreline Management Act (SMA). The SMP contains numerous violations of the SMA, as well as violates the constitutional rights of citizens to due process, equal protection of the law, and the protection against the taking of property without prior payment of just compensation. Because the Growth Management Hearings Board (Board) found no violations of the SMA, this action seeks judicial review of the Board's decision and a declaration that the City, and the Department of Ecology (Ecology) in approving the City's action, have violated the constitution as more fully set forth below.

* * * * *

15. In addition, the Board's decision is unlawful in that it approved the City's SMP which is unconstitutional as articulated below:

16. The SMP violates Plaintiffs' and their members rights to substantive due process as being arbitrary, capricious or unduly oppressive in at least the following respects:

a. Requiring City approval for any human activity in the shoreline area.

b. Requiring vegetation replanting for any alteration of native vegetation within the shoreline jurisdiction or any vegetation within the shoreline buffer.

c. Requiring a clearing permit for any change in vegetation.

d. Giving the City control over landscaping decisions on private property, including:

i. Choice of species;

ii. Choice of plant location; and

iii. Choice of when and how to prune, maintain or remove;

e. Regulating all use of the property without regard to development.

f. Using private property for public purposes.

17. Plaintiffs contend that the SMP violates due process because it is void for vagueness in the following particulars:

a. The SMP gives the shoreline administrator unlimited discretion regarding docks and piers.

b. The City's approval requirements are triggered by "activity" which is defined as "human activity associated with the use of land or resources." SMP at p. 224.

c. SMP 4.1.2.4(2)(a) gives the administrator power to condition uses and activities "even if no permit is required."

d. When nonconforming uses are allowed to be re-established, the re-established use must be "restricted." SMP 4.2.1.5.2. Nothing explains the nature or extent of such restrictions that might apply.

g. SMP 4.1.3.5.1 prohibits disturbance of vegetation, the extent to which is completely unclear.

f. SMP 4.1.3.6 establishes the shoreline buffer. The exact buffer to be placed on any property is subject to vague standards to be applied by the Shoreline Administrator. SMP 4.1.3.6.3.

g. The City's Shoreline Administrator may require retention of "significant trees" SMP 4.1.3.1(6).

h. The SMP is vague in referring either to other sections of the SMP or city codes which do not exist.

i. The Shoreline Administrator is authorized to allow exceptions to planting of native vegetation, but only if he or she is convinced it will serve the same ecological function as native plants. SMP 4.1.3.1 (5).

j. The buffers within critical areas may increase 50 % for wildlife habitat.

18. The SMP subjects Plaintiffs and their members to unconstitutional conditions. For instance, any changes or disturbance of any native vegetation

on site or any vegetation in the shoreline buffer require the dedication of a perpetual conservation easement subject to the City's vegetation and revegetation retention standards and perpetual dedication of labor and services (requirement to nurture and maintain plants). Property owners are required to pay to replace any vegetation that may not survive for any reason. Property owners are required to give an easement to government agents for a minimum of 5 years to enter upon property assure that city-dictated plants are properly nurtured and maintained.

19. Conditions are imposed without any sense of proportionality or causal connection between damage and human activity. For instance, if the shoreline buffer is altered, the property owner must guarantee a 65% canopy within 10 years regardless of the extent of the buffer alteration. Similarly, re-vegetation requirements apply regardless of whether there is any development activity.

20. When mitigation is required for shoreline stabilization due to site disturbance, a specific planting plan is required regardless of the extent of the site disturbance.

21. If one is rebuilding a house, the City requires a restriction placed on title promising no bulkhead for "life of the development." SMP 4.2.1.6.1.3(b). If building a new house, the City conditions the permit with a prohibition on a bulkhead for 100 years. SMP 6.1.5.4. Similarly, a condition on subdivisions requires no bulkhead for 100 years. SMP 5.9.8.1.

22. Plaintiffs and their members are subject to a taking or damaging of property interests without

prior payment of just compensation as required by Article I, Section 16 of the Washington Constitution and without payment of just compensation under the Fifth Amendment to the United States Constitution.

23. For instance, the denial of the right to build a dock constitutes a denial of access to water for navigation purposes, which is property right.

24. The SMP prohibits landowners from protecting land from erosion, unless a house is in danger and prohibits protecting land without a house or primary structure. SMP 6.2.4.4 and 6.2.8.1.

25. The SMP takes property by mandating that property owners leave downed vegetation for wildlife and create conservation easements for the benefit of the City.

26. Plaintiffs and their members are subjected to unequal protection of the law. For instance, a nonconforming use may be resumed only if it was in a nonconforming structure that was destroyed by accident. There is no rational basis for prohibiting a nonconforming use to be resumed if was in a conforming structure.

27. The SMP's regulation of the types of plants that can be planted in one's garden interferes with the homeowners' freedom of expression. A homeowner or gardener should be allowed the full range of choices for the style of personal yards, homes and gardens. The City should not be able to interfere with such expression without a compelling reason. This feature of the SMP also violates Article I, Section 7 of the Washington Constitution.

28. SMP 7.2.1 purports to authorize site inspection without a warrant. Administrative inspections are not permissible without a warrant.

29. Plaintiffs are entitled to a declaration of rights and obligations under the statutes and constitutional provisions because the City's and DOE's actions have and will continue to result in substantial and actual injury to Plaintiffs.

30. A ruling by this Court will terminate the controversies between Plaintiffs, the City, and Ecology.

RELIEF REQUESTED

Wherefore, Petitioners and Plaintiffs now respectfully request the Court to award the following relief:

A. An order reversing the Board's decisions;

B. An order declaring the rights and responsibilities of Plaintiffs and Defendants with regard to the SMP;

C. An order declaring provisions of the SMP to be unconstitutional as previously alleged;

D. An award of costs in this action; and

E. Such other and further relief as the Court deems just and equitable.

RESPECTFULLY submitted this 22nd day of September, 2017.

STEPHENS & KLINGE LLP

By: s/ Richard M. Stephens
Richard M. Stephens, WSBA #21776
Attorneys for Petitioners

No. ____

In the
Supreme Court of the United States

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et al.,

Respondents.

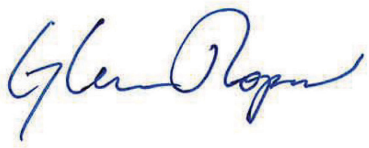
On Petition for Writ of Certiorari to the Washington State Court of Appeals

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 8,655 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 2020.



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No. ____

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.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 3rd day of December, 2020, send out from Omaha, NE 3 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 3rd day of December, 2020.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
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