No. 20-787

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent City of Bainbridge Island ("City") adopted its Shoreline Master Program after four years of public hearing and comment in which Preserve Responsible Shoreline Management and the other petitioners in this matter (collectively "PRSM") submitted voluminous evidence. On judicial review, the Washington Court of Appeals held that Washington's Administrative Procedures Act ("WAPA") allowed PRSM to supplement the record if it could show that the supplemental evidence was needed for adjudication of constitutional claims. The Court then analyzed the new evidence proffered by PRSM and concluded that it was not "needed" for review of PRSM's claims. PRSM has presented the following question:

> 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?

The City objects that this formulation of the question would not be presented by this case, where the Court of Appeals held that the record *can* be supplemented upon a showing that evidence is needed to resolve federal constitutional claims, but that PRSM failed to show the evidence was needed.

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STATEMENT OF THE CASE

In July 2014, after more than four years of public process, the City of Bainbridge Island ("City") adopted Ordinance No. 2014-04, the Bainbridge Island Shoreline Master Program ("SMP"). The public process included more than 100 meetings before various City boards and commissions at which public testimony or comment was taken, including one public hearing before the Bainbridge Island Planning Commission and three public hearings before the Bainbridge Island City Council. The City also received and responded to more than 2,000 written comments, at least 363 of which came from PRSM, its attorneys, or the named individual petitioners in this lawsuit. The Washington State Department of Ecology ("Ecology") also conducted an extensive public process. Ecology conducted one public hearing attended by 200 people and received and considered 112 oral or written comments, before approving the SMP.[1]

PRSM submitted substantial evidence directed at the SMP's underlying science. It offered multiple "white papers" totaling more than 225 pages by one of its members, Dr. Don Flora, in which Dr. Flora critiqued the consensus science about marine shoreline management.[2] PRSM also submitted several multipage letters, emails, and papers from Linda Young, including a 99-page letter in which Ms. Young argued, *inter alia*, that the SMP was an unconstitutional taking of property on its face and violated her First Amendment right to express herself through gardening. App. A-13.

PRSM appealed the City's adoption of the SMP to the Growth Management Hearings Board ("Board"). The Board issued a 119-page decision upholding the SMP and dismissing PRSM's appeal.[3] The Board addressed 52 legal issues and 39 sub-issues raised by PRSM, holding that PRSM failed to meet its burden of proof on each. The decision included a 16-page analysis

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[1] https://www.gmhb.wa.gov/Global/RenderPDF?source=case document&id=3750 at 10–12, 15 (last viewed January 4, 2021).

[2] *Id.* at 34.

[3] *Id.* at 1–119.

of the applicable science in the record relating to shoreline buffers, including review of more than 25 scientific exhibits and studies and several white papers authored by Dr. Flora and submitted by PRSM.[4] The Board did not mention the "precautionary principle." Rather, the Board concluded that "the City assembled current science, indicated data gaps and uncertainties, and provided objective, reasonable consideration of opposing views" and thereby complied with the Washington Shoreline Management Act in basing its shoreline buffers on appropriate scientific information.[5]

PRSM sought review of the Board's decision by the Kitsap County Superior Court. In 2017, PRSM moved to supplement the record. The proffered evidence consisted of: (a) testimony, from people claiming to have scientific backgrounds, about the perils of applying freshwater science to marine shorelines; (b) testimony from landowners about the impact of the SMP on their property values and free expression; and (c) evidence that some people found portions of the SMP difficult to understand. Pet. at 6; App. A-13, A-16–A-17. The superior court denied PRSM's motion. App. B-6.

The Washington Court of Appeals granted PRSM's request for discretionary review. The Court analyzed PRSM's proffered evidence under the WAPA, which permits supplementation with "material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record." Wash. Rev. Code § 34.05.562 (1)(c). The Court held that this section gave the superior court discretion to admit PRSM's new evidence. The Court explained further, however, that it "is also within the superior court's discretion to find that the facts proffered are not necessary to decide the disputed issues." App. A-11. The Court then analyzed each piece of proffered evidence and concluded that the superior court acted within its discretion in finding that each was not necessary to decide PRSM's constitutional claims. App. A-13–A-17. The Court thus affirmed the superior court's ruling in its entirety. The Washington Supreme Court denied PRSM's

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[4] *Id.* at 30–45.
[5] *Id.* at 45.

petition for review (App. C-1), and PRSM filed the present petition.

REASONS FOR DENYING THE PETITION

As even a cursory review of the Court of Appeals' holding makes clear, the "question presented" by PRSM is not accurate. PRSM asks whether it is unconstitutional "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." Pet. at i. And yet, the decision at issue expressly interpreted the WAPA's judicial review statute as *permitting* the introduction of evidence outside the agency record upon a showing that it is needed for the resolution of federal constitutional claims. As such, this case does not raise the question that PRSM seeks to present.

Further, even considering the question as packaged by PRSM, PRSM premises its argument on what it deems a split of authority but has not shown that any such split exists. What PRSM's cited cases show is general agreement on the basic principle that judicial review is usually limited to the administrative record. At most, PRSM has shown that some jurisdictions are stricter than others in applying exceptions to that general rule.

For these reasons, this Court should deny PRSM's petition.

I. THE QUESTION POSITED BY PRSM DOES NOT ARISE FROM THE FACTS OF THIS CASE.

PRSM premises this entire petition on a misstatement of the Court of Appeals' holding. According to PRSM, the Court of Appeals "construed WAPA to entirely bar litigants from presenting additional evidence to support a constitutional claim during judicial review of a Growth Board decision." Pet. at 17. PRSM then claims that the Court recognized only one limited exception, which arises "where the proposed evidence establishes an illegal decision-making process by the agency." *Id.* This characterization of the Court's holding is inaccurate.

The Court of Appeals simply did not say that the WAPA "entirely bars" new evidence. To the contrary, it specifically recognized that the WAPA allows new evidence, under Wash. Rev. Code § 34.05.562, if "needed" to decide certain types of disputed issues. App. A-10–A-11.

Nor did the Court of Appeals say that claims relating to an illegal decision-making process are the only basis for supplementation. PRSM appears to be mistaking the Court's observations about PRSM's arguments with the Court's ultimate holding. Wash. Rev. Code § 34.05.562 (1) establishes three circumstances under which a court may supplement the administrative record on judicial review:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be deter-mined on the agency record.

Wash. Rev. Code § 34.05.562 (1).

The Court of Appeals noted that PRSM had identified only subsection (b) as its ground for supplementing the record. App. A-10. The Court then explained why this section did not justify the relief PRSM sought. *Id.* A-10–A-11.

The Court of Appeals did not stop there, however. It went on to discuss subsection (c), at length. App. A-11–A-17. Although PRSM did not "specifically assert" this subsection, the Court nonetheless analyzed it because of PRSM's assertion "that the superior court abused its discretion by refusing its request to supplement the record because it needed to develop the factual record to support its constitutional claims." *Id.* A-11.

Subsection (c), the Court of Appeals explained, "provides the superior court with discretion to supplement the record with 'material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.'" App. A-11 (quoting Wash. Rev. Code § 34.05.562 (1)(c)). It is also, however, "within the superior court's discretion to find that the facts proffered are not necessary to decide the disputed issues." *Id.* The Court therefore spent six pages discussing all of PRSM's proffered evidence and concluded that the superior court did not abuse its discretion in finding that this new evidence was not "necessary" for resolution of PRSM's constitutional claims. *Id.* A-11–A-17.

This interpretation of Wash. Rev. Code § 34.05.562 (1), as permitting record supplementation where necessary for a constitutional claim, is consistent with the Washington Supreme Court's analysis. *See Washington Trucking Associations v. State Employment Sec. Dep't*, 188 Wn.2d 198, 393 P.3d 761 (2017). The respondents in *Washington Trucking* were motor carriers that had been assessed unemployment taxes. *Washington Trucking*, 188 Wn.2d at 204. While maintaining administrative appeals, they brought a separate lawsuit against the State alleging irregularities in the auditing process. *Id.* at 205. They argued that they lacked an adequate remedy under the WAPA because evidence about the auditing process was excluded in the administrative proceedings, and judicial review was limited to the record. *Id.* at 221 n. 17. The Washington Supreme Court held that the remedy under state law was adequate because it afforded the carriers an opportunity to "raise any constitutional claims on judicial review." *Id.* at 222. In a footnote, the Court explained that the superior court could admit new evidence that meets the

standards under Wash. Rev. Code § 34.05.562 (1). *Id.* at 221 n. 17.

In short, PRSM's central premise—that Washington law does not permit supplementation of the administrative record where needed to address constitutional claims—is fiction.[6] This Court should therefore deny the requested writ under its "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S. Ct. 1232, 1246–47, 94 L. Ed. 2d 472 (1987) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)).

II. PRSM'S ARGUMENTS ABOUT HYPOTHETICAL SCENARIOS DO NOT BEAR ON THE QUESTION PRESENTED.

PRSM raises several arguments that appear to be offered solely as background information. These include an unfounded claim that the Court of Appeals' mention of the distinction between as-applied and facial challenges conflicts with this

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[6] In a footnote, PRSM cites three cases that it contends are consistent with its claim that Washington law does not allow supplementation on judicial review. Pet. at 17 n. 5 (citing *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 14 P.3d 133 (2000); *Samson v. City of Bainbridge Island*, 149 Wash. App. 33, 202 P.3d 334 (2009); *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wash. App. 444, 204 P.3d 928 (2009)). These cases do not support PRSM's contention. *Herman* specifically acknowledged that a court can take new evidence on judicial review. The Court explained that while the appellate courts normally limit their review to the agency record, they will consider the superior court record "where the superior court accepts additional evidence under [Wash. Rev. Code §] 34.05.562." *Herman*, 149 Wash. App. at 454 (citing *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wash.2d 825, 834, 175 P.3d 1050 (2008)). *King Cty.* addressed evidence proffered directly to the Washington Supreme Court after oral argument. The Court explained that the proponent failed to explain how this evidence met the standard for submitting evidence to the appellate courts under Wash. R. App. Pro. 9.11. *King Cty.*, 142 Wash.2d at 549 n. 6. And *Samson* simply explained that the proponents had failed to inform it "which of the three exceptions applies to their evidence." *Samson*, 149 Wash. App. at 65.

Court's precedent. They also include several arguments about inapplicable situations in which additional evidence may be needed and a discussion about whether agency fact-finding may be insulated from judicial review. These arguments do not advance the question presented by PRSM.

A. The Court of Appeals' evidentiary analysis is not before this Court.

In a footnote in its Statement of the Case, regarding the Court of Appeals' determination that PRSM's proffered evidence was not "needed," PRSM claims that the Court of Appeals' analysis conflicted with this Court's precedent regarding facial vs. as-applied challenges. Pet. at 18 n. 6. This Court can safely disregard that footnote, both because this aspect of the Court of Appeals' decision is not before this Court and because PRSM has not established any conflict with this Court's precedent.

1. PRSM has not asked this Court to review the merits of the Court of Appeals' determination that the proffered evidence was not "needed." PRSM reinforces that this issue is not before this Court by raising its argument in a footnote appearing in the Statement of the Case. Nowhere in its Reasons to Grant the Petition section does PRSM offer any dispute to the Court of Appeals' conclusion that the evidence was not "needed" for review of PRSM's constitutional claims.

2. In any event, PRSM is mistaken when it claims that the Court of Appeals' discussion of facial vs. as-applied challenges conflicts with this Court's precedent. For this proposition, PRSM cites this Court's recent holding in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127–28, 203 L. Ed. 2d 521 (2019). The petitioner there was a death-row inmate who claimed the State of Missouri intended to execute him by cruel and unusual means. *Id.* at 1118–19. Based on his "unusual medical condition," he argued that the state's execution protocol was unconstitutional "as applied to him." *Id.* at 1118. Under this Court's precedent, a constitutional challenge to the method of execution requires proof of a known and available alternative that was substantially less painful. *Id.* at 1125–26. The inmate argued, however, that this proof of an alternative should be required only in facial challenges. *Id.* at

1126. In rejecting that argument, this Court explained that "classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Id.* at 1127 (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)). The Court of Appeals' analysis here was entirely consistent with that statement.

The Court of Appeals analyzed three categories of evidence. The first was an opinion by petitioner Linda Young about the expressive nature of gardening. App. A-13. PRSM did not show that this evidence was needed, the Court held, because the same witness had already opined that the SMP infringed on free expression, in a 99-page analysis that was already in the administrative record. *Id.* at A-13–A-14. Duplication of materials in the record is a proper ground for denying supplementation. *See Kerr Contractors, Inc. v. United States*, 89 Fed. Cl. 312, 335 (Fed. Cl. 2009) (finding that declaration was not necessary for judicial review because similar statements from the same declarant were already in the administrative record).

The second category of evidence consisted of opinions challenging the SMP's underlying science. *Id.* at A-16. The Court of Appeals based its decision regarding this evidence on the fact that PRSM had challenged, and submitted written briefing on, these same scientific issues in the administrative proceedings. *Id.* Because PRSM failed to explain why its supplementary scientific evidence was not already in the record, the superior court acted within its discretion in excluding it. *Id.* at A-16–A-17.

Finally, the third category of evidence was material intended to show that the SMP's terms were vague. *Id.* at A-17. The Court of Appeals affirmed the superior court's decision to exclude these materials based on this Court's holding in *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). *Maynard* held that "vagueness challenges to statutes not threatening First Amendment interests are examined in the light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard*, 486 U.S. at 361. Because PRSM raised

only a facial challenge and did not raise a First Amendment vagueness claim, the Court of Appeals concluded that a vagueness challenge was likely premature. App. A-17. The superior court therefore did not abuse its discretion in excluding PRSM's vagueness evidence. *Id.*

Bucklew did not purport to overturn *Maynard*'s holding that non-First Amendment vagueness challenges must be raised as-applied. Thus, PRSM's argument—that the Court of Appeals' holding at issue here conflicted with *Bucklew*—has no merit.

3. Equally devoid of merit is PRSM's claim that 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." Pet. at 28. For this proposition, PRSM cites the responses filed by the City and Ecology to PRSM's motion to supplement the record.[7] But PRSM has not identified any argument in which the City claimed that PRSM had failed to establish standing or any facts necessary to establish the scope of constitutional review. Nor has PRSM explained how any of the excluded evidence would have borne on those topics. Indeed, because PRSM's successive appeals have prevented the courts from reviewing the merits of its constitutional claims, PRSM's incantations about unfairness caused by the exclusion of its evidence are sheer speculation.

B. Questions regarding whether evidence is necessary in a facial challenge and whether agency fact-finding may be insulated from judicial review are immaterial to the question presented.

PRSM discusses at length two issues that are not implicated by the question it presents. The first relates to whether evidence may be needed to prove a facial constitutional challenge. The second regards the extent to which an administrative agency may decide constitutional issues and

[7] PRSM cites the superior court's Clerk's Papers ("CP") 73–74 and 283. CP 283 is Ecology's motion response. CP 73–74 is part of PRSM's petition for review by the superior court. The City assumes PRSM intended to cite CP 273–74, which is the City's motion response.

whether an aggrieved party has a right to review of such a decision. Neither issue is material here because whether the evidence proffered below was needed is not before this Court and because it is undisputed that the agency at issue did not decide PRSM's constitutional claims.

1. PRSM's contention that the right to present evidence applies equally to facial and as-applied challenges sheds no light on the question presented. PRSM discusses multiple cases offered for the proposition that presentation of evidence may be necessary in a facial constitutional claim. Pet. at 21–22. These cases all addressed the principle that, even in a facial challenge, the challenger must show that the statute impacts constitutionally protected conduct. *See*, *e.g.*, *Keystone Bituminous*, 480 U.S. at 495–96; *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015). PRSM's point, in discussing this authority, appears to be that it may at times be necessary to submit evidence to meet this standard. This line of authority does not help answer PRSM's question presented, which asks this Court to decide whether there is a due process right to supplement the record once the need for the evidence has already been established.

2. PRSM also discusses several cases that addressed issues relating to administrative agencies' authority to decide constitutional issues. Pet. at 23–27. For example, PRSM notes that this Court requires notice, an opportunity to be heard, and a decision based on evidence when fact-finding for constitutional claims is delegated to an administrative agency. *Id.* at 23 (citing *Crowell v. Benson*, 285 U.S. 22, 47 (1932)). That point is immaterial here. PRSM had notice of and the opportunity to be heard—and in fact was heard extensively—in the administrative proceedings. Those proceedings produced a voluminous evidentiary record that served as the basis for the agency's decision.

PRSM also notes that this Court has not decided the "difficult question" of whether legislatures may give administrative agencies "unreviewable" authority to make decisions that affect fundamental rights. Pet. at 24 (quoting *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445,

450 (1985)). Again, this question is immaterial here because the WAPA gave PRSM the right to seek judicial review of the SMP—a right that PRSM has now been exercising for many years.

PRSM also discusses two situations in which agencies are unsuited to decide constitutional issues. Pet. at 25–26. One scenario arises where the agency lacks jurisdiction over constitutional claims. *Id.* at 25 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)). The other arises where the agency's decision itself causes the alleged violation. *Id.* at 26 (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)).

Yet again, these issues are not implicated here. Everyone agrees that the agency here did not, and lacked jurisdiction to, decide PRSM's constitutional claims. Everyone also agrees that the Washington courts have jurisdiction to hear those claims. Indeed, they would have done so already if PRSM had not spent the last few years appealing the superior court's discretionary evidentiary decision.

In short, PRSM appears to have discussed the above issues for background purposes. They do not bear on the question that PRSM purports to present here.

III. PRSM FAILS TO IDENTIFY A SPLIT OF AUTHORITY.

As explained above, PRSM's question presented relies on a misreading of the lower court's decision. PRSM takes a finding that additional evidence was not "needed" for review of PRSM's constitutional claims and recasts it as a holding that additional evidence can never be presented to support a constitutional claim. PRSM then purports to show a split of authority on this artificial issue. PRSM's analysis again ignores any nuance in the cited opinions. It attempts to draw a stark contrast between cases holding that additional evidence is absolutely forbidden and cases recognizing some sort of plenary right to a *de novo* presentation of evidence. But none of the cited authority demonstrates any such conflict.

A. This Court has endorsed the principle of allowing new evidence where necessary.

Notably, the standard recognized by the Washington courts—that additional evidence may be introduced if "needed"—has already been endorsed by this Court. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23–24, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000). In *Shalala*, an association of nursing homes sued the Secretary of Health and Human Services in federal district court, alleging that Medicare regulations violated the Constitution. The district court dismissed the action for lack of federal-question jurisdiction because the association's members were required to pursue the administrative remedy provided by the Medicare laws. *Id.* at 5.

The association argued on appeal that "a host of procedural regulations unlawfully limit the extent to which the agency itself will provide the administrative review channel leading to judicial review." *Id.* at 23. This Court explained, however, that whether the agency could provide a hearing on a particular contention is "beside the point" because it is the "action" that must be "channeled through the agency." *Id.* (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975)). This Court then held that a court reviewing an agency determination, "has adequate authority to resolve any statutory or constitutional contention" not decided by the agency, "including ***where necessary***, the authority to develop an evidentiary record." *Id.* at 23–24 (emphasis added) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215, 114 S. Ct. 771, 127 L. Ed. 2d 29 (1994)).

That holding mirrors the action below. PRSM was required to channel its action through the Board's administrative process. Wash. Rev. Code § 90.58.190 (2)(a). The WAPA then gave PRSM the right to seek judicial review, including of constitutional issues that were beyond the Board's jurisdiction. Wash. Rev. Code § 34.05.510. And the superior court's review included the authority to develop an evidentiary record where "needed." Wash. Rev. Code § 34.05.562 (1); App. A-11; *Washington Trucking*, 188 Wn.2d at 221 n. 17. The holding below is thus entirely consistent with this Court's precedent.

B. PRSM fails to identify any case either absolutely barring or recognizing an absolute right to present new evidence.

Further, while trying to show a split of authority, PRSM has not identified any case that conflicts significantly with the Washington courts' analyses below or this Court's analysis in *Shalala*. Rather, all the cases cited by PRSM generally follow the same principle: that judicial review is usually limited to the administrative record, but new evidence may be presented under certain circumstances. PRSM fails to identify any split of authority worthy of this Court's resolution.

1. PRSM characterizes several cases as holding "that parties raising constitutional questions are not limited to the administrative record during judicial review of agency action." Pet. at 28–29. But nothing in these cases suggests a rule significantly different from that espoused by the Washington Court of Appeals in this action. For example, PRSM cites a case which expressly adopted the requirement that additional evidence be established as "necessary." *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 401 N.W.2d 805, 810 (1987) ("the trial court must be free to accept relevant evidence to supplement the agency record *if it appears necessary* to perform its judicial review function") (emphasis added).

PRSM also cites *Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895 (Me. 1973). There, the Maine Supreme Court remanded the matter to take "additional evidence bearing upon the constitutionality" of the agency's action. *Id.* at 911. It did so, however, only upon a finding that such evidence was "***necessary*** to allow this Court adequately to fulfill its responsibility to decide the constitutional issues by an exercise of independent judicial judgment on the facts as well as the law." *Id.* (emphasis added).

Notably, *Lewiston* did *not* require the trial court to take additional evidence. Rather, it directed the agency to take evidence and then report all such new evidence and any new findings to the trial court. *Id.* at 912. This procedure is consistent

with another case cited by PRSM, *N. Monticello All. LLC v. San Juan Cty.*, 468 P.3d 537 (Utah App. 2020). There, the appellate court instructed the district court to remand the matter to the agency "to take evidence." *Id.* at 541. The court did not identify any minimum showing that would be required to justify such a ruling. It was clear, however, that—unlike here—the appellant had not been permitted to present *any* evidence in the administrative proceeding. *Id.* at 540.

Another case cited by PRSM allowed the introduction of independent evidence "to establish a claim that the [agency] acted unlawfully or arbitrarily or in such a manner as to deny [a party] due process." *Bd. of Dental Examiners v. King*, 364 So. 2d 318 (Ala. 1978). This basis for admitting new evidence mirrors the Court of Appeals' holding here. As PRSM acknowledges, the Court of Appeals held that the WAPA allows new evidence where needed to show "unlawfulness of procedure or of decision making process." Pet. at 18 (quoting App. A-9–10). By allowing new evidence to show that the agency violated the party's due process rights in its administrative process, *King* applied the same rule.

Finally, PRSM relies on two cases that did not discuss record supplementation at all, but rather the scope of review. *See Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 808 A.2d 1107 (2002); *Buettner v. City of St. Cloud*, 277 N.W.2d 199 (Minn. 1979). *Buettner* held that the scope of review is different where a taxpayer challenges the constitutionality of a special assessment as opposed to its general reasonableness. Although the courts must apply a rebuttable presumption of correctness in the latter situation, judicial resolution of a constitutional challenge "must be based upon independent consideration of all the evidence." *Id.* at 203. *Cumberland Farms* held, similarly, "that the plaintiff is entitled to a de novo review of the factual issues underlying its inverse condemnation claim, unfettered by the board's previous resolution of any factual issues." *Cumberland Farms*, 808 A.2d at 1122–23. Neither case discussed the standards under which a party is entitled to supplement the administrative record. Both simply held that parties are entitled to *de novo* review of constitutional claims.

In short, of the many cases PRSM cites as supposedly recognizing a due process right of supplementation, none establishes a right that is any more expansive than what the Washington Court of Appeals recognized here. The most that can be said of these cases is that supplementation should be allowed upon showings that the evidence is necessary to support a constitutional claim or to show impropriety in the agency's process or that the proponent had no opportunity to present any evidence in the administrative proceeding. Here, the Court of Appeals held that the record could be supplemented if the evidence was needed to support a constitutional claim or to show impropriety in the administrative process, and PRSM undisputedly had the opportunity to—and did—present voluminous evidence to the agency. App. A-10–A-11, A-13, A-16. The Court of Appeals' holding was thus entirely consistent with the cases PRSM cites as supporting the rule it wants this Court to adopt.

2. To the extent there is any split of authority, it is not the stark contrast, posited by PRSM, between some jurisdictions that allow supplementation and others that prohibit it. Rather, it is between jurisdictions with stricter and more lenient exceptions to the general rule that judicial review is limited to the administrative record.

PRSM notes, for example, that the Third Circuit found no right to a *de novo* evidentiary hearing in *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648, 203 L. Ed. 2d 899 (2019). Pet. at 31. It is unclear whether the Court there was saying that due process never requires supplementation or simply that the petitioners had not shown a need for supplementation in that case.

PRSM also cites two cases that required fact-finding to occur at the agency level. Pet. at 31–32 (citing *Hetrick v. Ohio Dep't of Agric.*, 81 N.E.3d 980 (Ohio App. 2017); *In re Edwards Aquifer Auth.*, 217 S.W.3d 581 (Tex. App. 2006)). *Hetrick* applied a statute that allows a court to take additional evidence only upon a showing that it is newly discovered. *Hetrick*, 81 N.E.3d at 992. *Edwards Aquifer* construed a statute that allows a court to

remand a matter to the agency for additional fact-finding. *Edwards Aquifer*, 217 S.W.3d at 589 (citing Tex. Gov't Code Ann. § 2001.175 (c)). The cited statute permits this procedure upon a showing "that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency." Tex. Gov't Code Ann. § 2001.175 (c).

The other cases cited by PRSM do not discuss record supplementation at all. *See DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Hawai'i 187, 339 P.3d 685 (2014); *MB Associates v. D.C. Dep't of Licenses, Investigation & Inspection*, 456 A.2d 344 (D.C. 1982); *Stahl York Ave. Co., LLC v. City of New York*, 162 A.D.3d 103, 77 N.Y.S.3d 57 (N.Y. App. Div. 2018), *appeal dismissed, leave to appeal denied*, 32 N.Y.3d 1090, 114 N.E.3d 1090, 90 N.Y.S.3d 637 (2018), *and cert. denied sub nom. Stahl York Ave. Co., LLC v. City of New York, New York*, 140 S. Ct. 117, 205 L. Ed. 2d 32 (2019). In *DW Aina Lea*, the agency complained that the lower court should not have decided a constitutional issue because there had been no opportunity to present evidence on that issue in the administrative proceeding. The Hawaii Supreme Court held that the courts had authority to decide constitutional issues, regardless of whether such an opportunity had been provided. *DW Aina Lea*, 339 P.3d at 716. It did not discuss whether or under what circumstances the record could be supplemented to aid such review.

Finally, *MB Associates* and *Stahl* both rejected constitutional takings claims based on the agencies' underlying findings of fact. *Stahl* held that there had been no taking, based on the agency's finding that the affected buildings were still capable of earning a reasonable return. *Stahl York Ave.*, 162 A.D.3d at 115–16. Similarly, *MB Associates* held that there was no taking because substantial evidence supported the agency's finding that the building had a reasonable alternative economic use. *MB Associates*, 456 A.2d at 346). Neither mentions any effort by any party to supplement the record.

3. In short, PRSM has not identified a well-defined split of authority. Rather, it has presented this Court with several cases that, consistent with Washington law, allow record supplementation upon a showing that additional evidence is

necessary to support a constitutional claim. And it has identified other cases that appear to be more stringent in allowing exceptions to the general rule that judicial review is limited to the agency record.

Most importantly, the rule articulated by the Washington Court of Appeals here appears to be on the more lenient end of the spectrum. It requires a showing only that the evidence is "needed" for a constitutional claim. This contrasts with other cases that require a showing, for example, that the evidence was newly discovered and could not have been discovered earlier with reasonable diligence or that the party had good reasons for not presenting it earlier. *See Hetrick*, 81 N.E.3d at 992 ; *Edwards Aquifer*, 217 S.W.3d at 589. Thus, even if PRSM had shown a split of authority in need of resolution, this Court's review would not benefit PRSM because the holding below comports with the line of authority advocated by PRSM.

CONCLUSION

PRSM misrepresents the holding below. The Court of Appeals did not hold that the WAPA bars supplementation. Rather, it simply held: (a) that a party seeking to introduce supplementary evidence must show that it is necessary to adjudicate the issues; and (b) that PRSM's proffered evidence failed to satisfy this test. PRSM's disagreement with that evidentiary decision fails to raise any important constitutional questions, and this Court should deny the petition for writ of certiorari.

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Respectfully submitted,

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