22-2722
Brinkmann v. Town of Southold, New York

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2022
Argued: May 3, 2023
Decided: March 13, 2024

No. 22-2722

BEN BRINKMANN, HANK BRINKMANN, MATTITUCK 12500 LLC.,

Plaintiffs-Appellants,

v.

TOWN OF SOUTHOLD, NEW YORK,

Defendant-Appellee.

Before: KEARSE, JACOBS, and MENASHI, Circuit Judges.

Plaintiffs appeal from the judgment of the United States District Court for the Eastern District of New York (DeArcy Hall, J.), which dismissed their complaint alleging that the taking of their land for a public park was a pretextual and bad faith exercise of the Takings Clause of the Fifth Amendment and therefore unconstitutional, because the real motive was to prevent construction of the Plaintiffs' hardware store.

For the reasons below, we **AFFIRM.** Judge Menashi dissents in a separate opinion.

JEFFREY REDFERN (William Aronin, Institute for Justice, Arlington, VA; Arif Panju, Christen Mason Hebert, Institute for Justice, Austin, TX, on the brief), for Plaintiffs-Appellants.

BRIANNA WALSH (James M. Catterson, Danielle Stefanucci, Pillsbury Winthrop Shaw Pittman LLP, New York, NY, on the brief), for Defendant-Appellee.

DENNIS JACOBS, Circuit Judge:

The Defendant Town of Southold ("Southold" or the "Town") authorized the creation of a park on a parcel to be taken by eminent domain from Ben and Hank Brinkmann, who planned to build there a big-box hardware store with an 80-car parking lot. The complaint alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns' commercial use, and was made after varied objections and regulatory hurdles that the Town interposed and that the Brinkmanns did or could surmount.

The Brinkmanns and their company Mattituck 12500 LLC (collectively, "Plaintiffs") appeal from a judgment of the United States District Court for the

Eastern District of New York (DeArcy Hall, J.) dismissing the complaint under Fed. R. Civ. P. 12(b)(6). The only question is whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use.

On appeal, Plaintiffs argue that the exercise of eminent domain violates the Takings Clause if that public use, though real, is pretextual. We conclude that when the taking is for a public purpose, courts do not inquire into alleged pretexts and motives. Since a park is a public amenity that serves a public purpose, we affirm.

I

Ben and Hank Brinkmann own a chain of hardware stores on Long Island. In 2016, they contracted to buy (through plaintiff Mattituck 12500 LLC) a parcel of land on which to expand that chain in a commercial hub of Southold, New York. In response to objections by some residents "about the impact that the proposed store would have on traffic at the intersection," J.A. at 77 (Compl. ¶ 39), the Brinkmanns funded a traffic study which found that the store would not cause traffic problems, and agreed to pay for improvements to the intersection that the Town deemed necessary. The Town next demanded that the Brinkmanns fund a "Market and Municipal Impact Study," and apply for special permits. When the Brinkmanns undertook to comply, Southold unsuccessfully attempted to purchase the site before the Plaintiffs closed.

After closing, Southold imposed a six-month moratorium on building permits in a one-mile area centered on Plaintiffs' property and twice extended the moratorium despite the county government's finding that the moratorium lacked supportive evidence. In July 2020, Southold convened a public hearing to consider whether a park on the parcel would constitute a public use. Formal findings to that effect were made in September 2020, and acquisition was authorized for a "passive use park."

Plaintiffs brought a § 1983 challenge alleging a pretextual taking in violation of the Takings Clause of the Fifth Amendment. The district court denied the Plaintiffs' motion for a preliminary injunction and granted Southold's motion to dismiss.

Plaintiffs now appeal.

II

We review de novo a district court's grant of a motion to dismiss, "constru[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Palin v. New York Times Co., 940 F.3d 804, 809 (2d Cir. 2019) (quoting Elias v. Rolling Stone LLC, 872 F.3d 97, 104 (2d Cir. 2017)).

III

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST., amend. V. There are only "two limitations on the sovereign's right to exercise eminent domain: the property taken must be for public use, and the owner must receive just compensation." Brody v. Vill. of Port Chester, 434 F.3d 121, 127 (2d Cir. 2005). The Plaintiffs, without contesting that a public park is a public use, allege that Southold is using the park as a cover for its true motive, which is to thwart the Brinkmanns' plan for a hardware store. According to Plaintiffs, under Kelo v. City of New London, 545 U.S. 469 (2005), "the Public Use Clause requires the government's stated objective to be genuine, and not a pretext for some other, illegitimate purpose." Appellants' Br. at 19.

But Kelo cannot support that reading; the Takings Clause is not an overarching prohibition against any and all purposes alleged to be "illegitimate." As we have previously observed, the Kelo opinion includes only "a passing reference to 'pretext' . . . in a single sentence." Goldstein v. Pataki, 516 F.3d 50, 61 (2d Cir. 2008). And the context of that sentence is a passage of Kelo describing the Takings Clause's parameters and its prohibition of takings for "private" purposes:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a [government] may transfer property from one private party to another if future "use by the public" is the purpose of the taking . . . .
>
> As for the first proposition, the [government] would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See [Hawaii Hous. Auth. v.] Midkiff, 467 U.S. [229,] 245 [(1984)] ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void") . . . . Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

Kelo, 545 U.S. at 477–78 (internal citation and footnote omitted).

"Subject to specific constitutional limitations, when the legislature has" decided that something is a public use, "the public interest has been declared in terms well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954).

Accordingly:

> In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ."

Midkiff, 467 U.S. at 239–40 (quoting Berman, 348 U.S. at 32). Midkiff goes on to say:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . . But the Court in Berman made clear that it is "an extremely narrow" one. [348 U.S.] at 32. The Court in Berman cited with approval the Court's decision in Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." . . . . [T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896).
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> . . . . [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Midkiff, 467 U.S. at 240–41.

There can be no dispute that a public park, even an unimproved one, is a public use. Public parks have been recognized as a "public use" for more than a century. See, e.g., Shoemaker v. United States, 147 U.S. 282, 297, 13 S. Ct. 361, 390 (1893) ("The validity of the legislative acts erecting [public] parks, and providing for their cost, has been uniformly upheld."); Rindge Co. v. Los Angeles Cnty., 262 U.S. 700, 707–08 (1923) ("condemnation of lands for public parks is now universally recognized as a taking for public use").

While in some cases there may be plausible allegations that the exercise of eminent domain supposedly for a park had been pretext for an intention to use taken property for a different--and private--purpose, Plaintiffs' complaint does not allege that the Town meant to confer any such private benefit or intends to use the property for anything other than a public park. To the contrary, the complaint quotes the Town's Supervisor as stating, "I will never allow anything to be built on that property." J.A. at 24 (Compl. ¶ 75). Plaintiffs have not pointed to any Town purpose that violates the Takings Clause.

This Court's holding in Goldstein confirms that understanding. Goldstein involved a post-Kelo challenge to takings made to build a basketball stadium and several high-rise apartment buildings in Downtown Brooklyn. Goldstein, 516 F.3d at 53. Plaintiffs' contention was "that the project's public benefits are serving as a 'pretext' that masks its actual raison d'être: enriching the private individual who proposed it and stands to profit most from its completion," id. at 52–53--and that "all of the 'public uses' the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment," id. at 54. Rejecting that argument, this Court held 1) that the resulting economic development of Brooklyn was a public benefit, and 2) that "review of a legislature's public-use determination is limited such that where the exercise of the eminent domain power is rationally related to a conceivable public purpose, . . . the compensated taking of private property . . . is not proscribed by the Constitution." Id. at 58–59 (internal quotation marks omitted).

As Goldstein demonstrated, a pretext-based challenge to a taking has a "dubious jurisprudential pedigree." Goldstein, 516 F.3d at 62. Assessing the same lone sentence from Kelo on which the Brinkmanns attempt to build their hardware store, this Court "reject[ed] the notion that in a single sentence, the

Kelo majority sought *sub silentio* to overrule Berman, Midkiff, and over a century of precedent[.]" Id. "We do not read Kelo's reference to 'pretext' as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns." Id. at 63.

Thus it is demonstrated that judicial deference is justified by federalism, Kelo, 545 U.S. at 482 ("Our earliest cases [on the Public Use Clause] in particular embodied a strong theme of federalism[.]"); by separation of powers, Berman, 348 U.S. at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation[.]"); by competence, Midkiff, 467 U.S. at 244 ("[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."); and by prudence, Kelo, 545 U.S. at 499 (O'Connor, J., dissenting) (it would be "unworkable" for courts to "decid[e] . . . what is and is not a governmental function" (quoting Midkiff, 467 U.S. at 240–41)).

A "pretext" limitation that invalidates a taking for a public park would undo this "longstanding policy of deference to legislative judgments in this field," id. at 478, 480, by inviting courts "in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it," Goldstein, 516 F.3d at 62. Such motives are by nature fragmented--and rarely, if ever, pure. Different legislators may vote for a single measure with different goals. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). So members of a town council who are hostile or indifferent to a hardware store or other commercial use may vote for a park (in whole or part) because they favor open space (there or elsewhere) for reasons of aesthetics, and for playgrounds, athletics, fresh air, dog-runs, and whatnot.

In this area, Supreme Court precedent wisely forecloses inquiry into whether a government actor had bad reasons for doing good things. A condemning authority, therefore, has "a complete defense to a public-use challenge" if, "viewed objectively, the Project bears at least a rational relationship to . . . well-established categories of public uses, among them . . . the creation of a public, open space[.]" Goldstein, 516 F.3d at 58–59.

IV

Plaintiffs point to a series of state and federal court decisions which purportedly endorse a generalized "pretext" limitation on the Takings power. They are undaunted by the fact that this limitation has never presented itself as the dispositive issue in either this Circuit or before the Supreme Court. The cases which supposedly suggest otherwise are uniformly inapposite: they are nearly all decided on the principle that has been articulated in some state courts--but is unknown to federal takings law--that instrumentalities of the states lack the power to act (variously) "in bad faith," or "arbitrarily and capriciously."

For example, in United States, Department of Interior v. 16.03 Acres of Land, More or Less, Located in Rutland County, Vermont, 26 F.3d 349 (2d Cir. 1994) ("Rutland County"), while we began by noting that "condemnation decisions by governmental entities to which Congress has delegated eminent domain authority are subject to judicial review," we explained that an inquiry at the outset is needed as to whether officials authorized to effect a taking for a public purpose have "acted outside the scope of their taking authority," id. at

355. Rather than suggesting that there is a generalized pretext limitation on takings, we emphasized that "a reviewing court may only set aside a takings decision as being arbitrary, capricious, or undertaken in bad faith in those instances where the court finds the [official's] conduct so egregious that *the taking at issue can serve no public use*." Id. at 356 (emphasis added). We thus applied the principle enunciated in Berman that the narrow role of the judiciary in a Takings Clause case is to determine whether the purpose was a "public use."

Plaintiffs also rely on a New Jersey rule that forbids takings "motivated by fraud, bad faith, or other manifest abuse of [a municipality's] accorded power of eminent domain." E. Windsor Mun. Utilities Auth. v. Shapiro, 270 A.2d 410, 411 (N.J. 1970). But that rule is actually derived from a state law doctrine which provides that "[s]o long as [a municipal] corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion[.]" City of Newark v. New Jersey Tpk. Auth., 81 A.2d 705, 707 (N.J. 1951). In other words, the kind of bad faith taking discussed in the New Jersey cases relied upon by the Plaintiffs are *void ab initio* acts that are beyond the municipality's statutory authority. Those cases do not concern the Fifth Amendment's Takings Clause. For example, in Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., 673 A.2d 856 (N.J. Super. Ct. Law Div. 1995), the court included a citation to that clause of the federal Constitution along with its citation to the New Jersey Constitution, see id. at 860; but it cited no federal cases, and it referred only to having researched New Jersey and other state law cases, see id. at 861. As the court found, there were as of 1995 "no reported New Jersey decisions upholding a bad faith challenge to a public body's authority to condemn[.]" Id.

Further, the decision in Essex Fells did not represent application of a generalized prohibition of pretext. Rather, the court concluded that the plaintiff Borough had failed to show that its taking was for a public use. Although the Borough stated, in accordance with New Jersey's Eminent Domain Law, that "this property is needed for public use[,] specifically park land and recreational use," id. at 860 (internal quotation marks omitted), the court found that the Borough in fact "had *not* determined that it should proceed to condemn Kessler's land *for any authorized public purpose*," id. at 862 (emphasis added). There was ample basis in the record for this finding, including evidence that when the property had been part of an approximately 15-acre parcel owned by a college and offered to the Borough, the Borough had opted to purchase only 2.53 acres, "stat[ing] that the [B]orough's need for any additional recreational space was [thereby] fully met"; that the Borough believed that it would "have some control over who purchased the balance of the subject property"; that the Borough had a "gentlemen's agreement" with the college to "sell the balance of the property 'to the right people'"; and that the "Borough officials were actively soliciting residential developers to acquire" "the balance of the property" "for development of single family residences"; according to the mayor, the Borough "had never wanted anything but single family housing at this site." Id. at 858, 861–62 (internal quotation marks omitted). This is the polar opposite of the acknowledgement in the Plaintiffs' complaint that Southold's Town Supervisor said he would "never allow anything to be built on th[e subject] property." J.A. at 24 (Compl. ¶ 75).

Rhode Island and Georgia likewise derive their prohibition on "bad faith" takings from similar doctrines of state law. (These cases are disposed of in the margin.[1])

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[1] **Rhode Island:** Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006), speaks to whether a state "agency has exceeded its delegated authority by an arbitrary, capricious, or bad faith taking of private property," id. at 103 (internal quotation marks omitted) (citing Capital Properties, Inc. v. State, 749 A.2d 1069, 1086 (R.I. 1999) ("[A] showing that a [state] agency has exceeded its delegated authority by an arbitrary, capricious or bad faith taking of private property is a matter properly cognizable by the judicial branch.")). True, the court goes on to say that "substantive due process" is in play "even when the [taking] is made through procedures that are in themselves constitutionally adequate.'" Id. at 104 (quoting Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1084 (R.I. 1997)). But the case it cites for that proposition, Brunelle, itself relies on a hodgepodge of federal case law, most notably a Ninth Circuit case, Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), which took an exceedingly broad view of substantive due process generally, holding that it prohibits "arbitrary and capricious government action" in *any* context, id. at 1407, but which had been overruled by Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc)--a case that itself was later "undermined" in part, Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 852–53 (9th Cir. 2007), by Supreme Court decisions, see id. at 854–56. See also Shannon v. Jones, 812 F. App'x 501, 503 (9th Cir. 2020) (describing Armendariz as "overruled in part . . . as recognized in Crown Point Dev[elopement]"). All this is to say that the Rhode Island case law is muddled both by state law on state agencies' authority to use the eminent domain power and by a reliance on vague and overbroad out-of-circuit authorities on substantive due process.

Other state cases relied on by the Plaintiffs invoke a rule against pretext without distinguishing between the Takings Clause of the Fifth Amendment and the state statutory analog. This conflation invites the misreading of the federal Takings Clause. For example, Plaintiffs cite Middletown Township v. Lands of Stone, 939 A.2d 331 (Pa. 2007), which offers dicta on the federal Takings Clause, but ultimately rests its decision on the far narrower ground that the township at issue was "authorized by statute to exercise eminent domain only for a single

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Georgia: Earth Management, Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981), invokes a bar on "bad faith" exercises of the eminent domain power in the context of municipalities' statutory inability to take *any* action in bad faith. Earth Management cites "[t]he most recent pronouncement of this court on the issue of bad faith," id. at 460, in City of Atlanta v. First National Bank of Atlanta, 271 S.E.2d 821 (Ga. 1980), a case which itself bases its holding on the premise that "[a] court should not interfere with an exercise of the discretion of a condemning authority determining the necessity of taking land for public purposes and selecting the location and amount of land reasonably necessary unless the condemning authority abused its discretion or exceeded its authority," id. at 822. For that proposition, City of Atlanta relies on authority from a 1908 holding that actions undertaken by municipal corporations "should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter." Piedmont Cotton Mills v. Georgia, Ry. & Elec. Co., 62 S.E. 52, 54 (Ga. 1908). The second Georgia case cited by Plaintiffs, Carroll County v. City of Bremen, 347 S.E.2d 598 (Ga. 1986), merely follows on from Earth Management. Under these cases, any issue as to bad faith was simply part of the inquiry into whether the taking was within the scope of statutory authority.

public purpose, that of recreation." Id. at 337. Thus, the court was obviously empowered to search the "true" purpose of the alleged taking because "[r]ecreational use must be the true purpose behind the taking or else the Township simply did not have the authority to act, and the taking was void ab initio." Id. at 337–38. Plaintiffs' cited Colorado case, City of Lafayette v. Town of Erie Urban Renewal Authority, 434 P.3d 746 (Colo. App. 2018), also has nothing to do with the Takings Clause: it interprets a Colorado statute granting the power of eminent domain to a condemning authority. That statute requires "the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use." Id. at 751 (quoting COLO. REV. STAT. ANN. § 38-1-101(2)(b)). At the risk of being obvious, where state takings are subject to statutes that prescribe uses and evidentiary standards, the courts have a role to play. But the scope of power to review comes from the standards set in the relevant statutes, not from the Takings Clause.

Finally, Plaintiffs rely on a single New York State trial court decision that was never appealed. In In re Hewlett Bay Park, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966), the court rejected a pretextual taking and held that "when dealing with a legislative determination to condemn, it becomes especially important to scrutinize the purpose, for a proper purpose is the very essence of the right to condemn," id. at 1010. However, Hewlett Bay Park relied for that holding in part on Cuglar v. Power Authority of the State of New York, 163 N.Y.S.2d 902 (N.Y. Sup. Ct. 1957), which recognized the well-established principle that "appropriation of lands for public use is a legislative function, and the instrumentality in which it reposes such powers is the sole judge of the necessity, in lieu of any provision to the contrary,"[2] id. at 921.

While federal courts--in dicta--have occasionally stated as a broad principle that takings will be upheld "in the absence of bad faith," see, e.g., United States v. 58.16 Acres of Land, More or Less In Clinton Cnty., State of Ill., 478 F.2d 1055, 1058 (7th Cir. 1973) (quoting United States v. Meyer, 113 F.2d 387,

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[2] Though the court in Cuglar acknowledges a single precedent to the contrary--Application of Port of New York Authority, 118 N.Y.S.2d 10 (N.Y. Sup. Ct. 1952)--application of that decision--like the majority of the state court cases Plaintiffs rely on--is based on state *statutory* grants of eminent domain powers to condemning authorities (in this case, the Port Authority) which in turn place limits on the condemning authority's ability to undertake "palpably unreasonable" condemnations, id. at 10–11 (citing, inter alia, Section 15, chapter 47, Laws of 1931, McK. Unconsol. Laws, § 6485, Bridge and Tunnel Unification Act).

392 (7th Cir. 1940)), no such "bad faith" rule has ever proved dispositive.[3] For example, the Seventh Circuit in 58.16 Acres of Land noted that it had "cited [cases] which hold that the courts are empowered to determine if the taking of private property is for a public use," and it issued a narrow ruling that, because "questions of bad faith, arbitrariness, and capriciousness, *all bearing upon the determination of public use*, ha[d] been raised by [landowners], the district court was required to resolve those questions," id. at 1059 (emphasis added). It did not announce a "bad faith" or "pretext" limitation on the power of eminent domain. Neither did the Ninth Circuit's decision in Southern Pacific Land Co. v. United States, 367 F.2d 161 (9th Cir. 1966), which merely stated in dicta that "the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith," id. at 162

[3] The allusion to such a "bad faith" limitation appears to be purely aspirational. Most such references derive from Shoemaker. There, the Supreme Court cited approvingly to an older case which noted in dicta that "[i]t is to be assumed that the United States is *incapable of bad faith*" and that "the citizen may well confide in the ultimate justice of his government[]--the most generous, as it is the happiest and most powerful, on the earth." Shoemaker, 13 S. Ct.at 375 (emphasis added) (quoting Great Falls Manuf'g Co. v. Attorney General, 124 U.S. 581, 599 (1888)).

(discussing United States v. Carmack, 329 U.S. 230, 243–44 (1946)). That may have been so in 1966, but it is not so now. The Supreme Court's current pronouncement on "pretext" concerns *only* the pretext of non-public (that is, private) use. Kelo, 545 U.S. at 478. So long as the actual purpose for which the eminent domain power is exercised is a public one, there is no violation of the Takings Clause.

Of course, courts may intercede if an exercise of eminent domain runs afoul of some *other* constitutional or statutory provision which *does* permit an examination of motives, such as Title VII of the Civil Rights Act or the Equal Protection Clause. States--as well as Congress--are also free to place additional limitations on the power of their instrumentalities to exercise the power of eminent domain. And they may invite the courts to help police those limitations. But the Takings Clause itself includes no such limitations.

We have considered Plaintiffs' remaining arguments and find them to be unavailing.

* * *

The dissent endeavors to avoid or cloud our holding that a taking is permitted by the Takings Clause if the taking is for a public purpose--as a public park indisputably is. In so doing, the dissent commits two errors.

First, the dissent repeatedly conflates [i] the *purpose* for which the property was taken and is to be used--a public park--with [ii] the *motivation* for taking it. See, e.g., Dissent at 2 (" . . . preventing an owner from lawfully using his own property is not a valid public purpose."). Thus the dissent treats the Takings Clause as an overarching prohibition against ulterior motives. See id. at 26. Such a doctrine would allow litigation to long delay and ultimately stifle the making of public infrastructure.

The dissent relies on an entirely off-point case, concerning the ripeness and validity (or not) of a *regulatory* taking claim, in which no compensation is paid. Sherman v. Town of Chester, 752 F.3d 554, 561–65 (2d Cir. 2014); see Dissent at 5. It, therefore, mattered a lot whether the town had "suffocat[ed] [plaintiff] with red tape to make sure he could never succeed in developing" his property without the town ever exercising the eminent domain power or paying just compensation. Sherman, 752 F.3d at 565. At the risk of being obvious, different factors may come into play if a taking is attempted without compensation. So, nothing in Sherman undermines the well-settled proposition that "where the *exercise of the eminent domain* power is rationally related to a conceivable public purpose," as it undeniably was in this case, "the Court has never held a *compensated* taking to be proscribed by the Public Use Clause." Midkiff, 467 U.S. at 241 (emphases added). The "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' *and vice versa*." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002) (emphasis added) (footnote omitted).

As our opinion observes, other statutory and constitutional provisions *do* allow courts to examine allegedly invidious or discriminatory motivation. Op. at 21; Berman, 348 U.S. at 32 ("*Subject to specific constitutional limitations*, when the legislature has" decided that something is a public use, "the public interest has been declared in terms well-nigh conclusive." (emphasis added) (quoted in Op.

at 6–7)). Nothing in this opinion inhibits the enforcement of laws that prohibit invidious discrimination based on race or religion, or allows a taking to achieve such discrimination. But courts do not need to search the motives of public officials who prefer a public park to an eyesore in the form of a large hardware store with the prospect of 80 vehicles at a time parked and circling.

Second, the dissent attempts to cloud the issue of public purpose by positing that other motives for creating the park render the park itself a "Fake Park." Dissent at 2. The dissent dilates on this point elsewhere by calling the 1.7-acre passive-use park an "empty field." Id. at 1. This evasion betrays an urbanite prejudice that a park must contain a tennis court or a statue or a merry-go-round. And that evasion is needed to promote the central error of the dissent, that the jostle of motives common to all legislation has not produced a public amenity. The evasion is critical to the dissent because it is the public amenity that constitutes the public use for which the government can pay due compensation for private property.

So long as public land is open to the air and to the people, it is a park; and that, of all things, cannot be faked. The author of the dissent may come to 12500

Main Road, Mattituck, NY, and he may walk the park, breathe its air, or spread his picnic upon it. There is nothing Fake about it.

The judgment of the District Court is **AFFIRMED**.