No. 18-1429

In The
Supreme Court of the United States

STAHL YORK AVE. CO., LLC,

Petitioner,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the Appellate Division,
Supreme Court of New York

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders of the United States ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all new homes constructed in the United States annually.

NAHB is a vigilant advocate in the nation's courts. Many of its members own real property. Therefore, NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Courts have consistently declined to defer to agency interpretations that "raise serious constitutional questions." *U.S. West, Inc. v. Federal Communications Comm'n*, 182 F.3d 1224, 1231 (10th Cir. 1999). Despite this hard-stop at the Constitution, however, the lower court in this case nevertheless extended deference to a local municipal agency in its adjudication of Petitioner's Fifth Amendment takings claim.

Even before this Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984) courts have considered agency positions on regulatory matters under judicial review. *See, e.g., Surgett v. Lapice,* 49 U.S. 48, 68, 8 How. 48 (1850) (cited by Justice Sotomayor at oral argument in Transcript of Oral Argument, *Kisor v. Wilkie,* No. 18-15 (March 27, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-15_3314.pdf). *Chevron* instructs courts to defer to an agency's reasonable interpretation of its organic statute where Congress has left an ambiguity to fill. *See Chevron,* at 843 (describing the two-step analysis of when to defer to an agency's "permissible construction" of a statute.). As of this writing, courts also remain obligated to defer to an agency's interpretation of its own regulation. *Auer v. Robbins,* 519 U.S. 452 (1997); Transcript of Oral Argument, *Kisor* (No. 18-15).

Further, the practice of deferring to an agency's interpretation or decision exists for several important reasons, such as the agency's subject

matter expertise of the action being litigated and its familiarity with its originating statute. None of those factors are present here.

NAHB urges this Court to grant the petition for certiorari to make clear that courts should not defer to agency interpretations of constitutional questions.

ARGUMENT

I. THE NEW YORK COURTS ERRONEOUSLY DEFERRED TO AN AGENCY'S DECISION OF A CONSTITUTIONAL ISSUE.

The trial and appellate courts in this case based their dismissal of Petitioner's takings claim on conclusions developed by the City of New York's Landmarks Preservation Commission (LPC). Petitioners Appendix at 17-18*, In the Matter of Stahl York Ave. Co., LLC v. City of New York, et al.,* No. 18-1429 (May 10, 2019) ("Pet. App."). The LPC is a municipal preservation agency created through legislation by the City of New York. However, this Court and others have made clear that courts cannot defer to an agency's interpretation of a constitutional question.

A. Courts Do Not Defer to Agency Interpretations of Constitutional Questions.

It is a well-established principle that courts do not defer to an agency's interpretation of the Constitution. *See, e.g., U.S. West, Inc.,* at 1231 ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."); *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988)("The federal Judiciary does not, . . . owe deference to the Executive Branch's interpretation of the Constitution.")(citing *U.S. v. Nixon*, 418 U.S. 683, 703-05 (1974)); *Northern Arapaho Tribe v. Ashe*, 92

F.Supp.3d 1160, 1171 (D. Wyo. March 12, 2015)("No deference is given to an administrative agency's interpretation of the Constitution.").

The rationale for this principle is clear – courts are charged with "saying what the law is." *Nixon*, at 704-5. The Constitution is an area of "presumed judicial competence," *Akins v. FEC,* 101 F.3d 731, 740 (D.C. Cir. 1996), and separation of powers dictates that the federal courts are the only branch that may decide the constitutionality of an action. *See Nixon,* at 704 ("Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'")(internal citations omitted); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F.Supp.3d 1191, 1232 (D. N.M. Oct. 22, 2014)("Courts have superior competence in interpreting – and constitutionally vested authority and responsibility to interpret – the content of the Constitution.").

Nonetheless, the New York Supreme Court deferred to the LPC's conclusions when it dismissed Petitioner's Fifth Amendment takings claim. For example, the court deferred to the LPC's view on what constituted the "relevant parcel" at issue in this case. Pet. App. at 51 ("Respondents have demonstrated that the determination that the entire lot is the relevant improvement parcel is rational and not arbitrary and capricious and, therefore, the agency determination must be upheld."). The court claimed it was duty-bound to defer to an "administrative agency's rational interpretation of

its own regulations *in its area of expertise*." Pet. App. 53 (emphasis added). However, "relevant parcel" is one element of a legal determination – an interpretation of Supreme Court precedent – used to discern whether just compensation is required under the Fifth Amendment. *See, e.g., Murr v. Wisconsin,* 137 S. Ct. 1933 (2017); *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978); *Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111 (Fed Cir. 2015), *cert. denied* 137 S. Ct. 2325 (2017). The LPC's stated purpose is the designation and regulation of properties as historic within the City of New York – and not interpreting the U.S. Constitution.[2] Thus, the opposite is true – the court was duty-bound to conduct its own analysis to determine the nature of the relevant parcel – a question of constitutional interpretation.

The Supreme Court, Appellate Division, fared no better. In its brief *Penn Central* analysis, the court again relied on the agency's decision to determine whether a Supreme Court-created test of a Constitutional claim is satisfied. Pet. App. at 22 ("*As the LPC determined*, the buildings in question are capable of earning a reasonable return . . . ") (emphasis added).

Petitioner clearly articulates the substantive concerns with the LPC's faulty, biased reasoning, Petition for Writ of Certiorari at 13, 26, *Stahl York Ave. Co., LLC v. The City of New York,* No. 18-1429 (May 10, 2019) ("Pet'rs Brief"), but procedurally, the

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[2] https://www1.nyc.gov/site/lpc/about/about-lpc.page (last visited June 10, 2019).

court should not have solely relied on the agency's position on these legal tests in the first place. This Court should grant the petition to affirm that judges alone are empowered to interpret the Constitution.

B. The Rationales for Agency Deference Are Not Present in This Case.

Courts have long recognized that agencies possess specialized knowledge of the areas they regulate, and of the statutes they are charged with implementing. *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)(finding that agency "rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). In *Chevron*, this Court provided a now widely-familiar two-step process for determining whether courts should defer to an agency's interpretation of its organic statute – the statute by which Congress created the agency and/or bestowed it with authority to act. *Chevron,* at 843. This Court listed several factors under which deference to agency action makes sense: "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasonable fashion, and the decision involves reconciling conflicting policies." *Id.* at 865. Thus, deference to agency action is most appropriate where the agency decision is technical, fact-based, and the subject matter is in the agency's area of expertise. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005)(holding that the FCC correctly resolved questions involving a "subject matter [that] is technical, complex, and dynamic," and correctly used

its "expert policy judgment" to do so.); *Northern Arapahoe Tribe v. Ashe,* at 1170 ("A court reviewing an informal adjudication must accept the administrative agency's *factual* determinations unless they are 'arbitrary [or] capricious.'") (emphasis added).

Finally, the administrative process involves the solicitation of all views and requires agency consideration of these views when determining how to proceed. *See General Motors v. Ruckelshaus*, 742 F.2d 1561, 1583 (D.C. Cir. 1984)(describing a legislative rulemaking as one that hears from all sides to a proposed action).

These factors are not present in this case. The LPC, while perhaps an expert on the City of New York's historic preservation laws, is by no means an expert on the Constitution, the Fifth Amendment, or the takings clause. Indeed, the LPC did not consider in any way whether a taking would occur if it denied Petitioner's hardship exception, because the taking did not occur *until* the LPC denied the request for an exception. Thus, it is wholly inappropriate for the New York courts to give any deference to the LPC's opinions on the hardship exception when they consider whether that action has violated the Constitution.

There is little to suggest that the LPC solicited all view points and responded to all substantive comments, despite Petitioners' attempts to provide the LCP with detailed information. *See* Pet. App. 42 (describing Petitioner's submission to the LPC on the hardship exception before it).

The lower courts' extension of deference to the LPC's so-called analysis violates precedent and fails to satisfy the core justifications for deferring to agencies. This Court should grant the petition to unequivocally state that deference to agency positions on constitutional questions is contrary to the law.

II. COURTS HAVE HELD THAT CONSTITUTIONAL CLAIMS SHOULD BE ADJUDICATED SEPARATELY.

It is not uncommon for a party to bring claims arising out of multiple statutory, constitutional, or common law sources. Nonetheless, courts have held that the standard of review must fit the source law. In *Federal Communications Comm'n v. Fox Television Stations, Inc.,* 556 U.S. 502 (2009), this Court recognized that while a regulatory action may be upheld under the APA's "arbitrary and capricious" standard of review, "its lawfulness under the Constitution is a separate question to be addressed in a Constitutional challenge." *Id.* at 516. *See also Webster v. Doe*, 486 U.S. 592 (1988)(finding that while an agency's conduct had not violated the APA, its conduct nonetheless could be reviewed for failure to comply with the Constitution.); *Northern Arapahoe Tribe,* at 1171("When reviewing a constitutional challenge to agency action, the district court must treat the constitutional challenge under the APA separately from an arbitrary and capricious challenge.")(citing *Fox*).

Thus, courts are to treat each claim as distinct. Part of the rationale for separate treatment is that it is entirely possible that an agency action may satisfy the APA, but still violate the Constitution. *See, e.g., Webster*, at 601-4 (finding that, while the respondent CIA agent's APA claim failed to overcome APA section 701's limited exceptions to judicial review, the agent's constitutional claim could go forward)*; Northern Arapaho Tribe,* (finding that the U.S. Fish and Wildlife Service's permit action was not arbitrary and capricious, but did violate the Free Exercise Clause of the Constitution).

Here, the New York courts failed to maintain this distinction when it came to Petitioner's New York State Administrative Procedure Act (SAPA) Article 78 claim and its Fifth Amendment takings claim. For example, in considering which property constitutes the "relevant parcel" – a key element of demonstrating a Fifth Amendment taking that has no regulatory parallel – the court repeatedly used administrative review terminology, demonstrating its conflation of the two distinct claims. The court held that "if . . . the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." *See, e.g.,* Pet. App. 52-3. While the Court's holding is accurate in the context of reviewing agency administrative compliance, it directly conflicts with precedent requiring courts to review constitutional claims *de novo. See supra* Section I.A. The justification for separately adjudicating the two claims is made

abundantly clear by the confusion that was sown in Petitioner's case when the two claims were combined.

A grant of certiorari is needed here to end the confusion and clarify for courts that constitutional and other types of claims must be separately adjudicated.

III. THE ADMINISTRATIVE RECORD GENERATED IN THIS CASE CANNOT BE USED TO DECIDE A CONSTITUTIONAL CLAIM.

This Court has not yet definitively stated whether a court must use an administrative record when deciding claims that arise outside of the federal Administrative Procedure Act (APA) or the relevant state law equivalent.[3] However, this Court and other courts have held that constitutional and statutory claims must be considered separately, and that the deference due to an agency action does not apply to constitutional concerns.

Even in cases where the agency action at issue is not questioned as faulty, courts nonetheless consider whether the complained-of activity violates the Constitution where such a claim is raised. At a minimum, in the context of Fifth Amendment

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[3] It is an open question whether courts should use an administrative record for both an APA claim and a Constitutional claim. *See, e.g., Northern Arapahoe Tribe,* at 1174 ("[T]he Supreme Court [has] not definitively addressed the question of whether constitutional review of agency action is limited to the administrative record.").

takings claims, any administrative record generated in a related action cannot form the complete basis for judicial review because critical elements will be missing.

A. The Administrative Record is Used by Courts to Review Final Agency Action That is The Object of The Record.

As with agency deference, it is helpful to ponder the rationale behind using the administrative record in a challenge to agency action in order to better understand why the New York courts' use of the LPC docket was inappropriate here.

The administrative record has evolved to become an integral part of the rulemaking process. The administrative record encourages public participation by providing an open and accessible location for the public to view agency proposals and supporting documents, as well as comments filed by other members of the public. The record also provides the basis for the agency's decision on whether to adopt a rule, and if so, the provisions that should be included in the rule. Finally, the record assists the court in reviewing a challenged regulation. Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 320 (4th ed. 2006).

Thus, courts defer to the administrative record in the context of a regulatory action because the record forms the basis of the action itself. Indeed, an agency must base its regulatory action on the information in the record. Considering information not in the record – or conversely, failing to consider

information that is contained in the record – opens the rule up to challenge. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(holding that an agency action that "failed to consider an important aspect of the problem" or "runs counter to the evidence before the agency" will be found on review to be arbitrary and capricious).

Once again, it becomes clear that none of the factors that make the administrative record relevant to adjudication are present in Petitioner's case. As the Petitioner states, the record lacks critical information required to consider whether a taking has occurred – because the LPC's record was not created for this purpose. Pet'rs Brief at 14-5.

Administrative agencies are required to propose regulatory actions with a certain level of specificity so that the public can understand the nature and provisions of the contemplated regulatory action. APA, 5 U.S.C. § 553(b)(3). If the proposal fails to raise elements that ultimately appear in the final rule, the regulation may be vacated for failing to be the "logical outgrowth" of the proposal. *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-1080 (D.C. Cir. 2009). Any attempt to reconcile the logical outgrowth requirement with the administrative record in Petitioner's case illustrates the utter inapplicability of the administrative record to Petitioner's takings claim. The LPC did not propose to take Petitioner's property; instead it adjudicated its request for a hardship exception from the local historic preservation regulations. And while the LPC's decision not to grant the exception

caused the taking, that was not, in fact, the LPC's agency action – the action it took was to determine that the exception should be denied. Therefore, the record is lacking evidence establishing that a taking occurred because the taking was never the focus of the administrative record.

When courts use the administrative record to review a constitutional claim stemming from an agency action, these courts also have considered whether the record contained the information necessary to adjudicate the constitutional claim. *See, e.g., Northern Arapahoe Tribe,* at 1171 (finding that the court will limit itself to review of the administrative record unless an exception applies). Courts have noted also that exceptions exist that allow the record to be supplemented. *Id.* In this case, significant elements of a takings claim are left unanswered by the record, such as how to define the unit of property or the value taken. Pet. App. 23.[4] The court should therefore have allowed Petitioner to develop a record on the takings claim.

B. Takings Claims, Even When Rooted in Agency Action, Are Not Adjudicated on The Administrative Record.

The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for public

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[4] While *amicus* takes no position at this time on a bright-line rule on the use of administrative records to review constitutional claims, Petitioner's case provides an example where using an administrative record for a constitutional claim falls decidedly short.

use, without just compensation." Takings claims can be brought against the federal government or state governments, and constitute a complex and continually evolving legal regime.[5]

Land use takings claims are a unique Constitutional challenge because the remedy is always monetary compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Unlike violations of other constitutional rights, declaratory judgment or injunctive relief cannot constitutionally remedy the injury if indeed a taking of private property has occurred. Interestingly, the APA's judicial review jurisdiction is restricted solely to cases demanding relief other than monetary damages. 5 U.S.C. § 702.

As with other cases involving agency action, the action itself may satisfy the APA or relevant state administrative procedure rules, but constitute a taking nonetheless. In these instances, courts have not limited themselves to the administrative record. Often, the administrative record is not even included in the case. Instead, the court considers only the facts relevant to determining whether a taking has occurred. *See, e.g., Florida Rock Indus., Inc. v U.S.,* 18 F.3d 1560, 1563 (Fed. Cir. 1994) (recognizing that the permit denial was not in dispute in Florida

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[5] This Court has before it a case related to the circumstances under which takings claims can be brought in federal court. *Knick v. Township of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), *cert. granted in part* 138 S. Ct. 1262 (2018) (No. 17-647).

Rock's litigation whether the denial constituted an uncompensated regulatory taking of its land). As the court in *Florida Rock* stated, "It is for the trial court as an initial matter to determine whether the Government acted within its proper role in the circumstances presented by the case of *Florida Rock.*" *Id.* at 1571.

Likewise, it was for the New York courts to independently consider Petitioner's taking claim. Deference may have its place in a complex, federal administrative regime, but it has no place in adjudicating constitutional concerns.

CONCLUSION

For the above-going reasons, *amicus* respectfully requests that this Court grant the petition.

Dated: June 13, 2019

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