

No. 12-723

**In the
Supreme Court of the United States**

ARTEMIO M. ILAGAN and CARMELITA ILAGAN;
162.40 Square Meters of Land More
or Less, Situated in the Municipality
of Agana and Unknown Owners,
Petitioners,

v.

ENGRACIA UNGACTA AND FELIX UNGACTA;
GOVERNMENT OF GUAM,
Respondents.

**On Petition for Writ of Certiorari
to the Supreme Court of Guam**

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Respondents' (Ungactas) Opposition fails to identify anything that would inhibit this Court from taking this case to answer the question of whether heightened Public Use Clause review applies to, and ultimately prohibits, a private-to-private taking of property that appears to predominately serve a private purpose. Most notably, the Opposition does not dispute the evidence showing the private character of the transfer of the Petitioners' (Ilagans)¹ land to their neighbors, the Ungactas. To be precise, the Opposition does not deny: (1) that the taking of the Ilagans' land was initiated and funded by the Ungactas; (2) that the Ungactas are politically connected, with Respondent Felix Ungacta serving as Mayor of Agana at the time of the taking; (3) that the taking was designed to give the Ungactas a driveway to their private residence;² (4) that the Agana Plan was defunct at the time of taking; (5) that the taking was disconnected in time, space, and process from past Agana Plan condemnations; or (6) that the government has abandoned its defense of the taking, (ironically) leaving the "public use" argument to be made by the private party that benefitted from the taking.

¹ Carmelita Ilagan passed away while this case was pending in the Guam Supreme Court. Although the Ilagans' counsel notified that court of this event, the court kept Carmelita Ilagan on the caption and referred to the plaintiffs as the "Ilagans" in its opinion. For consistency, the same framework has been used here, although Mr. Ilagan is the only active plaintiff at this time.

² The Opposition incorrectly states that Respondents lost road access earlier "due to an earlier implementation of the Agana Plan." Opp. at 10 n.22. While this tracks a statement in the Guam Supreme Court's opinion, there is no evidence in the record that the Ungactas lost road access due to the Agana Plan.

The Ungactas apparently believe that these facts have no import compared to the alleged connection between the Agana Plan and the Ilagan taking. They contend that the government's declaration that the taking serves the Plan is sufficient, standing alone, to give the taking a public hue—regardless of any conflicting evidence—because courts must defer to the government in this area. Opp. at 8-9. The Opposition thus affirms the controversy before the Court: does the Public Use Clause bar a taking that the government asserts serves an economic plan when the evidence shows it actually and predominately serves a particular private party's own interests?

Because this dispute implicates important issues of constitutional law, and courts are in confusion on how to address a pretext Public Use claim, the Court should grant the Petition.

ARGUMENT

I

THIS CASE IMPLICATES ALL THE PRIVATE TAKINGS AND PRETEXTUAL TAKINGS CONCERNS IDENTIFIED IN THE *KELO* OPINIONS

In the Petition, the Ilagans explained that this case implicated the Court's concerns, repeatedly expressed in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the Public Use Clause would not allow a taking alleged to serve an economic plan if it appeared truly designed to transfer land to a particular private citizen for a predominately private purpose. Pet. at 11-19.

The Ungactas' Opposition contends, however, that this case is merely about whether *Kelo* applies when an alleged economic plan condemnation is isolated from "multiple and contemporaneous" takings that arose under the same plan. Opp. at 8-9. This is untrue. The one-to-one land transfer here is suspect not only because it was isolated in time and space from legitimate Agana Plan takings, see Pet. App. at C-2-6, but also because of the pervasive private involvement in, and private benefit from, the taking. The undisputed facts show that the taking was directed, funded, and is now defended by the family of the former Mayor of Agana, and that it advanced this family's private road access goals. See Pet. App. at A-5-6; *id.* at B-2-3, 10.

In light of these facts, there is no doubt that this case implicates the private and pretextual takings concerns expressed in *Kelo*. For example, the *Kelo* majority warned that the government "would no doubt be forbidden from taking [] land for the purpose of conferring a private benefit on a particular private party." 545 U.S. at 477. The evidence here suggests exactly that; *i.e.*, that the government of Guam took the Ilagans' land and transferred it to the Ungactas so they could obtain private access to their land. Pet. App. at B-9-10.

Justice Kennedy's concurring *Kelo* opinion stressed that the Public Use Clause would not permit a taking "intended to favor a particular private party, with only incidental or pretextual public benefits." 545 U.S. at 491 (Kennedy, J., concurring). The Ungactas characterize this case as "a perfect example of a private benefit being completely incidental to the important

public purposes emphasized by the Agana Plan.”³ Opp. at 13. But this is impossible to reconcile with the facts showing that the taking of the Ilagans’ land did not arise as a valid implementation of the Agana Plan, Pet. App. at B-8-9, that it gave road access to the Ungactas, and that the only possible “public benefit” arising from the taking was alteration of a portion of one lot line.⁴ *Id.* at C-3.

Justice Kennedy also expressed concern about “private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.” 545 U.S. at 493 (Kennedy, J., concurring) (citation omitted). This risk is evident here given that the transfer of the Ilagans’ land to the Ungactas occurred at the Ungactas’ instigation, at a time when Felix Ungacta was Mayor of Agana.

In one way or another, the entire *Kelo* Court expressed the view that the government should not “be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” *Id.* at 478. And yet, this is exactly

³ The Opposition wrongly states that “the design and purpose of the taking at issue here was found to be entirely consistent with the objectives of the Agana Plan.” Opp. at 13. To the contrary, the trial court found “the Government has not (in almost 30 years) presented any evidence that *this* taking was part of a larger plan beyond stating that it is.” Pet. App. at B-8.

⁴ The fact that the condemnation only straightened part of the lot line which the Ungactas claim was corrected indicates that the primary intent of the taking was to carve out a slice of the Ilagans’ property that was useful to the Ungactas, rather than to advance the Agana Plan goals.

what the Ilagans' claim has happened here. The Ilagans have, in fact, consistently argued that the taking of their land was for the Ungactas' private purposes, and that it violates the *Kelo* Court's prohibition against pretextual takings. See Supplemental Excerpts of Record at 7 (Answer defense: the "taking is for a private and not a public purpose"); see also Ilagan Brief on Appeal at 29-31 (quoting the *Kelo* majority's admonition that government not "be allowed to take property under the mere pretext of a public purpose" and then asserting that "[t]his is precisely the case here").⁵

The trial court ruled that the evidence confirms the Ilagans' pretextual/private takings claim, but the Guam Supreme Court⁶ held that this Court's precedent did not support their claim. Pet. App. at A-3, 23; *id.* at C-3. Therefore, contrary to the Ungactas' position, this case clearly presents the important issue of whether the post-*Kelo* Public Use Clause bars an alleged

⁵ The Opposition wrongly states "[t]he issue present on appeal [to the Guam Supreme Court] . . . was whether the trial court erred in misreading *Kelo* and holding that an economic development plan meeting public use purposes required multiple and contemporaneous takings." Opp. at 6. This question was simply a sub-issue of the broader question before the court, namely, did the Guam trial court correctly rule that the taking of the Ilagans' land did not serve a valid public purpose? See Pet. App. at A-8 (noting that the Ungactas argue that "the trial court erred in holding that the taking . . . was for an improper purpose as it was not part of the original Agana Plan"), see also Ilagan Brief on Appeal at 1-2 (discussing the Public Use Clause issue).

⁶ The Guam Supreme Court in this case consisted of three off-island *pro tem* judges. They heard the case because all the regular Justices recused themselves, two of them because they had previously represented the Ungactas in this matter before being appointed to the Guam high court.

economic development taking that predominately serves a favored private party. The Court should grant the Petition.

II

**THE OPPOSITION CONFIRMS
THAT THIS CASE RAISES AN
IMPORTANT QUESTION AS TO
WHETHER COURTS MUST DEFER
TO THE GOVERNMENT'S PUBLIC
USE PROCLAMATION WHEN THE
EVIDENCE SUGGESTS IT IS TAKING
PROPERTY FOR PRIVATE GAIN**

In the Petition, the Ilagans showed that this case presents an issue as to whether courts must defer, under *Kelo*, to a legislature's allegation that a one-to-one transfer of property serves an economic plan even when substantial evidence undermines this claim. Pet. at 16, 18. This issue is important because if there are no limits on *Kelo*'s doctrine of judicial deference, the government need only issue a proclamation that it is pursuing some public economic purpose in order to take private land from the less powerful for the private benefit of favored, politically connected parties. Indeed, to hold, like the Guam Supreme Court, that courts must defer to a governmental public use justification in almost all circumstances is to imbue Congress and state legislatures with the power to unilaterally define (and thus to narrow) the scope of a constitutional provision (the Public Use Clause) meant to restrain law-making bodies.

Notably, Respondents' Opposition does not deny that the case presents the issue of whether the Guam Supreme Court improperly construed *Kelo* to require judicial deference even when the evidence refutes the government's justification. Instead, it repeatedly defends the Guam High Court's decision to defer. *See* Opp. at 8-9, 12, 15. Respondents assert that judicial deference was appropriate notwithstanding facts showing that a private party benefitted from the taking of property, that the party was known beforehand, the public benefit was incidental, and the risk of favoritism given the heavy involvement of the politically connected Ungactas in the taking. *Id.*

Whatever the merits of this argument, it confirms that the issue of the scope of *Kelo* deference is squarely presented here. If additional confirmation is needed, the Court need only look at the conflicting conclusions of the Guam courts in this case. The Guam trial court invalidated the Ilagan taking largely because it found "the Government has not (in almost 30 years) presented any evidence that *this* taking was part of a larger plan beyond stating that it is," Pet. App. at B-8, and that it did not have to defer to the naked legislative claim. In contrast, the Guam Supreme Court held that the government's act of simply "stating it is" an economic development plan taking was enough to validate the taking under *Kelo*. *See* Pet. App. at C-3. The Court should clarify which of these competing views reflects the correct standard of Public Use review.

III

**THIS CASE HIGHLIGHTS
A CONFLICT ON WHETHER AND
HOW A PROPERTY OWNER CAN,
AFTER *KELO*, ESTABLISH THAT A ONE-
TO-ONE “ECONOMIC DEVELOPMENT”
TAKING IS A PRIVATE TAKING**

The Ungactas do not deny that courts are in confusion about how to analyze a claim that an “economic development plan” taking violates the Public Use Clause as a pretext for advancing the private interests of a private party. They contend instead that this case is not relevant to the conflict, because (in their view) it does not include an economic development plan causing “significant private to private takings at issue in *Kelo* or other cases.” Opp. at 15-16.

This claim would be news to the Guam courts. The Guam Supreme Court’s published decision clearly understood that the case implicated a “private to private transfer” of land purportedly premised on an economic development plan. Pet. App. at A-28. So did the Guam trial court. *Id.* at B-9. And the Ilagans certainly consider the appropriation of their land by their neighbors a “significant private to private” taking, as it harmed their remaining property and diminished its economic return. *Id.* at A-8.

In any event, the essential feature of this case, for purposes of gauging its relevance to post-*Kelo* conflicts is the nature of the claims. Like a number of other post-*Kelo* condemnees, the Ilagans contend that the taking of their land for the purpose of transferring it to another citizen was unconstitutional, despite the

government's economic justification, because its real effect was to advance private interests. *See* Ilagan Brief on Appeal at 29-31. In essence, they claim the Agana Plan served as "cover" for a taking intended to help out the Ungacta family, and that the condemnation therefore violated the Public Use Clause even under the *Kelo* framework.

The issues raised by this sort of claim are exactly what post-*Kelo* courts cannot agree on. As the Petition and brief of the amici show, the courts are in utter disarray as to how to resolve such pretextual Public Use claims. Pet. at 19-28. In particular, the courts do not agree on what facts or circumstances must be present to trigger searching examination of the subject condemnation as a potential pretextual private taking. *Id.* The Opposition makes no attempt to reconcile this conflict.

The courts will continue to employ different criteria, and come to different results, in pretextual public use cases unless and until this Court steps in to provide guidance. This case provides an ideal vehicle for addressing the conflicts because all the various factors relied on by the courts since *Kelo* are present. The Court can therefore use the case to clarify the circumstances and tests that are relevant to disposition of a pretextual takings claim, and thereby bring uniformity to an important, but confused, area of federal constitutional law.

CONCLUSION

The Court should grant the Petition.

DATED: March, 2013.

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