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

RICHARD M. STEPHENS
Stephens & Klinge, LLP
601 108th Avenue NE
Suite 1900
Bellevue, WA 98004
Telephone: (425) 429-2532

GLENN E. ROPER
Counsel of Record
DEBORAH J. LA FETRA
BRIAN T. HODGES
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
GERoper@pacificlegal.org

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).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitional Provision

Statutes

Administrative Codes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

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

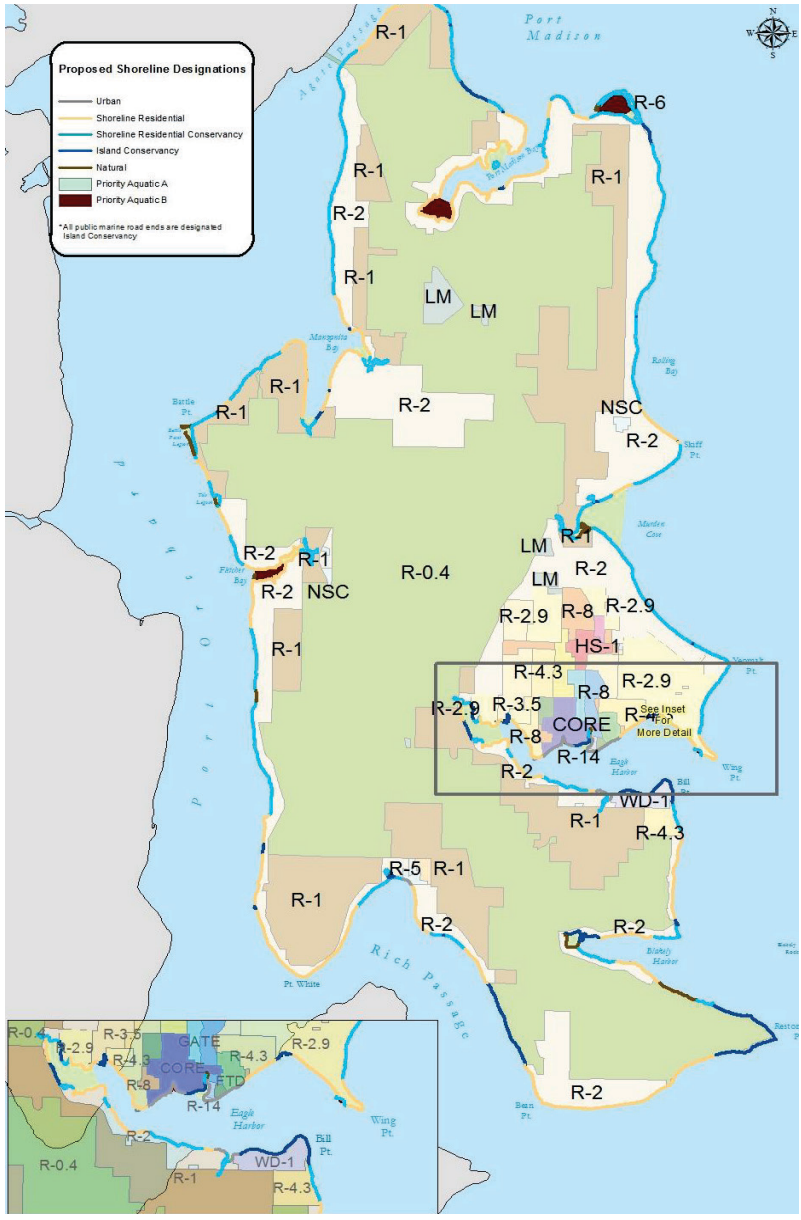
denied the ability to introduce evidence regarding disputed elements of constitutional claims.

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.

---

[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.

---

[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.

---

[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

---

[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.

---

[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

---

[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,

RICHARD M. STEPHENS
Stephens & Klinge, LLP
601 108th Avenue NE
Suite 1900
Bellevue, WA 98004
Telephone: (425) 429-2532

GLENN E. ROPER
Counsel of Record
DEBORAH J. LA FETRA
BRIAN T. HODGES
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Counsel for Petitioners