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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

Whether review is warranted turns on what precisely the lower courts decided. Did the Court of Appeals decide—as Petitioner PRSM argues and as the City of Bainbridge Island argued below—that the Washington Administrative Procedure Act (WAPA) forbids evidence to support constitutional claims during judicial review of Growth Board decisions? Or did it conclude—as the City now asserts for the first time—that such evidence *could have been* introduced under WAPA, but that PRSM's proffered evidence was unnecessary? The former interpretation is correct. As the City stated below, the Court of Appeals' decision "determine[d] . . . that judicial review of a decision of the Board is limited to the administrative record, even when constitutional issues may be raised." Reply App. A-2.

Yet now, after successfully convincing the state courts to adopt a rule of law barring PRSM's evidence, the City has changed its tune. It argues that WAPA does *not* limit judicial review to the administrative record and that whether to allow additional evidence is a discretionary decision for the trial court. BIO 4–6. That severely distorts the Court of Appeals' holding that all judicial review of Growth Board decisions is "appellate" and that additional evidence may only be introduced to contest the validity of the administrative proceeding. App. A-8–9. The City also mischaracterizes PRSM's proffered evidence, which was needed to address gaps in the record and establish facial constitutional claims.

The City's desire to avoid this Court's review is understandable, as it concedes that restricting judicial review of constitutional claims to an admittedly

incomplete administrative record conflicts with this Court's decisions. BIO 12. But the lower courts are hopelessly conflicted on the issue, and the City's shifting arguments accentuate the need to resolve the split.

I. The City Misstates the Holding and Facts Below to Challenge the Question Presented.

The City makes several legal and factual concessions that support PRSM's Petition. First, it concedes that this Court's decision in *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000), requires that evidence be admitted in court where necessary to support constitutional claims. BIO 12;[1] *see also* Goldwater Inst. Amicus Br. 14–18 (arguing that it violates due process to require claimants to present all constitutional facts at the agency level) (citing cases). Second, it agrees that "in a facial challenge, the challenger must show that the statute impacts constitutionally protected conduct." BIO 10. Third, it concedes that there were "gaps" in the administrative record. BIO 2. Fourth, the City does not dispute that Washington law exempted it from disclosing factual defenses to constitutional claims during the administrative process. *See* Wash. Admin. Code § 173-26-201(2)(a).

Yet to evade review of the Court of Appeals' decision excluding evidence during judicial review, the City misstates both the Court of Appeals' holding and the evidence that PRSM sought to introduce.

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[1] That concession directly contradicts the position it consistently took below. *See* Reply App. C-1–3; D-2–3; E-4–6; F-1–3; G-1–3.

A. As the City previously, repeatedly recognized, WAPA bars evidence outside the administrative record during judicial review.

When moving to publish the decision below, the City asserted that the Court of Appeals held that "[Washington] courts will not allow an APA administrative record to be supplemented for consideration of constitutional claims." Reply App. A-4. That is precisely what the Petition argues. *See* Pet. 17 (the Court of Appeals "construed WAPA to entirely bar litigants from presenting additional evidence to support a constitutional claim during judicial review"). And it accurately describes Washington law. *See* Pet. 17–18.

Yet now, the City claims that under WAPA, "the record *can* be supplemented upon a showing that evidence is needed to resolve federal constitutional claims." BIO i. Although the Court of Appeals' decision is not completely clear, the City's claim is misleading. While the Court of Appeals posited, in dicta, that Wash. Rev. Code § 34.05.562(1)(c) could provide an exception to the rule barring additional evidence, it also recognized that the exception applies only in limited, statutorily defined circumstances. App. A-11–12. Washington courts consistently hold that a WAPA appeal from this type of proceeding does not qualify for the exception. *Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, 187 Wash. App. 113, 124 (2015) (subsection (1)(c) does not apply to a proceeding that "required a decision based on the record"); *see also* Reply App. B-3 n.2 (Department of Ecology explaining that subsection (1)(c) does not apply where

the Board made rulings based on an administrative record).[2]

If the City had taken its *current* position below, then the parties could have proceeded to a hearing that considered the substance of PRSM's additional evidence. But instead, the City argued the exact opposite. *See* Reply App. C-3 ("Raising constitutional claims does not modify the superior court's mandate to limit review to the agency record" because "[W]APA's narrow exceptions do not include evidence necessary to establish a constitutional claim."); *id.* at C-2 (WAPA "clearly prohibits the superior court from admitting new evidence unless it falls within [specific] statutory exceptions," none of which "apply to the instant case."); *id.* at D-2 (City arguing that there is no "statutory or constitutional right to present new evidence to a reviewing court under [W]APA" and that "all evidence, including evidence supporting constitutional claims, must be presented during the administrative [*i.e.*, legislative update] process").

Because the Washington courts accepted the City's arguments and conclusively construed WAPA to bar PRSM's additional evidence, no court has weighed

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[2] Tellingly, no party argued for application of subsection (1)(c) because it is expressly limited to "rule making, brief adjudications, or other proceedings not required to be determined on the agency record." Wash. Rev. Code § 34.05.562(1)(c); *see also id.* § 34.05.010(16) (defining a rule); *id.* § 34.05.482–.491 (defining "brief adjudication"). The Growth Board is required to make its decisions based on the record, bringing it outside the exception in subsection (1)(c). *See Kopp v. Wash. State Dep't of Employment Sec.*, 185 Wash. App. 1008, at *6 (2014) (unpublished) (reversing trial court's admission of supplemental evidence as violating the "highly limited circumstances" of subsection (1)(c)).

that evidence or determined its relevance to contested questions of fact on federal constitutional claims. And if the City gets its way, no court ever will.

The **Growth Board** did not—and could not—consider evidence relating to PRSM's constitutional claims. *See* Pet. 14–15. The City asserts that the Board "addressed 52 legal issues and 39 subissues," BIO 1, but, pursuant to its governing statute, those related only to statutory compliance with Washington's Shoreline Management Act. *See* Wash. Rev. Code § 90.58.190(2)(b). The Board did not consider *even one* constitutional issue because, as the City concedes, BIO 11, it lacked jurisdiction to do so. *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office*, 199 Wash. App. 668, 684–85 (2017).

The **trial court** excluded PRSM's additional evidence without reviewing it. The court decided that the proffered evidence was duplicative of the administrative record, although the judge had not read that record and relied instead on the City's representations. CP 350 ("This Court has yet to review the record below.").[3]

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[3] Even if PRSM's additional evidence overlapped with the public comments and other evidence before the Growth Board (an as-yet untested proposition), constitutional claims are reviewed *de novo* because the Board lacks subject matter jurisdiction over such claims. *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 158 Wash. App. 866, 881 n.8 (2010) (Growth Board could not review due process claim; Court of Appeals reviewed the trial court's due process ruling *de novo*). Accordingly, on judicial review a party must be allowed to present evidence to substantiate those claims. *See, e.g.*, *Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989) (the contention that a court

The **Court of Appeals** affirmed, without reviewing the substance of PRSM's additional evidence as it relates to the federal constitutional claims. App. A-17. It held—rejecting PRSM's argument to the contrary—that the trial court acted in an exclusively "appellate" capacity and could not admit additional evidence unless the evidence showed that the Growth Board used an illegal decision-making process. App. A-8–10. That conclusion follows from WAPA's text, which requires that additional evidence "relates to the validity of the agency action at the time it was taken *and*" meets one of three exceptions. App. A-10 (quoting Wash. Rev. Code § 34.05.562) (emphasis added); *Kopp*, 185 Wash. App. 1008, at *5–*6 (denying supplementation under subsection (1)(c) because the "evidence does not go to the validity of the agency's action").

The City's discussion of other Washington cases, BIO 5–6 & n.6, is incomplete and misleading—and contrary to its position below. For example, *Washington Trucking Associations v. Employment Security Department* did not hold that subsection (1)(c) grants the trial court discretion to admit evidence necessary to establish a constitutional violation—instead, it applied the statutory limitation that the court may consider additional evidence that "relates to the validity of the agency action." 188 Wash. 2d 198, 221 n.17 (2017); *see also* Reply App. E-4 (City arguing that interpreting *Washington Trucking* to allow "proposed evidence in support of new constitutional claims" would be "inconsistent

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"must examine only such facts as were available [in the administrative process] is contrary to the concept of a de novo review").

with the [Washington] Supreme Court's specific reference" to Wash Rev. Code § 34.05.562).

The City also omits key language from its discussion of other Washington decisions. BIO 6 n.6. The City argued below that those cases hold that "[r]egardless of the issues involved, 'APA judicial review is limited to the record before the agency,'" and additional evidence may be allowed only if it "fall[s] 'squarely' within one of the statutory exceptions set forth in RCW 34.05.562." Reply App. F-2 (quoting *Samson v. City of Bainbridge Island*, 149 Wash. App. 33, 64 (2009)). Critically, the City also argued below that *Herman v. State of Washington Shorelines Hearings Board*, 149 Wash. App. 444 (2009), holds that, based on WAPA's narrow language, "filling a 'gap' in the administrative record is not an appropriate basis for allowing supplementary evidence." Reply App. G-4.

B. PRSM's proposed evidence was necessary to its constitutional claims.

Absent reversal by this Court, PRSM's constitutional claims will necessarily be heard and decided without the evidence necessary to establish key elements of those claims. *See* Pet. 27–28.

The City's description of PRSM's proposed evidence is misleading. BIO 2. As the City's pleadings below acknowledged, PRSM's evidence was aimed at filling acknowledged gaps in the record and establishing necessary elements of facial *Nollan/Dolan* constitutional claims. *See* Reply App. G-4 (City admitting that PRSM's evidence was offered to fill gaps in the record, but arguing that, under

WAPA, that is not an appropriate basis for supplementation).[4]

This additional evidence is crucial to establishing the scope of PRSM's unconstitutional conditions claims by showing the circumstances in which a City landowner will be compelled to surrender a disproportionate amount of land as a conservation easement. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013); *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (discussing facts needed to set the scope of facial review). It is also needed to demonstrate that the revised SMP harms protected property rights, as required under *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987). The City acknowledges these are disputed issues and expressly contested the proper scope of constitutional review below. *See* Reply App. C-3 (arguing that a facial challenge "must be rejected if there are any circumstances where the statute can be constitutionally applied"). *But see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 888, 894 (1992) (relying on expert testimony to limit the scope of facial review). And the Growth Board observed that the administrative record contained no information regarding impacts on particular property rights, which is necessary to establish standing for PRSM's constitutional claims. *See*, *e.g.*, AR 5815 n.52 (the City's legislative record contains no data speaking to impacts to property).

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[4] The City emphasizes one homeowner's assertion of her right to express herself through gardening, BIO 1, 8, but at this stage Petitioners are not pursuing that claim.

PRSM could not introduce and adjudicate this evidence prior to the judicial review phase. Before that time, the only "evidence" consisted of public testimony and exhibits presented by interested parties (including the City) during the legislative phase of updating the SMP when City officials considered possible changes but had not published a final version of the law. The Growth Board, which lacks jurisdiction to consider constitutional claims, is not an adjudicative body and cannot exercise an adjudicative function. *See* Pet. 14–15, 27.

II. The Split Among the Lower Courts Requires Resolution.

The City implicitly acknowledges that the lower courts are inconsistent and divided. BIO 15; *see also* Goldwater Inst. Amicus Br. 10–11 (noting that "federal courts are divided" and state courts "are in total disarray" on the question presented). Although the City mischaracterizes many of the cases, it still recognizes that lower courts sit on a spectrum from a "more lenient" to a "stricter" approach to allowing exceptions to administrative-record review. BIO 15, 17. The City's characterization improperly downplays what is at stake. Whether parties may support constitutional claims in court with evidence is a fundamental due process issue, not simply a matter of how forgiving a judge is in applying statutory exceptions.

The City agrees that various courts have held that parties must be allowed to introduce evidence during judicial review when constitutional claims are at stake, BIO 13–15—a position it vehemently opposed below. *See* Reply App. C-1–3; D-2–3; E-4–6; F-1–3; G-

1–3. In those courts, PRSM would be allowed to introduce additional evidence.

As for the cases that disallow evidence on judicial review, the City minimizes or misconstrues them:

- Contrary to the City's assertion, the Third Circuit unambiguously held in *Delaware Riverkeeper Network (DRN) v. Sec'y Penn. Dep't of Envtl. Prot.*, 903 F.3d 65, 74 (3d Cir. 2018), that "[d]ue process does not entitle Petitioners to a de novo evidentiary hearing; the opportunity to [for public] comment and to petition this Court for review is enough." Following that ruling, DRN sought certiorari to rectify the same injustice presented by PRSM's Petition: "Because aggrieved parties have no ability to create a meaningful record, they cannot cite or rely on any evidence challenging or questioning the Department's decision in any subsequent judicial proceeding . . . ." *DRN*, Docket No. 18-1106, Pet. for Writ of Cert., 2019 WL 916756, at *30 (Jan. 9, 2019).

- The City does not dispute that in *Hetrick v. Ohio Dep't of Agric.*, 81 N.E.3d 981, ¶44 (Ohio App. 2017), the court upheld a statutory limitation that only allowed supplemental evidence if the evidence is *new* and could not have been discovered prior to the hearing. That limitation would categorically exclude PRSM's proffered evidence. *See id.* ¶45.

- The City misreads *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 589 (Tex. Ct. App. 2006), which states that a reviewing court may admit new evidence *only* "when the administrative record

fails to reflect procedural irregularities alleged to have occurred in the administrative hearing." (citing Tex. Gov't Code Ann. § 2001.175(e)). The City references a *different* subsection, BIO 16, which permits a claimant to seek a remand to introduce additional evidence before the *administrative body*—a remedy that makes sense only if that body (unlike the Growth Board) has jurisdiction to resolve the claim.

- In *Stahl York Ave. Co., LLC v. City of New York*, 50 Misc. 3d 1207(A), at *9 (2016), *aff'd*, 162 A.D.3d 103, 116 (N.Y. App. Div.), the New York courts did not independently analyze the plaintiff's takings claim based on allegations in the complaint, but instead deferred to administrative findings, even though the plaintiff had neither a reason nor an opportunity to develop the factual basis for its constitutional claim before the agency. The plaintiff was thus prohibited from introducing evidence in court. Like the Growth Board here, the agency had no authority to adjudicate a takings claim.
- Finally, as the City concedes, BIO 16, in *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Haw. 187, 218 (2014), the Hawaii Supreme Court ruled against a party's constitutional claims even while acknowledging that the administrative review statutes prevented the party from presenting its evidence. This is the fate that awaits PRSM if it is forced to litigate its claims without the ability to put forth the evidence that supports them.

CONCLUSION

After relentlessly arguing below that WAPA bars the introduction of additional evidence, the City seeks to evade review by mischaracterizing the Washington courts' acceptance of its position as consistent with *Shalala*. BIO 12–13. That tactical shift, if successful, would continue the very injustice that *Shalala* was intended to end. *See* 529 U.S. at 23 (discussing the need for courts to "resolve any statutory or constitutional contention that the agency does not, or cannot, decide"). Absent reversal by this Court, no adjudicative fact-finder will *ever* consider the substance of PRSM's proposed additional evidence, and its claims will be decided on an incomplete and uncertain record. That outcome would be contrary to fundamental notions of due process.

The petition for a writ of certiorari should be granted.

DATED: January 2021.

Respectfully submitted,

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