No. _____

In the
Supreme Court of the United States

MAUREEN P. RICHTER,

Petitioner,

v.

CITY OF DES MOINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Due process guarantees an individual the right to have her grievances heard by a neutral adjudicator at the first level of review when a self-interested government agency deprives that person of her rights in property. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626 (1993). The City of Des Moines rejected Maureen Richter's application to build a trail on her property that would allow her to safely access the shoreline portion of her lot because it had a competing interest in keeping the land undeveloped. Ms. Richter appealed the denial to the city hearing examiner, who must—under Des Moines' code—apply a "presumption of correctness" to the city's legal and factual assertions. The examiner denied Ms. Richter's appeal.

Does a rule requiring that an administrative law judge presume the correctness of a city's factual assertions in the appeal of a land use permit denial violate procedural due process where the city has an interest in denying the permit?

LIST OF ALL PARTIES

Maureen Richter was the plaintiff and appellant in the federal proceedings below, and is the petitioner herein.

The City of Des Moines, a Washington state municipal corporation, is the respondent.

CORPORATE DISCLOSURE STATEMENT

This petition is filed on behalf of an individual; it is not filed by or on behalf of a nongovernmental corporation.

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PETITION FOR WRIT OF CERTIORARI

Maureen Richter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's amended opinion is reported at *Richter v. City of Des Moines*, ---- Fed. Appx. ---- (9th Cir. 2013); 2013 WL 4406689 (9th Cir. Aug. 19, 2013) (unpublished), and is reproduced in the Appendix (Pet. App.) at A. The Ninth Circuit's order denying rehearing and rehearing en banc is reproduced at Pet. App. D. The Ninth Circuit's superseded opinion of July 8, 2013, is reported at *Richter v. City of Des Moines*, 532 Fed. Appx. 755 (9th Cir. 2013) (unpublished). The opinion of the United States District Court for the Western District of Washington is reported at *Richter v. City of Des Moines*, 2012 WL 8671871 (W.D. Wash. Mar. 1, 2012), and is reproduced at Pet. App. B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit issued an opinion on July 8, 2013, affirming dismissal of Richter's procedural due process claim. Pet. App. A. The court denied Richter's petition for rehearing and rehearing en banc on August 19, 2013 (Pet. App. D), and concurrently issued an amended opinion. Pet. App. A. On October 22, 2013, Justice Kennedy entered an order granting Richter's application to extend the time to file a petition for writ of certiorari through January 16, 2014. *Richter v. City of Des Moines*, No. 13A389.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS AT ISSUE

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

42 U.S.C. § 1983, provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]

The Des Moines Municipal Code 18.94.113 provides, in relevant part:

> The administrative decision appealed shall be given substantial weight by the hearing examiner. On any such appeal, the standard of review shall be whether the administrative decision was clearly erroneous based on a review of all evidence, or the administrative decision was arbitrary or capricious. Failure of a party to request review by the hearing examiner of an administrative decision shall be a bar to any further judicial review.

STATEMENT OF THE CASE

A. The City Denies Ms. Richter's Application To Construct a Trail Across Her Property

Maureen Richter owns a waterfront home in a residential neighborhood in the City of Des Moines, Washington. Pet. App. B at 2. Her home is located at the top of a bluff overlooking Puget Sound.[1] *Id.*; Pet. App. F at 1-2. Her property includes a private recreational beach at the bottom of the slope. Pet. App. B at 2; Pet. App. F at 2.

The dispute in this case arose from Ms. Richter's desire to access the beach portion of her property. When she purchased the property, the beach portion of the lot could be accessed only by the remnants of an old, sinuous dirt trail that ran from the top of the slope to the shore. Pet. App. C at 26-27; Pet. App. F at 2. The trail, however, was unsafe and, in 2006, Ms. Richter began to improve it, intending to provide a safe way for her family and guests to access the shoreline. *Id.*

Ms. Richter's proposed use of the bluff was in line with historical practices on the lot. For many years, owners developed the bluff to connect the uplands to the water. The north edge of the bluff is the location of an old skid road, which was used for sliding timber to the shoreline before floating it to mills—a relic of the region's 19th Century logging industry. Pet. App. C at 26, 28. The south edge of the bluff contains an old, abandoned water line. *Id.* And utility easements for

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[1] The Des Moines City Code defines a "bluff" as a shoreline slope that is predominantly in excess of 40 degrees. DMMC 18.04.087.

gas, cable television and internet, and sewer run across the base of the bluff just above a rock bulkhead at the shoreline. *Id.*

Over the years, however, the city enacted regulations that require shoreline property owners to leave substantial portions of their lots as undeveloped "buffers" (*i.e.*, conservation areas) to benefit the public in different ways (*e.g.*, wildlife habitat, storm water filtration, erosion control, etc.). Pet. App. C at 15-18. The city does not condemn the buffer as a conservation easement; instead, it strictly enforces its regulations to ensure that the lot continues to provide public benefits—even if that means denying a person's right to engage in a traditional and otherwise lawful use of her land.[2] *Id.* at 16-17. When a shoreline property owner applies to the city to make use of her land, the owner must prove to the city's satisfaction, through the land use permit application process, that the buffer will continue to provide all the benefits to the public. *Id.* at 18-21.

Unfortunately, Ms. Richter did not know that she needed to obtain permits from the city before beginning the trail improvement project. Pet. App. F at 2. When the city learned of the project, it issued a stop work order and imposed an extraordinary fine of $252,000.

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[2] Under Washington property law, a buffer is a valuable real property interest belonging to the landowner. RCW 64.04.130; *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("[T]here is little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose."); *Nw. Louisiana Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285 (Fed. Cir. 2006) (A taking may occur when government policies cause vegetation overgrowth that interferes with property rights.).

Pet. App. B at 2; Pet. App. F at 2. Wanting to comply with the city's regulations, and justifiably worried about the large fine, Ms. Richter immediately stopped work and tried to resolve the matter with the city. Pet. App. F at 2-3. The parties eventually agreed that the city would process an "after-the-fact" permit application for a trail in return for Richter's payment of a significantly reduced penalty of $5,000. *Id.* Ms. Richter contracted with an engineering firm, and applied to the city for permission to construct a trail that would allow people to walk safely down the bluff and reach the beach from her house. *Id.* at 3.

To Ms. Richter's surprise, the city denied her application. *Id.*; Pet. App. G. City staff claimed that her project proposal did not do enough to avoid vegetation disturbance and minimize impervious surfaces. Pet. App. C at 18-21; Pet. App. G. However, Ms. Richter believed that the city had denied her permit for improper reasons and did not correctly apply development regulations to her property. Pet. App. C at 35-37, 39-41. Indeed, an independent planning expert who reviewed Ms. Richter's permit file concluded that city staff used the trail permitting process to punish her for having disturbed a buffer, and that staff had deliberately ignored professional opinions submitted by Ms. Richter relating to her proposed trail improvements. Pet. App. E at 7-9, 16-17.

B. Ms. Richter Seeks Review of the Permit Decision and Is Denied the Right to Neutral Adjudication of the Facts

Ms. Richter appealed the staff's denial to the city's hearing examiner—a quasi-judicial official who presides over land use appeals. Pet. App. C. The examiner is governed by Des Moines Municipal Code (DMMC) § 18.94.113, which requires the examiner to apply a standard of review that is overtly favorable to the city in all land use appeals. Specifically, the code provides that the examiner shall afford the city staff's decision "substantial weight," and may overturn the decision only if the permit applicant can show that the decision is "clearly erroneous" or "arbitrary and capricious." Pet. App. C at 46-47. The city's code, as explained and applied by the examiner, deviates from the typical standard of review in an administrative appeal by adopting a presumption that all of the factual assertions made by city staff at an appeal hearing are presumed correct—effectively rendering all testimony in favor of the land use applicant meaningless.[3] Pet. App. C at 39-40, 46-47.

In this case, the hearing examiner's review of Ms. Richter's appeal largely turned on a series of factual questions related to the city's classification of

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[3] Typically, only the administrative agency's interpretation of the laws it administers is afforded substantial weight on appeal—its findings of fact are reviewed for substantial evidence based on consideration of all evidence in the record. *See*, *e.g.*, *Clark Cnty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 254 P.3d 862, 874 (Wash. 2011), *vacated in part sub nom. Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 298 P.3d 704 (Wash. 2013); *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013).

Ms. Richter's bluff as an "environmentally sensitive area," due to its slope and proximity to the shoreline. Pet. App. C at 18-19, 39-40, 46-47. To prevail on appeal, Ms. Richter was required to show that her trail project would have a minimal impact on the buffer by locating the trail in areas of previous disturbance (*i.e.*, the historic trail, utility easement, etc.), and by minimizing vegetation removal and new impervious surface areas. *Id.*

The parties introduced competing evidence at the administrative hearing. Pet. App. C. But the hearing examiner did not weigh the evidence. Instead, announcing that he was required to give city staff's factual assertions "substantial deference," the examiner adopted all of the city's contentions (including testimony and evidence prepared for trial), regardless of expert testimony and evidence in support of Ms. Richter's trail project. Pet. App. C at 39-40, 46-47. Unsurprisingly, the examiner ruled that the city did not err when it denied the application.[4] Pet. App. C at 47. The ultimate effect of the examiner's 2008 decision was to delay Ms. Richter from building the trail for several years and incur tens of thousands of dollars in additional expenses. Pet. App. F at 4.

C. The District Court Refuses To Apply *Concrete Pipe* and Dismisses Ms. Richter's Due Process Claim

Ms. Richter filed a complaint in state court under Washington's Land Use Petition Act (LUPA) seeking to reverse the examiner's decision. Pet. App. B at 4. At

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[4] The hearing examiner was compelled to rule in favor of Ms. Richter on one question of state law due to an intervening decision from Washington's Supreme Court. Pet. App. C at 42-43.

the hearing, the judge indicated that the city would have to allow the trail, after which the city settled the land use appeal by approving Ms. Richter's permit. *Id*.

The settlement, however, did not resolve all claims.[5] Ms. Richter's complaint also contained federal claims under 42 U.S.C. § 1983 to recover damages for the violation of her procedural due process rights, among other allegations not pertinent to this petition. Pet. App. B at 5. The complaint alleged that the city's hearing examiner procedure had deprived her of her due process right to an impartial adjudication by requiring that the examiner presume that all of the factual assertions made by city staff were correct. That standard, Ms. Richter argued, violated *Concrete Pipe,* 508 U.S. at 626. In that case, this Court held that due process does not allow an agency to enjoy an evidentiary presumption at the first level of review where that agency has an interest in the property being adjudicated. *Id*.

The city removed the case to federal district court, which dismissed Ms. Richter's due process claim on summary judgment, mistakenly concluding that she had no protected property interest in accessing and using the shoreline portion of her lot. Pet. App. B at 6-9. The district court also concluded that, even if she had a protected property interest, the due process claim would fail, because *Concrete Pipe* was limited to ERISA claims. *Id*. at 9-10.

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[5] The settlement agreement expressly allowed Ms. Richter to proceed with her state and federal claims for damages. Pet. App. B at 4.

D. The Ninth Circuit Ignores *Concrete Pipe* and Holds That Requiring an Adjudicator to Grant Substantial Deference to the City's Factual Assertions at the First Level of Review Satisfies Due Process

Ms. Richter appealed to the Ninth Circuit. The court of appeals issued a 2-1 amended opinion affirming the district court's judgment in 2013. Pet. App. A. The majority assumed that Ms. Richter had a constitutionally protected property interest in her ownership and use of her property (including access to her beach), but ruled, without any analysis, that the city's administrative appeal procedures satisfied the general test for due process as set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (To determine whether an individual has received due process, the court will balance (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.). Pet. App. A at 3. The majority opinion was silent on the effect of this Court's opinion in *Concrete Pipe*, despite extensive argument from the parties. *Id.*

E. Judge Ikuta Finds a Violation of Due Process and a Conflict With This Court's Due Process Precedents

Writing in dissent, Judge Ikuta asserted that the Fourteenth Amendment's Due Process Clause protects Ms. Richter's interests in developing her property, and that her procedural due process claim should have withstood the city's summary judgment motion because "the undisputed facts show that Richter never had a

neutral adjudicator determine whether she had met the City's requirements for proceeding with the proposed use of her land." Pet. App. A at 7. This was because the examiner is "required by law to give the [city] staff decision 'a presumption of correctness.'" *Id.* Judge Ikuta agreed with Ms. Richter that the city's administrative appeal procedure raises "grave due process concerns," based on this Court's opinion in *Concrete Pipe*, 508 U.S. at 626. Pet. App. A at 7. Additionally, Judge Ikuta found that Ms. Richter could prove a due process violation under the *Mathews* factors because she has a substantial property interest at stake (*i.e.*, the right to develop her property), there is a high risk of erroneous deprivation of that interest, and the administrative burden of curing the problem would be minor, since the city would simply have to "provide a neutral hearing in the first instance." Pet. App. A at 7 n.2. Judge Ikuta therefore concluded that summary judgment for the city was not warranted. *Id.* at 8.

Ms. Richter petitions this Court for a writ of certiorari, seeking reversal of the Ninth Circuit's opinion dismissing her procedural due process claim.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH THIS COURT'S JURISPRUDENCE ON THE RIGHT TO A FAIR HEARING

The Ninth Circuit's opinion in this case created a rule that insulates municipal land use decisions from meaningful review by a neutral adjudicator—even where there is a risk that the municipality's decision is motivated by its competing interest in the land. Specifically, the decision below holds that a local regulation requiring that an administrative law judge presume that a city is legally and factually correct when it denies a land use application will always satisfy due process, regardless of the circumstances affecting and influencing the land use decision. Pet. App. A at 3. The Ninth Circuit's decision conflicts with this Court's due process jurisprudence, and the breadth of the lower court's opinion may deprive countless property owners throughout the Western United States of the most basic protections provided by the Due Process Clause of the Fourteenth Amendment.

Ms. Richter wanted to provide for reasonable access to her beach, which is a well-recognized property right inherent in the ownership of shoreline property.[6]

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[6] Washington courts specifically recognize that owners of second class tidelands, such as Ms. Richter, hold a protected right in accessing and using the shoreline. *In re Clinton Water Dist.*, 218 P.2d 309, 312 (Wash. 1950); *see also Hughes v. Washington*, 389 (continued...)

See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 130 S. Ct. 2592, 2598 (2010); *see also Alexander Hamilton Life Ins. Co. v. Gov't of Virgin Islands*, 757 F.2d 534, 538 (3d Cir. 1985) (access to water is a fundamental right inherent in shoreline property ownership); *United States v. Harrison Cnty.*, 414 F.2d 784, 785 (5th Cir. 1969) (the right of access to water includes the right to engage in customary aquatic pursuits such as swimming, boating, and fishing); *see also Nielson v. Sponer*, 89 P. 155, 155 (Wash. 1907) (an owner's right to access riparian water is protected by due process).

Procedural due process prevents government agencies from depriving an individual of property rights without the opportunity for a meaningful hearing. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it."). To make sure such hearings are truly meaningful, the Court "jealously guards" the requirement that they be impartial. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

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[6] (...continued)
U.S. 290, 293-94 (1967) (explaining access to water is protected because it is often the most valuable feature of shoreline property); *Hudson House v. Rozman*, 509 P.2d 992, 995 (Wash. 1973) (finding the right to access the waterfront is "the greatest value of the property").

In the land use permitting process, a hearing examiner typically is the first independent person to review the permitting agency's decision. *See* Stuart Meck & Rebecca Retzlaff, *The Zoning Hearing Examiner and Its Use in Idaho Cities and Counties: Improving the Efficiency of the Land Use Permitting Process*, 43 Idaho L. Rev. 409, 413-16 (2007) (detailing evolution of hearing examiner system); *see generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1269 (1975) (noting trend to "judicialize" administrative procedures); *cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (state procedures are subject to federal constitutional law of due process); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (same).

This Court's opinions declare that a hearing examiner at the first instance of review must review the matter *de novo*. *Marshall*, 446 U.S. at 247 (explaining that plaintiffs are entitled to "*de novo* hearing before an administrative law judge"); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *see* Black's Law Dictionary 382 (2d Pocket ed. 2001) (*de novo* review is "nondeferential review of an administrative decision"). Moreover, an appeal to a hearing examiner must comport with due process—including the impartiality requirement—because a constitutional defect at the hearing examiner stage cannot be cured later in court. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972); *see Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (impartiality requirement applies to quasi-judicial officials); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (same); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (same).

However, the City of Des Moines' code at DMMC 18.94.113 requires the hearing examiner to serve in a *non-neutral* capacity when reviewing land use appeals, by operation of law. *See* Pet. App. C at 46-47. The code instructs the examiner to give "substantial weight" to the city staff's decision to deny a permit, and to apply heightened standards of review: Only staff decisions that are "clearly erroneous" or "arbitrary and capricious" may be reversed. *Id*. The "clearly erroneous" standard allows the city staff's decision based on insufficient evidence to be sustained, so long as the examiner does not have a "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Similarly, the "arbitrary and capricious" standard of review is extremely deferential to city staff. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Those standards create a severe risk—borne out in this case—that bias on the part of city staff will be preserved throughout the appeal, because the hearing examiner lacks discretion to correct it. *See* Pet. App. C at 39-41, 46-47. This Court should grant certiorari to resolve the conflicts created by the Ninth Circuit's decision, and to preserve the important safeguards set out in the Due Process Clause.

A. The Ninth Circuit's Refusal To Apply *Concrete Pipe* Raises an Important Question of Federal Law That This Court Should Settle

The Ninth Circuit's refusal to apply, or even address, *Concrete Pipe* raises a significant question of constitutional law that should be settled by this Court: Do the due process protections recognized in *Concrete Pipe* apply where an agency decision threatens to deprive a person of his or her rights in property? The few courts to address that question are split. *See* Pet. App. A at 7-8 (Ikuta, J., dissenting) (*Concrete Pipe* applies to an administrative appeal of a land use decision); Pet. App. B at 9-10 (holding that *Concrete Pipe* does not apply outside of ERISA); *Rissler v. Jefferson Cnty. Bd. of Zoning Appeals*, 693 S.E.2d 321, 328 (W. Va. 2010) (Applying *Concrete Pipe* to a zoning board decision); *Guimont v. City of Seattle*, 896 P.2d 70, 79 (Wash. Ct. App. 1995) (*Concrete Pipe* is limited to federal economic legislation). And, with the exception of Judge Ikuta's dissent, none of these decisions provide any analysis as to why *Concrete Pipe* should or should not apply to appeals from land use decisions.

In *Concrete Pipe*, the Court reviewed a procedural due process challenge to a federal statute that allowed employers to arbitrate pension plan "withdrawal liability" determinations. Under the statute, employers who contributed to multi-employer pension plans could be penalized if they withdrew from a plan. 508 U.S. at 609. The penalty was assessed against an employer by the "plan sponsors." *Id.* at 610. If the employer objected to the penalty, the dispute would then be referred to arbitration. *Id.* at 611. The statute required the arbitrator to presume that any

determination made by the plan sponsors was correct, unless the employer showed "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." *Id.*

Concrete Pipe and Products of California (Concrete) received notice from its plan's sponsors that the company owed over $250,000 in withdrawal liability because Concrete had not contributed to the plan during a certain period of time. *Id.* at 613. Concrete objected, and the dispute went to arbitration, where the arbitrator applied the statutory presumption in favor of the plan sponsors, and found that Concrete was liable for a penalty. *Id.* at 614. This Court granted certiorari to determine whether the statutory presumption favoring the plan sponsors at arbitration violated Concrete's procedural due process rights by denying it access to an impartial adjudicator. *Id.* at 615 n.10.

The Court determined that the statute would violate procedural due process if construed to require the arbitrator to defer to the plan sponsors' findings. *Id.* at 626. The sponsors—who levied the penalties—were expected to seek the greatest penalties possible. *Id.* at 616. Yet the same sponsors enjoyed the statutory presumption in favor of their determinations at arbitration if an employer challenged a penalty. The risk of preserving bias during review was therefore obvious, because the arbitrator was required to defer to a potentially biased party in reaching his decision:

> [I]f the employer were required to show the [sponsors'] findings to be either "unreasonable or clearly erroneous," there would be a substantial question of procedural

> fairness under the Due Process Clause. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite and firm conviction that a mistake had been made. *Cf. Withrow v. Larkin*, 421 U.S. [35, 58 (1975)]. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.

Concrete Pipe, 508 U.S. at 626.

The Court, however, concluded that the statute was ambiguous in part, *id.* at 621, 625, so the Court elected to avoid due process problems by construing the statute to provide for arbitration "without affording deference to the plan sponsor's determinations." *Id.* at 626. This statutory construction still required the employer to carry the burden of proof, but that was constitutionally unremarkable because the arbitrator would be required to remain neutral. *Id.* In sum, requiring deference to the plan sponsors would preserve the sponsors' potential bias on appeal, thereby exposing the statute to invalidation under the Due Process Clause. *Id.* at 628-29.

Ms. Richter's case presents a similar problem to that identified by this Court in *Concrete Pipe*. Like the plan sponsors in *Concrete Pipe*, the city had an interest in preventing any development of Ms. Richter's bluff (*i.e.*, preserving the public benefits derived from maintaining the area as a conservation buffer). Pet.

App. C at 15-18. Any factual assertions made by city staff adverse to Ms. Richter's trail proposal directly benefitted the city. Ms. Richter sought to have her challenge to the city's permit decision reviewed by a neutral decision-maker in the first instance under a nondeferential standard of review. But, like the *Concrete Pipe* arbitrator, Des Moines' hearing examiner was required by the city's code to defer to the city's findings by giving the city staff's decision substantial weight and requiring Ms. Richter to meet heightened standards of review. Pet. App. C at 39-41, 46-47. Moreover, Ms. Richter pinpointed a serious risk of bias in her appeal by showing that city staff prejudged her application in an effort to punish her for having mistakenly began the trail improvement project without a permit. Pet. App. E at 7-9, 16-17.

Des Moines' code replicates the scheme this Court cautioned against in *Concrete Pipe*, because it violates procedural due process by depriving Ms. Richter of an impartial hearing. Yet the Ninth Circuit upheld that scheme without hesitation or analysis, in clear contravention of this Court's precedent on the important constitutional rule of impartiality. This is clear grounds for granting Ms. Richter's petition for writ of certiorari. *See* Rule 10(c).

B. The Ninth Circuit's Opinion Contradicts This Court's Opinions That Seek To Minimize Unfairness in Administrative Hearings

This Court has consistently protected property interests by requiring that government procedures that infringe on property rights be carefully scrutinized to guard against creeping unfairness, prejudice, or bias. In *Withrow*, the Court held that it has " 'always endeavored to prevent even the probability of unfairness' " from infecting administrative appeals. 421 U.S. at 47 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Therefore, any set of rules that "might lead [a decision-maker] not to hold the balance nice, clear, and true" must be abandoned.[7] *Tumey*, 273 U.S. at 532. This means that courts are concerned not only with actual bias, but also with laws that contain an "unacceptable risk of bias[.]" *Withrow*, 421 U.S. at 54. Courts must stand "alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Id.*; *see In re Murchison*, 349 U.S. at 136 (due process functions best when it satisfies "the appearance of justice") (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The Court confronted the "risk of unfairness" problem head-on in *Marshall*. 446 U.S. at 238. In that

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[7] Ms. Richter did not argue that the examiner was biased in the sense that he was self-interested or had a conflict of interest. That would be an obvious due process violation. *Ward*, 409 U.S. at 60. Ms. Richter argued instead that the city's code prevents even the most fair-minded examiner from serving as an impartial adjudicator, because it requires him to defer to the city's position on review and imposes a heightened standard of review when the city's decisions are challenged.

case, an employer challenged the administrative appeal procedures established under the Fair Labor Standards Act, alleging that the procedures created a constitutionally intolerable risk of bias because civil penalties levied for violations of the Act redounded to the Department of Labor as the enforcing agency. *Id.* at 239. Due process mandates a "powerful and independent constitutional interest in fair adjudicative procedure." *Id.* at 243. As such, all courts must assure that no person must face an adjudicator who is predisposed to find against him, *id.* at 242, even when the adjudicator may have no "actual bias" and would do his "very best to weigh the scales of justice equally between contending parties." *Id.* at 243 (quoting *Murchison*, 349 U.S. at 136).

The Court should grant certiorari to resolve the important "risk of unfairness" issue that Ms. Richter's case brings to light. The opinion below stands in glaring conflict with the Court's jurisprudence on the probability of bias in administrative appeals. *See* Rule 10(c). Des Moines' administrative appeal procedures create a constitutionally unacceptable risk that city staff's potential bias will influence the appeal. This Court has always endeavored to shield individuals from having their rights violated through the application of such unjust rules.

II

THE NINTH CIRCUIT'S OPINION THREATENS TO UNDERMINE PROCEDURAL DUE PROCESS ACROSS THE NATION

The due process problem at work in Ms. Richter's case is not an isolated or one-time phenomenon. The

hearing examiner system under which the City of Des Moines reviewed Ms. Richter's land use appeal is a common method for resolving permit disputes, and is gaining in popularity. A hearing examiner system is already prevalent in about one-quarter of the states, and the American Planning Association has adopted the system as part of its model planning and zoning legislation.[8] Meck & Retzlaff, *supra*, at 416, 422. Moreover, once adopted, the hearing examiner system is frequently used: Washington alone saw over 19,000 building permits processed from January to August, 2013, with each permit potentially creating the opportunity for an administrative appeal.[9]

The great irony here is that the hearing examiner system was designed to promote objectivity by replacing politically motivated zoning boards comprised of elected officials. Meck & Retzlaff, *supra*, at 410-11, 442-43. A hearing examiner is supposed to be an independent and professional adjudicator who promotes efficiency and cuts down on litigation of land use permits. *Id.* Any semblance of partiality undermines the whole system, and leads to significant due process problems. Ms. Richter's appeal shows that the values promoted by a hearing examiner system—independence, objectivity, efficiency—cannot be achieved if an examiner is prevented by operation of law from remaining neutral.

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[8] One survey reported that hearing examiners have been used in Alaska, Arizona, Florida, Idaho, Illinois, Indiana, Maryland, Ohio, Oregon, Tennessee, and Washington. Meck & Retzlaff, *supra*, at 416 n.23.

[9] *See* Building Industry Association of Washington, *Residential Building Permits*, *available at* www.biaw.com/documents/permits/bldg_permits_aug_13.pdf (last visited Jan. 2, 2014).

Furthermore, the Ninth Circuit's opinion improperly encourages municipalities to insulate their decisions from administrative reversal by imposing regulations that "tip the scales" in their favor. Administrative appeals are supposed to ensure that official decisions that affect individuals' property rights are reviewed by an outside, impartial adjudicator. Local governments will yield to the temptation to violate constitutional rights if they are allowed to control the appeal process through rules that dictate how the hearing examiner must weigh the evidence and resolve the claims. *See Loudermill*, 470 U.S. at 541; *Vitek*, 445 U.S. at 491. This harms the individual permit applicant whose project is being reviewed, and also detracts from "the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 172 (Frankfurter, J., concurring).

The Court should grant this petition and review Ms. Richter's case to ensure that the hearing examiner process remains free from interference by local permitting agencies that seek to capture it. The foundational due process principle of impartiality will be placed at risk unless the Court resolves this case. *See* Rule 10(c).

CONCLUSION

Due process guarantees each person the right to have his or her grievances heard by a neutral adjudicator when a self-interested government agency deprives that person of his or her rights in property. That fundamental guarantee cannot be met when a local government enacts rules that it has a home field advantage in land use appeals. Aggrieved property owners must be provided an opportunity to present their facts free of any evidentiary presumptions where the government has a direct interest in the outcome of the appeal.

For the reasons set forth above, Ms. Richter's petition for writ of certiorari should be granted.

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Respectfully submitted,

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