No. 20-787

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 Court Of Appeals

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Founded in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance civil justice and the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

The important question presented by this appeal—whether due process requires that private property owners be allowed to present scientific testimony and other evidence needed to support and resolve a previously unadjudicated judicial challenge to the constitutionality of a land-use regulation—implicates two of the Atlantic Legal Foundation's primary civil justice concerns: (i) the need for courts to protect

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[1] Petitioners' and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

individuals from uncompensated takings of their private property by governmental entities, and (ii) the need for courts to admit and consider the most current, complete, accurate, and reliable expert testimony, studies, and data in any type of litigation where an understanding of scientific matters is required. Over the years the Foundation has filed numerous *amicus* briefs on both of these subjects.

For example, the Foundation has advocated for the constitutional rights of property owners in Takings Clause cases such as *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). This Court explained in *Koontz* that its decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)—cases which apply the doctrine of unconstitutional conditions in a way "that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits"—are precedents that "provide important protection against the misuse of the power of land-use regulation." *Koontz,* 570 U.S. at 599, 604.

The Foundation also is a steadfast advocate for use of sound science in judicial and regulatory proceedings. For example, the Foundation submitted *amicus* briefs on behalf of renowned scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently citied scientists) in each of the "*Daubert* trilogy" of cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Court quoted the

Foundation's brief on the meaning of "scientific . . . *knowledge*" as used in Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 590 ("Indeed, scientists do not assert that they know what is immutably 'true'— they are committed to searching for new, temporary theories to explain, as best they can, phenomena.") (quoting Brief for Nicholaas Bloembergen, *et al.* at 9).

The Atlantic Legal Foundation urges the Court to grant the Petition for Writ of Certiorari in this appeal. As a matter of due process, state law—here, the State of Washington's Administrative Procedure Act ("APA")—should not be construed to bar property owners from presenting expert scientific testimony and other evidence needed to vindicate their Takings Clause and other federal constitutional rights in the first forum—here, a Washington state trial court—with jurisdiction to consider their constitutional challenge to an extraordinarily intrusive land-use regulation.

SUMMARY OF ARGUMENT

"In this age of science, science should expect to receive a warm welcome, perhaps a permanent home, in our courtrooms." Stephen Breyer, *Science in the Courtroom*, Issues in Science and Technology, Summer 2000, at 1.[2] But in this litigation, the Washington state courts have closed their doors to science. They have categorically refused to allow introduction of expert scientific testimony needed to support and resolve the Petitioner property owners' claims that the City of Bainbridge Island's state-approved Shoreline Master Plan ("SMP") is

[2] Available at https://issues.org/breyer/

unconstitutional, including because it fails to satisfy the two-part, "essential nexus / rough proportionality" unconstitutional conditions test that this Court established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*¸ 512 U.S. 374 (1994).

According to the state court of appeals, the property owners' scientific testimony and other evidence cannot be introduced in the state superior court because the Washington APA limits judicial review of the property owners' constitutional claims to the administrative record generated by a state regulatory review board that has no authority to entertain or adjudicate constitutional issues. Because the Washington Supreme Court declined to review this blatant deprivation of the property owners' due process rights, *see* Pet. at 20-21 (discussing the well-established right to present evidence), this Court's intercession is needed.

The Fifth Amendment's Takings Clause, made applicable to states through the Fourteenth Amendment, is a fundamental part of the Bill of Rights. *See Dolan*, 512 U.S. at 392. "Under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right — here the right to receive just compensation when property is taken for a public use — in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* at 385. The Bainbridge Island property owners contend that is the situation here, i.e., the SMP's mitigation measures, such as mandatory buffer zones and conservation

easements, lack an "essential nexus" with and "rough proportionality" to the supposed ecological impacts of the multitude of on-site private property activities for which the SMP requires the City's approval.

The SMP is expressly predicated on the "precautionary principle," a widely debated regulatory policy under which the breadth and severity of risk mitigation measures corresponds to the *unavailability* of scientific risk information. Making extensive use of the precautionary principle, the SMP's risk mitigation measures reflect broad, non-site-specific *assumptions* about the adverse ecological impacts of shoreline property owners' cumulative activities.

Because precautionary principle assumptions are intended to fill critical data gaps, they are not a substitute for current, accurate, reliable, and readily available scientific information. Nor can such assumptions satisfy the *Nollan/Dolan* nexus and proportionality standards. Instead, where as here, expert scientific testimony relevant to property owners' claims that a land-use regulation imposes unconstitutional conditions is proffered, a reviewing court should allow and consider such testimony. Due process demands nothing less.

ARGUMENT

The Question Presented Is Important Because Judicial Review of a Land-Use Regulation's Constitutionality Should Be Informed By the Most Current, Accurate, and Reliable Scientific Evidence Available

A. Bainbridge Island's Shoreline Master Program relies on the "precautionary principle" to fill critical gaps in the legislative record

Under the State of Washington's Shoreline Management Act, Wash. Rev. Code §§ 90.58.010–.920, local governments are "required to adopt and administer a Master Program . . . a combination of planning policies and development regulations that addresses shoreline uses and development." *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office*, 199 Wash. App. 668, 680 (2017). When adopting or updating their shoreline master programs, "local governments shall to the extent feasible . . . utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences [and] all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data." Wash. Rev. Code § 90.58.100(1)(a) & (e). Further, local governments "shall to the extent feasible . . . [c]onduct or support such further research, studies, surveys, and interviews as are deemed necessary." *Id.* § 90.58.100(1)(d).

The Washington State Department of Ecology's implementing regulations provide that "[t]o satisfy the requirements for the use of scientific and technical information in [§] 90.58.100(1), local governments *shall . . . identify and assemble the most current, accurate, and complete scientific and technical information available* that is applicable to the issues of concern." Wash. Admin. Code § 173-26-201(2)(a) (Basic concepts. Use of scientific and technical information.) (emphasis added). Local governments must, "[a]t a minimum, *make use of* and, where applicable, incorporate *all available scientific information* . . . from *reliable sources of science*." *Id.* (emphasis added); *cf.* Wash. Rev. Code § 36.70A.172(1) (Critical areas—Designation and protection—Best available science to be used.) ("In designing and protecting critical areas . . . counties and cities shall include the *best available science* in developing policies and development regulations to protect the functions and values of critical areas.") (emphasis added); *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash. App. 250, 266 (2011) ("In developing land use regulations, a county *must include the best available science* to protect the functions and values of critical areas. . . . [T]he phrase is generally interpreted to require local governments to analyze valid scientific information in a reasoned process.") (emphasis added).

The Petition for Writ of Certiorari explains, however, that Respondent City of Bainbridge Island chose to ignore these statutory and regulatory mandates to assemble and use current, accurate, complete, reliable, and available scientific information when updating its local SMP. *See* Pet. at 7, 10-11,

11 n.2. Instead, the City has attempted to justify the SMP's extraordinarily broad, burdensome (and unconstitutional) land-use requirements by explicitly relying on the so-called "precautionary principle" to fill or circumvent critical data gaps in the legislative record. *See* SMP § 1.2.3 (Development of the City's Shoreline Master Program) ("The 'precautionary principle' was employed as guidance in updating the policies and regulations of this SMP. . . . [The precautionary principle] states, in part that 'as a general rule, the *less known* about existing resources, the *more protective* shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources.'") (emphasis added);[3] *see also* Wash. Admin. Code § 365-195-920 (Dep't of Ecology) (Criteria for addressing inadequate scientific information.) ("Where there is . . . incomplete scientific information . . . [a] '*precautionary* or a *no risk* approach'" should be used.) (emphasis added).

In other words, when the precautionary principle is applied to governmental land-use planning, incomplete or inadequate scientific information serves as the rationale for imposing aggressive risk mitigation measures (e.g., mandatory buffer zones and conservation easements), which necessarily exact private property or otherwise impair private property rights.

Rather than making use of the best available scientific information, or obtaining new information, to identify and mitigate the actual or potential,

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[3] The City's Shoreline Master Program (Ordinance No. 2014-04) is available at https://tinyurl.com/y9c9ezec.

site-specific ecological impacts of existing or future shoreline development, the City's state-approved SMP relies on a vague, expansive, and distinctly *unscientific* precautionary principle approach to gloss over critical data gaps and rationalize its onerous, indiscriminate, disproportionate, and invasive mitigation measures. *See* Pet. at 10 (explaining that by relying on the precautionary principle, the City used "deliberate ignorance as a reason to impose dramatically expanded regulation").

The SMP simply assumes, for example, that the island's more than 50 miles of marine shoreline is fully intact, and that all abutting shoreline properties are fully forested with mature vegetation. *Id.* at 4, 11 n.2. Based on demonstrably inaccurate, worst-case, non-site-specific "precautionary" assumptions like these—along with incomplete, outdated, and/or inapposite studies, *see id.* at 10; App. A-4—the SMP imposes sweeping risk-mitigation measures that encompass all "human activity associated with the use of land or resources" within 200 feet of the shoreline, including mandatory shoreline conservation easements on all developed shoreline lots. Pet. at 11, 12.

Neither the City's SMP revision process nor the Washington Growth Management Hearing Board's subsequent administrative review proceeding afforded the property owners a meaningful opportunity to submit scientific evidence relevant to the SMP's mitigation measures. *See id.* at 7, 8, 13. The superior court should have done so since the litigation that the property owners filed in that court in accordance with the state APA—and from which this appeal arises—affords the property owners their *first opportunity* to

challenge the SMP's constitutionality. *See* Pet. at 8-10, 14-15; App. B-2 ("The Board below was not empowered or authorized to make determinations regarding questions of constitutionality."); A-7 ("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."); *see, e.g.*, *Aho Constr. I, Inc. v. City of Moxee*, 6 Wash. App. 2d 441, 462 (2018) ("The [superior] court . . . agreed to hear the property owners' due process challenge to a critical areas regulation because the [growth] board lacked jurisdiction to resolve constitutional challenges.").

But the superior court—indicating that it can act only in an appellate capacity with regard to a Growth Board decision that did not, and under Washington law could not, address the constitutionality of the SMP—denied the property owners' request to supplement the administrative record for the purpose of submitting scientific and other testimony in support of their constitutional claims. *See* App. B-3 ("This Court acts in an appellate capacity with respect to its review of the Board decisions [and] the Court's review . . . is most always confined to the agency record."). The state court of appeals, citing sections of the state APA, affirmed. *See* App. A-7 ("Regardless of the issues raised in an APA appeal, 'APA judicial review is limited to the record before the agency.'") (quoting *Samson v. City of Bainbridge Island*, 149 Wash. App. 33, 64 (2009)) (citing Wash. Rev. Code § 35.05.558).

The "record before the agency" in this case, however, features an SMP that fills critical scientific gaps in the City's legislative record with

precautionary principle assumptions. Those flimsy assumptions are neither an adequate nor appropriate substitute for the expert scientific testimony and other evidence that the property owners seek to present for the purpose of delineating and substantiating their constitutional challenge to the SMP, particularly their claims arising under the doctrine of unconstitutional conditions. *See* Pet. at 15-16 (explaining that the proposed expert testimony would address the types of scientific studies needed to assess nexus and proportionality of the SMP's mandatory conservation easements); *see also* App. A-4 (describing the property owners' proffered scientific testimony). This Court's intercession is needed to ensure that when called upon to review the constitutionality of a land-use regulation such as Bainbridge Island's SMP, a trial court is not confined to the precautionary principle assumptions on which the land-use regulation is based, but instead, can and should be informed by the most accurate, complete, and reliable scientific information that is available.

B. The precautionary principle is not a substitute for current, accurate, reliable, and readily available scientific information

Legal scholars have explained that "[t]he precautionary principle simply reflects the classic adage: Better safe than sorry." Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 Wash. & Lee L. Rev. 851 (1996). "The principle suggests that government should take precautions to protect public health and the environment, even in the absence of clear evidence of harm and

notwithstanding the costs of such action." *Id.* This is a "simple idea for the regulation of risk: In case of doubt, follow the *precautionary principle.* Avoid steps that will create a risk of harm. Until safety is established, be cautious; do not require unambiguous evidence" of risk. Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003, 1003-04 (2003).

The precautionary principle is "[a]n amorphous pillar of contemporary environmental theory." *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 137 n.56 (D.D.C. 2014). When used in environmental decision making, the precautionary principle typically "has four central components: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making." David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 Envtl. Health Perspectives 871 (Sept. 2001).

Although the precautionary principle has become "a mantra for the green movement," Cross, *supra* at 851, it has its critics. *See, e.g.*, *id.* at 851-52 ("[T]he precautionary principle is deeply perverse in its implications for the environment and human welfare."); Sunstein, *supra* at 1004 ("[T]he precautionary principle provides help only if we blind ourselves to many aspects of risk-related situations and focus on a narrow subset of what is at stake."); Kriebel et al., *supra* at 872 (summarizing "[p]oints of

opposition" in "the lively debate" about "the usefulness of the precautionary principle"); *see also Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 918 (D.C. Cir. 2017) ("This approach to regulation has been criticized.") (citing Sunstein, *supra*).

For better or worse, Bainbridge Island's SMP expressly relies on the "'precautionary principle' . . . as guidance in updating the policies and regulations of [the] SMP." SMP § 1.2.3. More specifically, the SMP incorporates by reference the State Shoreline Guidelines, which declare that "the less known . . . the more protective" an SMP should be. Wash. Admin. Code § 173-26-201(3)(g). This Department of Ecology guidance reflects a *policy* choice rather than a scientific judgment. *See generally Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1140 (9th Cir. 2016) (an ecology-related precautionary approach is a "policy choice, not a scientific determination").

Like virtually all descriptions of the precautionary principle, "the less known . . . the more protective" policy set forth in the Shoreline Guidelines, and incorporated into the City's SMP, is predicated on a *lack* of adequate risk-related knowledge about actual or potential risks. *See generally* Sunstein, *supra* at 1014 (under a "Prohibitory Precautionary Principle," such as the principle included in the Shoreline Guidelines, "[p]rohibitions should be imposed on activities that have an *uncertain potential to impose substantial harm*, unless those in favor of those activities can show that they present no appreciable risk.") (emphasis added).

By definition, therefore, the precautionary principle's "better-safe-than-sorry" approach only

applies where, or to the extent that, scientific knowledge about particular risks is *unavailable*. *See Ferry Cnty. v. Growth Mgmt. Hearings Bd.*, 184 Wash. App. 685, 742 (2014) ("*In the absence of scientific evidence*, a county should adopt a precautionary or no risk approach.") (citing Wash. Admin. Code § 365-195-920) (emphasis added); *Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wash. App. 680, 693 (2012) ("If the *absence of relevant scientific information* creates uncertainty about the development risks to a critical areas function, the County must follow WAC 365–195–920(1) and use a precautionary or a no risk approach that strictly limits land use activities until the uncertainty is sufficiently resolved.") (internal quotation marks omitted) (emphasis added).

Here, scientific information relevant to the nature and extent of current, site-specific, Bainbridge Island shoreline ecological risks *is* available. But the City's legislative process and Growth Board's administrative review proceedings, by design or otherwise, offered the property owners virtually no opportunity to present it. *See* Pet. at 7-8. This scientific information not only would have obviated the need to resort to precautionary principle assumptions, but also would have enabled the City to adopt a revised SMP that requires site-specific analyses and scientific judgments regarding the need for mandatory conservation easements and other mitigation measures. *See id.* at 7-8, 13; *see generally Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, No. 15-35940 (9th Cir. Aug. 29, 2017) (unpublished), at 6 n.2 (federal environmental agency's "reasoned decision to use the

available scientific data in a limited fashion was a scientific judgment, not a policy choice").

The fact that the SMP mitigation measures that the property owners contend represent an unconstitutional taking of property are based on the precautionary principle (i.e., on the City's deliberate lack of adequate knowledge about site-specific sources of shoreline ecological risks)—rather than on current, reliable, and available scientific information—is *precisely why* the expert scientific testimony that the property owners seek to present should be admitted and considered by the superior court. Restricting that court's constitutional analysis to the precautionary principle assumptions on which the SMP's mitigation measures are premised would require the court to "wear blinders," to "focus on some aspects of the regulatory situation but downplay or disregard others." Sunstein, *supra* at 1035. Interpreting the state APA to prohibit testimony needed for judicial resolution of constitutional claims because it is not already part of an administrative record that state law limits to *non*-constitutional issues is fundamentally unfair.

C. Scientific evidence—not the precautionary principle—is needed to determine whether the Shoreline Master Program imposes unconstitutional conditions

The property owners contend that the SMP subjects them to "unconstitutional conditions," and thus, an unconstitutional (i.e., uncompensated) taking of their private property for a public purpose. *See* Pet.

at 2, 3, 15; App. D-4–D-5 (Amended Petition for Judicial Review, ¶¶ 18-21) (providing examples of unconstitutional conditions imposed by the SMP).

"[A]n overarching principle, known as the unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. This Court's decisions in *Nollan* and *Dolan* "involved a special application of the 'doctrine of unconstitutional conditions,' which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 530 (2005). More specifically, in *Nollan* and *Dolan* the Court "held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 570 U.S. at 599. "Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

Citing Washington case law, the certiorari petition explains that the *Nollan/Dolan* nexus/proportionality test applies to the SMP, including its buffer and

conservation easement requirements. *See* Pet. at 16 n.3 (citing *Kitsap*, 160 Wash. App. at 272-74). Indeed, the SMP is replete with references to the need for shoreline property owners to obtain permits to undertake virtually *any* activity that might directly or indirectly affect the shoreline ecology. The SMP states, for example, that "any person wishing to undertake activities constituting 'development' within shoreline jurisdiction shall apply to the [SMP] Administrator for a Shoreline Permit. Based on the provisions of this Master Program, the Administrator shall determine if a Letter of Exemption, a Substantial Development Permit, a Shoreline Conditional Use Permit, and/or a Shoreline Variance is required." SMP § 1.3.5(3); *see id.* § 8 (broadly defining "activity" and "development"). As another example, the SMP lists in great detail the specific activities that are "allowed within the Shoreline Buffer and Site-specific Vegetation Management area *with an approved clearing permit*." *Id.* § 4.1.3.7(1) (emphasis added); *see id.* § 8 (defining "clearing" as "the destruction or removal of vegetation or plant cover").

The question presented by the certiorari petition is not whether the SMP violates the unconstitutional conditions doctrine. That remains a question to be determined initially by the Washington superior court. Instead, the issue before this Court is whether due process requires that the property owners be allowed to present scientific testimony and other evidence in support of their constitutional challenge to the SMP, including their claim that the SMP mitigation measures fail to satisfy the *Nollan/Dolan* nexus/proportionality test.

Although the ultimate burden is on the City to demonstrate that the SMP satisfies the *Nollan/Dolan* test, *see Dolan*, 512 U.S. at 391 n.8, the property owners should be entitled to present testimony and other evidence, albeit outside the existing administrative record, to rebut whatever evidence—or precautionary principle assumptions—the City offers in its attempt to demonstrate that the SMP meets the *Nollan/Dolan* nexus and proportionality standards.

The property owners contend in their Amended Petition for Judicial Review, filed in the superior court, that "[c]onditions are imposed [by the SMP] without any sense of proportionality or causal connection between damage and human activity." App. D-5. As one example, they point to the SMP's requirement that "if the shoreline buffer is altered, the property owner must guarantee a 65% canopy within 10 years regardless of the extent of buffer alteration." *Id.* Or "[i]f building a new house, the City conditions the permit with a prohibition on a bulkhead for 100 years." *Id.* The City might attempt to argue that such conditions satisfy the *Nollan/Dolan* test based on the precautionary principle's better-safe-than-sorry, no-risk approach, e.g., based on ultra-conservative, non-site-specific *assumptions* that a 65% canopy and a 100-year prohibition against bulkheads correspond by nature and extent to the potential risks created by any type of buffer alteration or new home construction. Or the City might point to its legislative record, which the property owners indicate the City intentionally limited to "incomplete studies based on historical—not current—information about functions and potential stressors on the shoreline." Pet. at 10; *see also id.* at 12-13 (noting that "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 the incomplete studies.").

Like the property owners, the superior court should have insisted on an evidentiary record that is neither one-sided nor incomplete—an evidentiary record that contains current, accurate, reliable, and available scientific information relevant to whether the SMP provides for the type of "individualized determination" (i.e., site-specific analysis) required by *Nollan/Dolan* to demonstrate nexus and proportionality as to each shoreline property, and thus, passes constitutional muster. *Dolan*, 512 U.S. at 391. Indeed, the state court of appeals acknowledged that "[t]he nature of the Nollan/Dolan analysis is fact-specific, and therefore, must be evaluated on a case-by-case basis." App. A-15. At least two scientific experts retained by the property owners are prepared to provide testimony relevant to the types of data that the City would be required to provide in order to establish site-specific nexus and proportionality for the SMP's mitigation measures. *See* Pet. at 15-16 & 16 n.3; App. A-3–A-4, A-16 (describing proffered testimony). The court of appeals did not dispute that such testimony is necessary and appropriate; instead, its opinion merely questions "why this testimony is not in the administrative record." App. A-16. But the opinion itself answers this question by explaining that the Growth Board did not have jurisdiction to hear constitutional claims. *See* App. A-7 (citing *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hearings Bd.,* 158 Wash. App. 866, 881 n.8 (2010)).

The court of appeals ruling, and the superior court ruling which it affirms, are simply unfair: According to the court of appeals, the shoreline property owners are entitled to challenge the SMP's constitutionality in a state trial court only after participating in an administrative proceeding that was limited by law to non-constitutional issues, but the property owners cannot introduce expert scientific testimony to support their constitutional challenge because the state APA restricts the state trial court to the administrative record. This Court should grant certiorari to address this fundamental violation of due process.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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